

Supreme Court of Kosovo
API.-KZI. No. 7/2011
Prishtinë/Priština
21 February 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 14 February 2012 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Anne Kerber and Supreme Court Judges Nazmije Ibrahim, Gyltene Sylejmani and Salih Toplica as panel members

And with Holger Engelmann as Court Recorder,

In the presence of the

National Public Prosecutor Jusuf Mezini, Office of the State Prosecutor of Kosovo (OSPK),

Defense Counsel Av. [REDACTED] for the defendant A. O. [REDACTED];

In the criminal case number API.-KZI. No. 7/2011 against the defendant:

A. O. [REDACTED], father's name [REDACTED] mother's maiden name [REDACTED], born on [REDACTED] in the village of [REDACTED] in the Municipality of [REDACTED], residing in the same place, Kosovo Albanian, married, father of one child, accomplished secondary school, machine technician, unemployed, average economic conditions,

Convicted in the 1st Instance by Verdict of the District Court of Prishtine/Pristina in the case no. P. Nr. 64/2005 dated 30 November 2009 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, the defendant was found guilty of **Aggravated Murder** pursuant to Article 147 paragraph 1 items 3 and 8 of the Criminal Code of Kosovo (CCK); because on 28 October 2004 during the evening the defendant in the village Bardhe I Madh in the Municipality of Fushe Kosove/Kosovo Polje, at the location called "Te Kalaja" in a cruel or deceitful way and with the purpose of concealing another criminal offence of fraud, with revolver of undefined brand, of caliber 9x19 mm, willingly deprived from life the now late K. Z. [REDACTED] 20 years of age, from the village of Halilaq, by shooting 12 times on his body, by which 10 of those were gunshot wounds and two other penetration wounds from a fire arm, aiming mainly on the spinal part of the body, in which the wounds caused the death of victim verified on the autopsy report dated 24th December 2004, from which wounds K. Z. [REDACTED] immediately died and the dead body was hidden by the assistance of another co-accused in the hole with the size of 3.40m x 4.80m, filled with water and covered with plastic bag and ground;

And was sentenced to 30 (thirty) years of imprisonment pursuant to Article 37 as read with Article 147 paragraph 1, items 3 and 8 of the CCK, whilst according to Article 73 of the CCK the time spent in detention since 29 October 2004 and until the Judgment would become final was counted as part of the imprisonment sentence;

The 1st Instance Judgment was fully affirmed and the appeals of the defendant, his Defense Counsel and the District Prosecutor were rejected in the 2nd Instance by the verdict of the Supreme Court of Kosovo (Ap.-Kz. No. 364/2010, dated 12 April 2011).

The defendant, dated 22 June 2011, timely filed an appeal against the Verdict of the Supreme Court of Kosovo dated 12 April 2011 (Ap.-Kz. No. 364/2010); It was asserted that the Verdict contains essential violation of the criminal procedure, incomplete establishment of the facts, violation of the criminal law and that the criminal sanction announced would unjust. The defendant proposes reviewing the case, because he had not deprived the victim K█████ Z█████ of his life.

The OSPK, with a response dated 04 October 2011 and registered with the Registry of the Supreme Court of Kosovo the same day fully objected to all aspects of the appeal as ungrounded and therefore proposed to reject it and to affirm the contested Judgment related to A█████ O█████.

Based on the written Verdict of the District Court of Prishtine/Pristina in the case no. P. No. 64/2005 dated 30 November 2009 (filed with the Registry of that Court on the same day), and the Verdict of the Supreme Court of Kosovo (Ap.-Kz. No. 364/2010, dated 12 April 2011), the submitted written appeal of the defendant, the relevant file records and documents and the oral submissions of the parties during the session on 21 February 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on the same day, hereby issues the following:

JUDGMENT

The appeal filed by the defendant A█████ O█████ on 24 June 2011 against the Judgment of the Supreme Court of Kosovo AP.-KŽ. No. 364/2010, dated 12 April 2011, is REJECTED AS UNGROUNDED. The Judgment of the District Court of Prishtinë/Priština P. No. 64/2005, dated 30 November 2009, in the form of the Judgment of the Supreme Court of Kosovo AP.-KŽ. No. 364/2010, dated 12 April 2011, is AFFIRMED.

REASONING

Procedural History

1. During the evening of 28 October 2004, in the village Bardhe I Madh, Municipality of Fushe Kosove/Kosovo Polje, at the location called "Te Kalaja" the late victim K█████ Z█████, 20 years of age, from the village of Halilq, was deprived from life by the use of a revolver of undefined brand, caliber of 9x19 mm, by shooting 12 times at his body. Ten bullets caused penetrating wounds, whereas two others hit the spinal part of the body, which – according to the autopsy report dated 29 December 2004 – led to the immediate death of the victim. The dead body of the victim, which the latter first was reported to police by his family as just missing – was finally discovered on 20 December 2004, laying in a swampy hole of 3.40mx4.80m close to the village Bardh I Madhe and partially covered with plastic and ground.

2. Based upon the results of the evidence procedure, the District Public Prosecutor of Prishtine/Pristina filed an indictment against the defendant A█████ O█████, charging him with Aggaravted Murder of K█████ Z█████ and one other co-defendant with Assistance to the Aggravated Murder, since he allegedly has helped to hide the dead body.

3. The indictment was consolidated by Confirmation decision of the 1st Instance Court on 29 November 2005.

4. The public Main Trial hearing against both defendants, A█████ O█████ and his co-defendant, started on 20 March 2006 and commenced through 22 sessions, which the latter took place on 21 March, 27 April, 07 June, 17 July, 04 September, 09 October, 09 November, 13 November, 18 December 2006, 17 January, 05 March, 23 April, 04 June, 25 June, 30 September, 22 October, 27 November, 17 December 2007, 06 March, 07 April, 26 May and 24 June 2008. For unexpected unavailability of the Presiding Judge, the trial was not concluded and the case had to be restarted with Judge Marije Ademi as Presiding Judge.

After the defendant A█████ O█████ unsuccessfully had filed many requests regarding the appointment of international judges to the case, the case – after EULEX had taken over – was finally assigned by decision of the President of the Assembly of EULEX Judges dated 24 April 2009 to a panel consisting of a majority of EULEX judges. The latter recommenced the trial from 04 July 2009 on.

5. During the main trial, the 1st Instance Court examined the defendant, A█████ O█████ on 10 November 2009, after the witnesses M█████ Z█████ and M█████ B█████ (22 June 2009), S█████ and O█████ Z█████, M█████ G█████ and L█████ B█████ (29 June 2009), H█████ O█████, F█████ G█████, B█████ S█████ and S█████ S█████ (10 August 2009), E█████ G█████ S█████ Q█████, F█████ B█████ and N█████ M█████ (11 August 2009), S█████ J█████, A█████ M█████ and expert witness Dr. T█████ C█████ (13 August 2009), expert witnesses Dr. T█████ G█████ and H█████ K█████ as well as the co-accused F█████ B█████ (01 September 2009) were heard.

6. Based on the evidence obtained, the 1st Instance Court established the factual situation, which led to the convictions as lined out before. Based on its findings, on 24 November 2009, the District Court announced the Verdict and found the accused guilty of the criminal offence of Aggravated Murder as listed above. Consequently, the Court imposed on the accused the punishment as also specified above.
7. The Judgment was timely appealed by the District Prosecutor of Prishtine/Pristina on 27 September 2009 and both the Defence Counsel of A O, Av on 06 October 2010 and the defendant A O on 12 October 2009.
8. The Office of the State Prosecutor of Kosovo (OSPK) in an opinion and motion to the appeals argued that the appeals filed on behalf of the defendant A O are ungrounded and therefore to be rejected, whilst the District Court Judgment had to be affirmed.
9. Dated 12 April 2011 the appeals panel of the Supreme Court of Kosovo pronounced its Judgment (Az.-Kz. 364/2010), thus rejecting the appeals of the defendant, his Defense Counsel and the District Prosecutor and affirming the Judgment of the District Court in case P.nr. 64/2005 dated 30 November 2009.
10. **The defendant** dated 22 June 2011 timely filed an appeal against the Verdict of the Supreme Court of Kosovo dated 12 April 2011 (Ap.-Kz.No. . 364/2010), asserting essential violation of the criminal procedure, incomplete establishment of the facts, violation of the criminal law and that the criminal sanction announced would unjust as outlined before. The defendant proposes reviewing the case, because he had not deprived the victim K Z of his life.
11. **The OSPK**, with a response dated 04 October 2011 and registered with the Registry of the Supreme Court of Kosovo the same day fully objected to all aspects of the appeal as ungrounded and therefore proposed to reject it and to affirm the contested Judgment related to A O as outlined before.
12. In the 3rd Instance Appeal session of the Supreme Court of Kosovo on 21 February 2012 the Defense Counsel as well as the OSPK Representative made full reference to their submissions in writing. The defendant A O gave a long and detailed statement, within which in a very detailed manner he pointed out that under the master mind of L P he as well as his previous co-defendant F B had planned to trap, kidnap and finally kill the now late victim K Z, but that the one who has pulled the trigger and shot the victim to death was L P. Reference was made again to an alleged amount of drugs having been the subject of conflict between the victim and in particular L P. Then the defendant described how he himself together with F B had thrown the corps of the victim K Z in a muddy hole and covered it with soil, garbage and in particular with pepper, everything upon advice of L P. Moreover, the latter had promised to pay an amount of 25.000 Euros to both, the defendant A O and F B for them participating in the respective criminal offense. Finally the defendant A O denied that he ever had been employed at the airport.

FINDINGS OF THE COURT

A. Competence of the Supreme Court to rule upon the case in a session

13. Regarding the long and detailed statement of the defendant in front of the Supreme Court panel on 21 February 2012 the question occurred, whether or not this statement technically had to be considered as a confession, thus urging the panel to assess this as new evidence pursuant to Article 412 paragraph 12 of the KCCP in the course of a hearing.

The Supreme Court of Kosovo finds that this is not the case. The panel at first has arrived to the opinion that the respective statement of the defendant technically has not to be qualified as a confession, but is just another statement of the defendant in a row with his at least eight previous versions of the situation on the ground as given in front of police, Public Prosecutor and later the Court between 28 October 2004 and 16 December 2004 as well as on 10 November 2009. Reference is made to the list of statements as contained in the 1st Instance Judgment (p.19 through 20 of the English version). The defendant has not stated that now he wants to confess, but instead has told that he would like to disclose some secrets he always had kept for himself so far, then telling a story which he has told already several times before, but this time with slight differences as to his role in the context of the crime committed. Also his proposal was not focused to hold a hearing as to his confession, but to implement a more lenient punishment to him, which would be in proper relation to his contributions to the criminal offense at hand.

Despite all this, reference is made to Article 430 paragraph 2, last sentence of the CCK, according to which at the level of appeal against a judgment of a court of 2nd instance “[a] hearing may not be conducted before the Supreme Court”. This provision excludes the possibility to introduce new evidence at the current instance.

Therefore, the Supreme Court refers to the aspects as stressed in the appeal of the defendant, based upon the session held on 21 February 2012.

B. Substantial violation of the provisions of the Criminal Procedure

I. THE ENACTING CLAUSE OF THE 2ND INSTANCE JUDGMENT

Ad 1: Comprehensibility and consistency of the enacting clause:

14. The defendant in his appeal has pointed out his opinion that the enacting clause of the 2nd Instance Judgment is unclear and incomprehensible as well as contradictory to itself and to the reasoning of the Judgment. In particular, the reasoning of the Supreme Court Judgment would give the impression that the appeal panel did not have much will and patience to thoroughly examine everything that was substantial in the case. Thus, **the Supreme Court had violated Articles 403 paragraph 2, item 12 of the KCCP.**

15. This panel of the Supreme Court at first finds that the enacting clause of the 2nd Instance Judgment fulfills all requirements of the KCCP and that in particular it is

absolutely clear and comprehensive. It is neither ambiguous nor in contradiction with the 2nd Instance Judgment.

In particular, Article 396 paragraphs 3 and 4 of the KCCP read as follows:

(3) The enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused or by which he or she is acquitted of the charge for that act or by which the charge is rejected.

(4) If the accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code. ...

Article 391 paragraph 1 of the KCCP – as far as it is relevant in the case at hand - reads as follows:

In a judgment pronouncing the accused guilty the court shall state:

1) The act of which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends;

2) The legal designation of the act and the provisions of the criminal law applied in passing the judgment; ...

The respective 2nd Instance Judgment as to the point under discussion after rejecting both the appeals of the defendant and his Defense Counsel against the District Court Judgment as well as the appeal of the Prosecutor, fully affirms “*the Judgment of the District Court of Prishtinë/Pristina in case P.nr. 64/2005, dated 30 November 2009*”.

It needs to be born in mind that the appealed Judgment of the 2nd Instance Court just punctually refers to the concerns as raised by the Defense against the 1st Instance Judgment and thus is in line with the provision of Article 415 paragraph 1 of the KCCP stipulating that *the court of second instance shall examine the part of the judgment, which is challenged by the appeal*. It is therefore noteworthy that the enacting clause of the 2nd Instance Judgment without any doubts fulfills all requirements of Article 396 paragraph 3 of the KCCP, as there are in particular the personal data of the accused in accordance with Article 233 of the KCCP and the decision by which he is pronounced guilty of the act of which he was accused. Regarding the latter it is established that the 2nd Instance Court fully refers to the challenged District Court Judgment, which was affirmed.

Therefore, this panel of the Supreme Court notes that the enacting clause of the appealed 2nd Instance Judgment is clear enough to stand challenges on its understandability, comprehensibility and consistency.

Ad 2: Contradictions within and shortcomings of the reasoning of the Judgment:

16. Moreover, the defendant has stressed that as of his opinion the reasoning of the 2nd Instance Judgment would be contradictory in itself and moreover it would contain shortcomings. In particular, as to his impression the appeal panel did not have much will and patience to thoroughly examine everything that was substantial in the case.

17. This panel of the Supreme Court finds that indeed the reasoning given by the 2nd Instance Court is quite short on each of the appealed points. Nevertheless, the challenged Judgment is very clear and precise regarding each point, thus carefully reflecting on all relevant aspects of the very detailed 1st Instance judgment. The latter in particular can be read up at p. 5 through 7 of the challenged Supreme Court Judgment (in its English version). There is particularly no indication for a violation of Article 403 paragraph 1, item 12 of the KCCP, since no contradiction of the enacting clause as such or between the latter and the reasoning of the Judgment can be established, when it comes to the legal qualification of the criminal act A [REDACTED] was found guilty for.

II. IMPROPER CONSIDERATION AND EVALUATION OF EVIDENCE

18. At the same time the defendant is of the opinion that the challenged 2nd Instance Judgment had not properly evaluated the statements as provided by the defendant himself and that instead the Court had made reference to unreliable witnesses.

This panel of the Supreme Court of Kosovo arrives to the opinion that no improper evaluation of evidence was made, neither by the 1st Instance Court nor particularly by the 2nd Instance panel of the Supreme Court.

The examination of the file allows finding out that already the 1st Instance Court carefully has analyzed all available physical evidence as well as the statements of the witnesses and the defendants and weighed them regarding all aspects one by one. Reference is made in particular to p. 9 through 26 of the 1st Instance Judgment (in its English version). Also the 2nd Instance Court had found that the District Court has provided a very detailed and thorough assessment of evidence.

C. Erroneous and incomplete determination of the factual situation

19. The defendant moreover has stressed that the determination of the factual situation was incomplete and erroneous. The Supreme Court panel in particular had not properly assessed the defendant's statement according to which the murder of the victim K [REDACTED] Z [REDACTED] was committed by I [REDACTED] P [REDACTED]. Moreover, as also stressed by the defendant, some evidence had been lost. In particular the expertise dated 29 October 2004 simply had "vanished" during the 1st instance procedure. Also, the second instance panel had not properly considered that according to the defendants statement in front of the 1st Instance Court the car keys of the victim's vehicle had been in the house of F [REDACTED] B [REDACTED] and that the different statement of the witness M [REDACTED] B [REDACTED], according to which the keys had been with the defendant, would be wrong. The Supreme Court moreover had not considered the defendant's statement that the telephone calls from

him to the victim K█████ Z█████ had not been done on the defendant's initiative, but under force instead.

20. Reference is made to what already was stated before, but under a different aspect. In the case at hand there is no indication that the 2nd Instance Court has failed to fully and completely determine the factual situation or has not properly assessed the determination of the 1st Instance Court. It can be read from the challenged Judgment itself that the 2nd Instance Court has carefully assessed *"the evidence in the case file [...] comparing it to the factual findings of the appealed Judgment"* (p.7 of the English version). A check of the 1st Instance Judgment and the minutes of the trial sessions as available in the case file moreover has brought that the aforementioned assessment of the 2nd Instance Court was well based upon the case file.

Last but not least reference is made to what was established in the case *R█████ A█████ and D█████* (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, p.20 (English version), according to which *"Appellate proceedings in the PCPCK rest on the principles that it is on the trial court to hear, assess and weigh the evidence at the trial. [...] Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings it substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact, or where its evaluation has been 'wholly erroneous'"*. This adjudication was repeated and further developed in other cases, in particular in the case against *F█████ E█████* (Supreme Court of Kosovo, Pkl-Kzz 71/09 dated 10 October 2009) and against *J█████ K█████* (Supreme Court of Kosovo, Ap.-Kz. No. 84/2009 dated 03 December 2009).

D. Substantial violation of the Criminal Law

21. The defendant is of the opinion that because of the alleged failures of the Supreme Court panel the latter also has violated the Criminal Law.

22. The panel refers to what was already stated before. Since no failures have been established regarding the procedural law and the establishment of facts, no conclusions can be drawn from this, leading to a violation of the criminal law.

Even considering the statements of the defendant *A█████ O█████* according to which it was not him but *I█████ P█████* who finally has shot the victim *K█████ Z█████* to death, no re-qualification of the criminal responsibilities of the defendant needs to be done. Having in mind that the trapping and killing of *K█████ Z█████* was part of a joint plan that was shared also by the defendant *A█████ O█████*, it is of no importance who finally has pulled the trigger.

E. Decision on the punishment

23. The defendant finally has expressed his opinion that the imposed punishment is inappropriate and draconic and thus at least needs to be seriously lowered, given it would be proven that he had committed the crimes he is charged with.

24. In difference to that, the injured party has proposed to increase the punishment up to the highest level possible, given that the defendant has not even apologized towards the family of the victim.

25. The decision on the punishment deems fair, properly conducted and not unusual as far as it can be based on the findings of the 2nd Instance Court. None of the previous instances have failed to consider any mitigating circumstances in favor of the defendant. Since none of his various statements can be considered a technical confession, they cannot lead to the decreasing of the punishment either. At the other side, there are no substantial reasons to have the punishment increased as proposed by the injured party. Thus, this panel of the Supreme Court shares the assessment made by the 2nd Instance panel, which has confirmed the assessment of the 1st Instance Court.

F. Conclusion of the Supreme Court of Kosovo


26. For the abovementioned reasons, the Supreme Court concludes that the appeal of the defendant A. O. is unfounded.

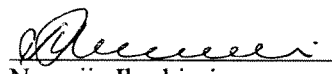
Consequently the Supreme Court has decided in accordance with Article 430 paragraph 2 as read with Articles 420 paragraph 1, item 2, 423 of the KCCP.

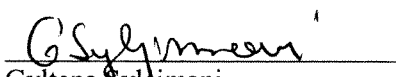
For the foregoing reasons the Supreme Court decided as in the enacting clause.

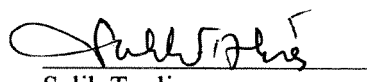
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Members of the panel:

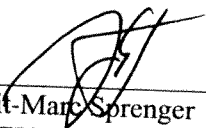

Anne Kerber
EULEX Judge


Nazmije Ibrahim
Supreme Court Judge


Gyltene Syljmani
Supreme Court Judge

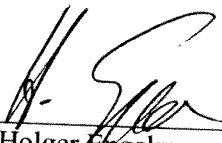

Salih Toplica
Supreme Court Judge

Presiding Judge:



Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk



Holger Engelmann
EULEX Legal Officer