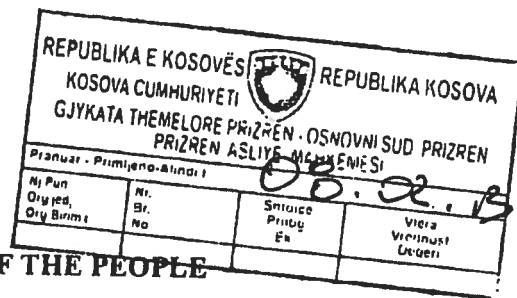


SUPREME COURT OF KOSOVO
Ap-Kz no. 110/2011
6 November 2012



IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of Judge Horst Proetel as Presiding Judge, and Judges Tore Thomassen, Emine Kaqiku, Marije Ademi, and Avdi Dinaj as members of the panel, in the presence of legal officer Chiara Rojek acting in capacity of recording clerk,

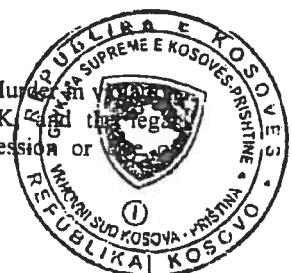
In the criminal proceedings against the Defendant O [REDACTED] Z [REDACTED], father's name [REDACTED] mother's name [REDACTED], born on [REDACTED] in village of [REDACTED] Municipality of Rahovec/Orahovac, of Kosovo citizenship, last residence in [REDACTED] [REDACTED], former businessman,

Charged as per in the Indictment PP no. 230/2005 filed on 17 July 2007 by the District Public Prosecutor of Prizren against the Defendants O [REDACTED] Z [REDACTED] and S [REDACTED] S [REDACTED] with the criminal offences of Aggravated Murder in co-perpetration contrary to Article 147 items 4, 5 and 8 read with Article 23 of the Provisional Criminal Code of Kosovo (PCCK) (count 1), Attempted Murder in co-perpetration contrary to Article 147 item 11 read with Articles 20 and 23 of the PCCK (count 2), Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraphs 1 and 2 of the PCCK (count 3), and for Defendant Osman Zyberaj only, with the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK (count 4),

Convicted in first instance by Judgment P no. 155/2007 of the District Court of Prizren dated 17 April 2008 for the criminal offences of Aggravated Murder in co-perpetration contrary to Article 147 item 5 of the PCCK read with Article 23 of the PCCK, Attempted Aggravated Murder in co-perpetration contrary to Article 147 item 11 read with Articles 20 and 23 of the PCCK, Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 1 of the PCCK, and of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK, and sentenced to an aggregated punishment of twenty-five (25) years, Confirmed in second instance by Judgment Ap-Kz no. 481/2008 of the Supreme Court of Kosovo dated 21 July 2009, except modification of legal designations under counts 1, 2 and 3,¹

Acting upon the Judgment Api-Kzi no. 09/2009 of the Supreme Court of Kosovo dated 28 December 2010, acting as third instance court, by which the Second Instance Judgment Ap-Kz no. 481/2008 was annulled and the case sent back to the second instance court for re-trial, and taking into consideration the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 16 March 2011,

¹ The legal qualifications under counts 1 and 2 were unified and qualified as Aggravated Murder in violation of Article 147 item 11 committed in co-perpetration under Article 23 of the PCCK and the legal qualification under count 3 was modified to Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 2 of the PCCK.



After having held a session and conducted a hearing to take evidence in the presence of Defendant O [REDACTED] Z [REDACTED] his Defence Counsels E [REDACTED] R [REDACTED] B [REDACTED] I [REDACTED] and L [REDACTED] S [REDACTED], EULEX Prosecutor Judit Tatrai representing the OSPK, and having deliberated and voted on 6 November 2012,

Pursuant to Articles 411 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the following,

JUDGMENT

1. The Defendant O [REDACTED] Z [REDACTED] personal data above, is **FOUND GUILTY** of the criminal offences of **Murder** in co-perpetration contrary to Article 146 of the PCCK read with Article 12 Paragraph 2 and Article 23 of the PCCK (count 1) and of **Attempted Murder** in co-perpetration contrary to Article 146 read with Article 20, Article 23 and Article 12 Paragraph 2 of the PCCK (count 2), punished under Article 147 Paragraph 1 item 11 of the PCCK

Because

On 10 October 2005 at about 16:20 hrs in the market of X [REDACTED] village, Prizren municipality, O [REDACTED] acting in concert with an unknown co-perpetrator for the purpose of deliberately depriving another person of his life, namely H [REDACTED] R [REDACTED] intentionally shot at and killed H [REDACTED] R [REDACTED], and for the purpose of deliberately attempting to deprive another person of his life, namely N [REDACTED] R [REDACTED], intentionally shot at and wounded N [REDACTED] R [REDACTED]

2. The criminal act of **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 Paragraphs 1 and 2 of the PCCK (count 3) is subsumed under counts 1 and 2.
3. The Defendant O [REDACTED] Z [REDACTED] personal data above, is **FOUND GUILTY** for the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 Paragraph 2 of the PCCK (count 4)
Because
On 19 April 2007 when he was apprehended by the police, he was in possession of a weapon for which he had no authorization to possess or use.
4. Therefore, the **Accused O [REDACTED] Z [REDACTED]** is **SENTENCED** as follows:
 - to fourteen (14) years of imprisonment pursuant to Article 146 read with Article 12 Paragraph 2, Article 23 and Article 147 Paragraph 1 item 11 of the PCCK, as he was in a state of diminished mental capacity at the time of the commission of the criminal act (counts 1 and 2), and
 - to two (2) of years of imprisonment pursuant to Article 328 Paragraph 2 of the PCCK (count 4).
5. An aggregated punishment of fifteen (15) years of imprisonment is imposed onto the Defendant O [REDACTED] Z [REDACTED] pursuant to Article 71 of the PCCK.
6. The time spent in detention on remand by O [REDACTED] Z [REDACTED] since 19 April 2007 is to be credited pursuant to Article 73 of the PCCK.
7. The Motion of the Defence filed on 6 November 2012 to terminate the detention on remand of O [REDACTED] Z [REDACTED] is **REJECTED** as ungrounded.



REASONING

I. Procedural history of the case

1. On 17 July 2007, the District Public Prosecutor of Prizren filed the Indictment PP no. 230/2005² against the Defendants O [REDACTED] Z [REDACTED] and S [REDACTED] S [REDACTED] for the criminal offences of Aggravated Murder in co-perpetration contrary to Article 147 items 4, 5 and 8 read with Article 23 of the PCCK, Attempted Murder in co-perpetration contrary to Article 147 item 11 read with Articles 20 and 23 of the PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraphs 1 and 2 of the PCCK. O [REDACTED] Z [REDACTED] was also charged with Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK.

2. On 30 August 2007, the Indictment was confirmed by Ruling KA no. 112/2007.³

3. The main trial started in January 2008. On 17 April 2008, the District Court of Prizren, by Judgment P no. 155/2007, found both Defendants guilty for the criminal offences of:

- Aggravated Murder in co-perpetration contrary to Article 147 item 5 of the PCCK read with Article 23 of the PCCK (count 1),⁴
- Attempted Aggravated Murder in co-perpetration contrary to Article 147 item 11 read with Articles 20 and 23 of the PCCK (count 2),⁵ and
- Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 1 of the PCCK (count 3).⁶

In addition, O [REDACTED] Z [REDACTED] was found guilty of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK (count 4).⁷

² Blue binder, DC Prizren HEP 52/2007 PP 230/05 case 128/05, O [REDACTED] Z [REDACTED] and S [REDACTED] S [REDACTED] pretrial I: indictment PP no. 230/2005 dated 17 July 2007

³ Blue binder Prizren district court KA 112/2007, O [REDACTED] Z [REDACTED] and S [REDACTED] S [REDACTED] Volume V, Ruling KA no. 112/2007 on confirmation of indictment, 30 August 2007

⁴ "Because on 10 October 2005 at about 16:20 hrs in the market of [REDACTED] village, Prizren municipality, O [REDACTED] Z [REDACTED] acting in concert as a co-perpetrator with S [REDACTED] S [REDACTED] for the purpose of deliberately depriving another person of his life, namely [REDACTED] intentionally shot at and killed [REDACTED] while other persons were present and in a manner that demonstrated a ruthless disregard for life and in a violent manner;"

⁵ "Because on 10 October 2005 at about 16:20 hrs in the market of [REDACTED] village, Prizren municipality, O [REDACTED] Z [REDACTED] acting in concert as a co-perpetrator with S [REDACTED] S [REDACTED] for the purpose of deliberately attempting to deprive another person of his life, namely N [REDACTED] intentionally shot at and wounded N [REDACTED] while other persons were present and in a manner that demonstrated a ruthless disregard for life and in a violent manner;"

⁶ "Because on 10 October 2005 at about 16:20 hrs in the market of [REDACTED] village, Prizren municipality, O [REDACTED] Z [REDACTED] acting in concert as a co-perpetrator with S [REDACTED] S [REDACTED] for the purpose of deliberately depriving another person of his life, namely H [REDACTED]; and while deliberately attempting to deprive another person of his life, namely N [REDACTED], intentionally shot at H [REDACTED] while in possession of and using a weapon for which he had no authorization to possess or use;"

⁷ "Because on 19 April 2007 when he was apprehended by the police, he was in a possession of a weapon for which he had no authorization to possess or use;"



4. An aggregated punishment of twenty-five (25) years was imposed onto both Defendants.⁸

5. On 04 August 2008, the Defence Counsels E [REDACTED] R [REDACTED] and R [REDACTED] G [REDACTED] lodged appeals on behalf of O [REDACTED] Z [REDACTED] against the Judgment P no. 155/2007. On 1 December 2008, the State Prosecutor issued an Opinion and Motion to the Appeals, thus proposing to reject them as ungrounded.

6. On 29 October 2008, Defence Counsel E [REDACTED] R [REDACTED] forwarded to the Court a letter of the Defendant and asked to have it attached to the Appeal. In this Letter, O [REDACTED] Z [REDACTED] stated that he accepted to have murdered [REDACTED] and wounded his brother in village [REDACTED] on 10 October 2005, and that he was the only person being involved in the case. Furthermore, he requested that the case be sent back for retrial. H.R.

7. On 21 July 2009, the Supreme Court of Kosovo issued the Judgment Ap-Kz no. 481/2008 by which the Appeal filed on behalf of Defendant O [REDACTED] Z [REDACTED] was partially granted. The Second Instance Court unified the legal qualifications under counts 1 and 2 (Aggravated Murder in co-perpetration contrary to Article 147 item 5 read with Article 23 of the PCCK and Attempted Aggravated Murder contrary to Article 147 item 11 read with Articles 20 and 23 of the PCCK) for Aggravated Murder in co-perpetration contrary to Article 147 item 11 read with Article 23 of the PCCK, and modified the legal qualification under count 3 (Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 1 of the PCCK) to Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK. The Second Instance Court acquitted the second defendant, S [REDACTED] S [REDACTED] from all the charges.

8. On 2 September 2009, the Defence Counsel E [REDACTED] R [REDACTED] of O [REDACTED] Z [REDACTED] filed an appeal against the Judgment Ap-Kz no. 481/2008 on the grounds of substantial violations of the provisions of criminal procedure under Article 403 of the KCCP, violations of the criminal law under Article 404 of the KCCP, an erroneous and/or incomplete determination of the factual situation under Article 405 of the KCCP, and on the account of a decision on criminal sanctions under Article 406 of the KCCP. He proposes to the Supreme Court of Kosovo to modify the challenged Judgment so to acquit the Defendant, or alternatively to annul it and send the case back for retrial. On 3 September 2009, Defence Counsel R [REDACTED] O [REDACTED] also filed an appeal on behalf of O [REDACTED] Z [REDACTED] on the same grounds. On 10 September 2009, the Defence Counsel T [REDACTED] G [REDACTED]

⁸ Defendant Z [REDACTED] was sentenced to a term of twenty-five (25) years of imprisonment under count 1, twenty-five (25) years of imprisonment under count 2, six (6) years under count 3 and three (3) years under count 4. Additionally, the District Court ordered that the revolver Amadeo Rossi S.A. 0.38 Special be confiscated and destroyed; that the defendants must reimburse the costs of the criminal proceedings, including but not limited to the sum of 850.00 euros to [REDACTED] for lost wage during the trial; that each Defendant shall pay separately a scheduled amount at a flat rate of 200 euros after the judgment goes into effect; that each defendant shall pay their respective costs of transportation and escort as well as the remuneration and necessary expenses of his respective Defence counsel. The Defendants be jointly and severally liable for the rest of the costs. The District Court ordered the publication of the final Judgment pursuant to Article 61 of the PCCK and instructed the Injured Party to pursue his claim before civil jurisdictions.



filed an appeal on the behalf of O [REDACTED] Z [REDACTED] on the basis of a violation of criminal law and a wrongful decision on criminal sanctions. He proposes to the Supreme Court of Kosovo to modify the First Instance Judgment and send back the case for retrial, or to modify the legal designation of the criminal act and to impose a more lenient sentence. On 25 January 2010, the State Prosecutor filed an Opinion and Motion on the appeals, seeking to affirm the contested Judgment.

9. On 28 December 2010, the Supreme Court of Kosovo, acting as third instance court, issued the Judgment Api-Kzi no. 09/2009 by which the Appeals filed on behalf of O [REDACTED] Z [REDACTED] were partially granted. The Second Instance Judgment Ap-Kz no. 481/2008 was therefore annulled, and the case sent back to the second instance court for re-trial.

II. Competence and procedure before the Supreme Court of Kosovo

10. The Supreme Court of Kosovo is competent to decide on the Appeals pursuant to Articles 26 Paragraph 1 and 398 and following of the KCCP. The Panel has been constituted in accordance with the Law no. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo dated 13 March 2008 and the Guidelines for Case Allocation for EULEX Judges in Criminal Cases at the Supreme Court of Kosovo dated 24 March 2011.

11. The Supreme Court holds that, in the light of the Third Instance Judgment's findings, the four issues circumscribe the scope of these appeal proceedings: the nature of the letter of O [REDACTED] Z [REDACTED] addressed to the Court on 29 October 2008, the existence of the criminal liability, the legal designation of the acts committed and the criminal sanctions imposed onto the Defendant. In its Judgment Api-Kzi no. 09/2009, the Supreme Court of Kosovo, in its Judgment, reached the following conclusions:

"33. For the abovementioned reasons, the Supreme Court concludes that the appeals of the Defence of defendant O [REDACTED] Z [REDACTED] are partially founded.

This in particular refers to a possible admission of the murder of [REDACTED] and the attempted murder of N [REDACTED] by the defendant O [REDACTED] Z [REDACTED] in terms of which the provided legal procedure was not carried out in accordance with the KCCP by the 2nd Instance panel (read point A.IV. of this Judgment). H.R.

Moreover, the 2nd Instance Court has failed to examine for the question, whether or not the defendant O [REDACTED] Z [REDACTED] was criminally reliable at the time when the respective criminal acts of shooting at [REDACTED] and [REDACTED] have been committed. Therefore, Article 415 paragraph 1, item 2 as read with Article 404 item 2 of the KCCP have been violated, since the examination in particular by the panel of second instance needs to be carried out *ex officio*, whenever this is indicated in which way ever in the respective case (read point C.III. of this Judgment). For these abovementioned reasons, the Judgment of the 2nd Instance panel of the Supreme Court needs to be annulled and the case will be sent back to the Court of 2nd Instance for re-consideration and re-trial.

H.R. Last but not least, the Supreme Court of Kosovo has found that the legal qualification of the killing of [REDACTED] and shooting at and wounding of N [REDACTED] needs to consider the question of premeditation and intention of the perpetrator, which was not elaborated by the 2nd Instance Court.

Premeditation is a bad wording used in the English version of the old law – the original version should be checked.



Finally, the reconsideration of the issues addressed above may lead to the necessity to re-evaluate on the imposed punishment as well..."⁹

12. On 14 November 2011, acting *ex officio* pursuant to Articles 176, 191 and 360 of the KCCP and upon the recommendations of the Third Instance Court, the Presiding Judge in this case issued an Order Ap-Kz no. 110/2011 by which a psychiatric expertise of O [REDACTED] Z [REDACTED] is to be carried out at the Psychiatric Department of the University Clinic Centre of Kosovo. This Order was subsequently amended on 12 March 2012.

13. The Commission of experts who performed the expertise was composed of Doctor F [REDACTED] (psychiatrist) D [REDACTED] (psychiatrist) and S [REDACTED] (clinical psychologist). The report of Super Expert Analysis of [REDACTED] was filed with the Court Registry on 6 September 2012, and was communicated to the parties. One of the panel members, Doctor [REDACTED] was summoned to appear in court to provide further explanations on the super expertise findings. o. 2.

14. During the court session of 6 November, the Defence counsels file a submission addressing the mentioned issues and proposing not to return the case for retrial. They propose a hearing to be conducted so to enable O [REDACTED] Z [REDACTED] to clarify the letter, the facts that occurred and his motivation. They request the Supreme Court of Kosovo to acquit him due to the lack of criminal liability, or to find him guilty for Murder. In the latter, the Defence suggests applying Article 12 paragraph 2 of the CCK on mental diminished capacity, and/or the criminal act to be qualified under Article 148 of the CCK, i.e. Murder committed in a state of mental distress.

15. Considering the above, the Supreme Court Panel decides to conduct a hearing to take new evidence as the requirements of Article 412 Paragraph 1 of the KCCP were met.

III. Findings of the Supreme Court of Kosovo

III.A. The letter of Defendant [REDACTED] dated 25 October 2008 o. 2.

16. On 29 October 2008, a letter of O [REDACTED] Z [REDACTED] dated 25 October was communicating by his Defence Counsel to the Court. In the letter, he admits to have murdered [REDACTED] and to have wounded his brother and to be the only person responsible.¹⁰ H - R.

17. In its Judgment Ap-Kz no. 481/2009, the Supreme Court of Kosovo, acting as second instance court, held that the written statement of the Defendant and his oral petition "represent a sort of guilty plea and not a new piece of evidence which can be taken only in a hearing and not during a session (art. 412.1 PCPCK),"¹¹ and considered that these

⁹ Supreme Court of Kosovo, Api-Kzi no. 09/2009, case O [REDACTED] Z [REDACTED] Third Instance Judgment, December 2010, page 24, para 33

¹⁰ Binder Dist.ct.prizren.Zyberaj shala P no 155/07 murder vol. VIII Apr.08 API - 9/09, AP 110 [REDACTED] dated 25 October 2008 o. 2.

¹¹ Supreme Court of Kosovo, Ap-Kz no. 481/2009, case O [REDACTED] Z [REDACTED] Second Instance Judgment, 21 July 2009, page 4, para 7



statements do not change the factual situation. During the 2009 appeal session, the Defendant O [redacted] Z [redacted] only reiterated that “[i]t is true that on 10 October 2005 a murder took place and that it was committed by me” as to the criminal acts, without providing any detailed explanations. He additionally requested a retrial and mentioned his health condition during the main trial.¹² The Supreme Court Panel rejected the motion for re-trial.¹³

18. At the third instance stage, the Supreme Court of Kosovo shares the views of the Defence in this respect in the sense that “... the Supreme Court of Kosovo finds that the concerns raised by the Defence in this regard are factually grounded, as a guilty plea according to the relevant provisions of the KCCP requires the defendant to be properly warned and heard about his version of what has happened and whether or not he pleads guilty separately on each point and that this needs to be done in the course of a hearing. This was not the case at hand.”¹⁴ This Panel concurs with the third instance findings that “a guilty plea needs to be considered as evidence in the sense of the law. This illuminates particularly from the fact that according to Article 315 paragraphs 3 and 4 of the KCCP in relation to the Confirmation Hearing (as repeated by Article 359 paragraphs 2 through 5 of the KCCP for the Main Trial session) the judge may proceed with his/her decision in case s/he is satisfied with the guilty plea, but otherwise needs to conduct the whole evidence procedure before.”¹⁵

19. During the appeal session on 6 November, O [redacted] Z [redacted] mentions that he was in a critical psychological and physical state during the main trial and could not express himself. He states that he admitted having committed the murder – and the attempted murder -. He, however, does not admit the guilt. He also gives his account of the events of 10 October 2005 which are summed up as follows:¹⁶ O [redacted] Z [redacted] and [redacted] were neighbors. [redacted]’s family was very poor and the Defendant supported them. [redacted] knew more or less about the illegal activities of O [redacted] Z [redacted] in relation to protests to the Serbian regime during the 80s and the war period, and he begun a pressure on him. O [redacted] Z [redacted] was detained and beaten up directly by [redacted]. In certain circumstances he had to go and report to [redacted] on his activities and friends. During the liberation war, there was an early organization, the head of this cell being O [redacted] Z [redacted] brother. On 12 May 1998, O [redacted] was wounded during a frontal battle and his military activities went down. His brother and nephew were killed during the war. [redacted] was directly responsible for that period of time because he was the head of Yugoslav and Serbian Service. O [redacted] Z [redacted] underwent medical treatment in [redacted] and then to [redacted]. After the war he returned to Kosovo. He and his family relatives did not see [redacted] in [redacted] apart from his wider family,

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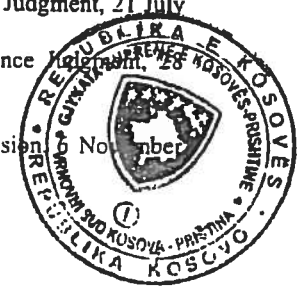
¹² Supreme Court of Kosovo, Ap-Kz no. 481/2009, case O [redacted] Z [redacted] minutes of session, 21 July 2009, page 13

¹³ Supreme Court of Kosovo, Ap-Kz no. 481/2009, case [redacted] Second Instance Judgment, 21 July 2009, pages 20-21, para 31 and following

¹⁴ Supreme Court of Kosovo, Api-Kzi no. 09/2009, case O [redacted] Z [redacted] Third Instance Judgment, 18 December 2010, pages 15-16, para 24

¹⁵ Ibid

¹⁶ Supreme Court of Kosovo, Ap-Kz no. 110/2011, case O [redacted] Z [redacted] minutes of session 6 November 2012, page 13 and following



H.R.

██████████ and the Serbian forces had withdrawn from Kosovo. O ██████ Z ██████ continued his normal life as businessman.

On that critical day, the Defendant had meetings and lunch with the directors of Sillos Company in a restaurant in ██████ He left his car by Sillos Company and used another car. After lunch, he spent a bit more time at Sillos Company and then left towards Prizren. He stopped to get some vegetables for his family at the Green Market in ██████ He drove from Sillos to the Green Market and parked his car opposite to his friend (N ██████ from Z ██████'s shop close to the market. When he was shopping in the market, he saw in direct line H ██████ and his brother, and at that moment O ██████ Z ██████ "thought that I was at the front line at the firing line". He then pulled out his gun, and shot a few times. The following days he understood from others that he killed ██████. Three/four months earlier his youngest brother had passed away. He carried a weapon for personal security reasons. N ██████ ever attacked or maltreated O ██████ Z ██████ The Defendant never intended to shoot him. He states that he had a severe mental condition and O ██████ Z ██████ received a medical treatment when he went to prison and that he was in a very grave psychological and health state at the time of the trial.

H.R.

20. The findings of the Supreme Court of Kosovo with regard to the account of the facts given by O ██████ Z ██████ will be found under Part III.C.

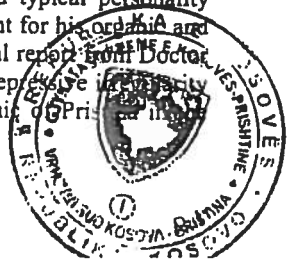
III.B. The criminal liability of the Defendant O ██████ Z ██████, the question of his mental state at the time of the commission of the criminal offences

21. In its Judgment, the Third Instance Court concluded that the Defendant O ██████ Z ██████ was affected by a number of different diseases, as well physical as psychiatric ones and "[a]ll this together and other expertise and documentation in the case file should have led the 2nd Instance Court to the *ex officio* examination of the criminal liability of the defendant at the time when the crimes were committed."¹⁷

22. This Supreme Court Panel observes that since the initiation of these criminal proceedings, the mental state of the Defendant has been subject to numerous communications, court orders and medical reports.¹⁸ Worth mentioning is that the First Instance Court put considerable attention into this matter, however all the analysis carried out on the mental state of O ██████ Z ██████ was mostly restricted to his aptitude to stand

¹⁷ Supreme Court of Kosovo, Api-Kzi no. 09/2009, case O ██████ Z ██████ Third Instance Judgment, 28 December 2010, page 23, para 31

¹⁸ Blue binder murder trial vol. VI, Letter from Doctor N ██████ psychiatrist of Dubrava prison – dated 5 January 2008: The letter mentioned chronic mental disturbances and Doctor ██████ concluded that this state justifies O ██████ Z ██████ transfer to the university clinical center of Pristina; Blue binder murder trial vol. VI, Medical report of O ██████ Z ██████ 12 February 2008, page 1639, mentioning that during his journey at Dubrava prison the Defendant showed some psychiatric disturbances; Psychiatric report from Doctor N ██████ P ██████ dated 16 February 2008, the doctor submits the following diagnosis: schizoid typical personality disorder F 21. His recommendations are to put him under a mandatory medical treatment for his organic and mental problems and to hospitalize him for an independent psychiatric opinion; Hospital report from Doctor X ██████ dated 21 February 2008, page 1681: the doctor mentioned as sickness depressive disorder with psychotic episodes and requested the Defendant to be sent to the university clinic of psychiatric and forensic department.



trial, and not to his mental capacity at the time the criminal acts were committed.¹⁹ The mental disturbances of the Defendant were noticed and reported by the medical personnel of Dubrava prison before the commencement of the main trial. On 10 March 2008, the Trial Panel concluded that, based on the preliminary conclusions of the experts, O [REDACTED] Z [REDACTED] is physically capable of attending the court sessions and has the mental capacity to understand the proceedings.²⁰ In the Judgment, it was concluded that “[d]uring all the stages of the trial, the Court was informed that Z [REDACTED] was mentally competent and was oriented in all aspects... the observation by the panel members of Z [REDACTED] conduct during the trial and at recesses, which were confirmed by others, corroborated the court’s belief that Z [REDACTED] alleged listlessness, physical weakness and confusion were simply part of his conscious effort to avoid the ultimate responsibility for his criminal acts on 10 October 2005.”²¹

23. In the Expertise Report dated 21 March 2008 from the University Clinical Centre of Kosovo, the experts concluded that O [REDACTED] Z [REDACTED] has hypnagogic and hypnopompic hallucinations and presents symptoms of anxiety, bouts of depression, paranoid ideation, and hostile behaviour. The diagnosis is Post Traumatic Stress Disorder (PTSD).²²

24. The Commission of experts designated by the Presiding Judge to perform a psychiatric expertise issued its Report in August 2012:

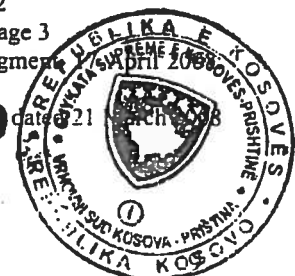
“According to the analysis of the documentation, amnesic data and psychiatric and psychological examination we find that:

- a) There is no eventual content of psychotic illness or psychotic reaction
- b) There are no elements of the organic damage of the brain and intellectual capabilities are in the level of normal.
- c) In the moment of occurrence it came up to the impossibility to assess the situation, feeling that the war is not over with the disordered affective proportion including the fear and hate that made him to return in the war memories.

¹⁹ Blue binder murder trial vol. VI, page 1564, Ruling of the presiding judge dated 1 February 2008 ordering a physical examination of O [REDACTED] Z [REDACTED] in order to determine whether his physical health may impact future proceedings; Order of the presiding judge dated 22 February 2008 by which physical and psychiatric tests are to be carried out on O [REDACTED] Z [REDACTED] to ensure that he can participate to the trial; Blue binder murder trial vol. VI minutes of main trial dated 31 January 2008, pages 6-10: the presiding judge mentioned the communication sent by Doctor [REDACTED] Dubrava prison (recommending the transfer of O [REDACTED] Z [REDACTED] to the clinical center of Pristina Psychiatric Unit), a report dated 9 September 2004 noting that [REDACTED] was diagnosed with depressive disturbances and a medical follow up dated 28 September 2006 with the same diagnosis; His health condition was subject to continuous care during the main trial: see *inter alia* Grey binder, DC Prizren Vol. VII feb 08, minutes of main trial dated 21 February 2008, pages 3-22-26-33, minutes of main trial dated 22 February 2008, pages 4-5-7, minutes of main trial dated 6 March 2008, page 3, minutes of main trial dated 10 March 2008, page 3, minutes of main trial dated 11 March 2008, page 3; Order of the presiding judge dated 26 February 2008 for a physical and mental health examination to determine the competency of O [REDACTED] Z [REDACTED] to stand trial; Grey binder, DC Prizren Vol. VIII April 08, minutes of main trial dated 15 April 2008, page 11-14; minutes of main trial dated 11 April 2008, page 2

²⁰ Grey binder, DC Prizren Vol. VIII April 08, minutes of main trial, 10 March 2008, page 3
²¹ District Court of Prizren, P no. 155/2007, case Osman Zyberaj, First Instance Judgment, pages 17-18

²² Grey binder, dc Prizren Vol. VII feb 08, Report on the mental state of O [REDACTED] Z [REDACTED] dated 21 March 2008 from the University clinical center of Kosovo



In that moment is presented the obvious difficulty in the assessment of the circumstances and situation.

All this decreased the mental capability at the moment of the commission of the criminal offence and the capability to control the actions and consequences of his actions in that moment was obviously decreased.”²³

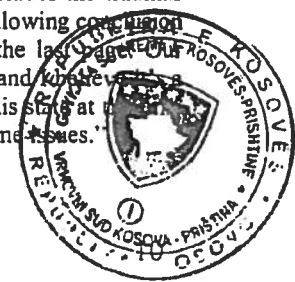
25. During the appeal session on 6 November, Doctor [REDACTED] one of the Commission experts, gave additional explanations on the conduct of the expertise and the findings of the Commission. The expert witness mentioned that no data on the Defendant’s mental state could be found from earlier period. He proceeded to a comparison between the 2008 expertise report and the 2012 super expertise report both issued by University Clinical Centre of Pristina experts.²⁴ He furthermore explained that O [REDACTED] Z [REDACTED] suffered from a decreased mental capacity, which can be attributed to PTSD but more to the characteristics of his personality (passive-aggressive disorder). According to the expert, “[h]e was in a state of tense emotion which diminished his capabilities to come to a correct and quick conclusion that that cat was prohibited and he could kill an innocent person in those moments. He had the diminished capacity to follow his actions, this is called the volatile part of the will to control actions and these capabilities were diminished but not excluded.”²⁵

26. He, however, mentioned that “the full control of his actions is not excluded but that control and judgment whether the act is prohibited and if something else happened as it was a market day this ability to act and the ability to judge the importance of the act. The team of experts considering all previous circumstances that this person was born a long time ago and has an unbalance in the psycho-social sphere and went through a lot of trauma and stress such individual is vulnerable in such situation and did not have full control and judgment for the act not to occur.” In regard to the existence of a mental distress of O [REDACTED] Z [REDACTED] at the critical time (which was not subject to expertise by the Commission of experts), the doctor stated that the Defendant was under a lot of emotional pressure and his emotional state prevailed over logic, possibly causing some kind of state of distress. When asked if the Defendant could pose a danger to society, the expert answered that he undertook psychiatric treatment in prison and that he is not dangerous anymore but he has to take antidepressants.

²³ Blue binder Supreme Court of Kosovo, Ap-Kz no. 110/2011 – Retrial – O [REDACTED] Z [REDACTED] Psychiatric Department of the University Clinic Centre of Kosovo, super expert analysis of case O [REDACTED] Z [REDACTED] 31 August 2012, page 5, English version

²⁴ Supreme Court of Kosovo, Ap-Kz no. 110/2011, case O [REDACTED] Z [REDACTED] minutes of session, 6 November 2012, page 7: Dr. [REDACTED] “I read and analysed the previous expertise, they are not far away from each other. There are a few elements that do not match, for example page 2, the findings, we did not find the same things also the conclusion on the last page and the elements of PTSD, pressure includes the traumas within 6 months – this does not stand as PTSD will show up even years afterwards. The following conclusion is correct that he can understand the charges against him, the findings as noticed on the last page of the expertise emphasised his mental state at the moment the criminal offence was committed and that he has a wider clear image of characteristics of his personality and his history. More is said about his state at the moment of the commission of the criminal offence. The first expertise did not concentrate on the same issues.”

²⁵ Ibid, page 6



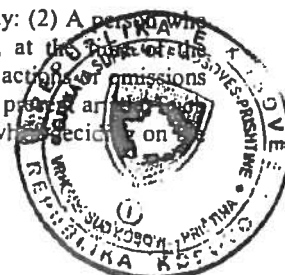
27. In the Supreme Court's view, the Experts appointed to perform the expertise are competent and the psychiatric expertise of the Commission as well the explanations of Doctor [REDACTED] are convincing. Furthermore, the Panel considers that both expertise reports do not substantially differ. As far as some discrepancies can be noted, this appears irrelevant as more intensive explorations were performed during the second expertise. Consequently, there is no need for a further final third expertise.

28. It results that the Defendant had the capacity to recognize the unlawfulness of his criminal activity and the ability to act correspondingly. On the other hand, it clearly appears that due to his disturbed personality and the PTSD, his capacity to abstain from committing the criminal acts has been diminished. The Expert has well established that PTSD can still influence an individual behaviour even after such a long period time elapsed between the conflict in Kosovo and the commission of the criminal offences. At least, it cannot be excluded that the mentioned circumstances had a relevant impact on the Defendant's behaviour. These doubts are to be interpreted in favour of O [REDACTED] Z [REDACTED]

29. Considering the above, the Supreme Court of Kosovo holds that when the Defendant committed the criminal offences of Murder and Attempted Murder in [REDACTED] village in October 2005, he was in such emotional state that his ability to control his acts was seriously weakened. The Supreme Court Panel thus endorses the conclusions of the super expertise report provided in August 2012. At the critical time, O [REDACTED] Z [REDACTED] suffered from mental disorders, namely the war dependence and PTSD. This is attested by the Defendant's statements, his behaviour during the criminal proceedings, the medical and expertise reports contained in the case file as well as the statements of witnesses.

30. The fact that the ability of O [REDACTED] Z [REDACTED] to understand or control his actions was substantially diminished because of his mental disorder at the critical time, characterizing a diminished mental capacity, mandates the application of Article 12 paragraph 2 of the PCKK.²⁶ This leads to a significant reduction of punishment in accordance with Articles 64 and 66 of the PCKK (see Part III.D. of this Judgment below). In that respect, UNMIK Regulation no. 2004/34 on Criminal Proceedings involving perpetrators with a mental disorder is not applicable due to the fact that according to the expert, the Defendant does not longer represent a danger and does not need a special psychiatric treatment. The special situation having led to the commission of the criminal offences deems singular and, moreover, the treatment O [REDACTED] Z [REDACTED] received during the time spent in detention on remand has reduced the risk of repetition.

²⁶ Article 12 paragraph 2 PCKK Mental Incompetence and Diminished Mental Capacity: (2) A person who committed a criminal offence is considered to have diminished mental capacity if, at the time of the commission of a criminal offence, his or her ability to understand or control his or her actions or omissions was substantially diminished because of the conditions referred to in paragraph 1 of the present article and the person is criminally liable but the court shall take into consideration these conditions when deciding on the duration and the type of sanction or measure of mandatory treatment it imposes.



III. C. The legal designation of the criminal acts committed

31. With regard to the criminal offences of Murder and Attempted Murder, the Supreme Court of Kosovo acting as third instance court stated that "... the Supreme Court of Kosovo has found that the legal qualification of the killing of [REDACTED] and shooting at and wounding of [REDACTED] needs to consider the question of premeditation and intention of the perpetrator, which was not elaborated on by the 2nd Instance Court..."²⁷

H.R.
N.R.

32. The Trial Panel convicted O [REDACTED] Z [REDACTED] for Aggravated Murder in co-perpetration in violation of Article 147 item 5 of the PCCK ("Deprives another person of his or her life while acting ruthlessly and violently") read with Article 23 of the PCCK and Attempted Aggravated Murder in co-perpetration contrary to Article 147 item 11 read with Articles 20 and 23 of the PCCK. The Second Instance Court, in its Judgment Ap-Kz no 481/2009, excluded the circumstance of commission under Article 147 item 5 of PCCK and, in view that "the conviction of the defendant for two different counts violates the criminal law to his detriment", decided to unify the counts of Aggravated Murder and Attempted Aggravated Murder under Article 147 item 11 of the PCCK.²⁸ This legal assessment is not shared by the present panel. Considering the factual situation and the mental stage of O [REDACTED] Z [REDACTED] at the critical time, the criminal offences cannot be qualified as **Aggravated murder** in the sense of Article 147 of the KCCP. The existence of the requirements of Article 147 items 3, 5 and 9 cannot be ascertained. In particular, it was not established that the Defendant has waited for the late victims, hence the shooting cannot be assessed as deceitful.

33. In the Supreme Court's opinion, the Defendant did not act in a **ruthless and violent way**. These aggravating circumstances foreseen in Article 147 item 5 are not met in the instance. The intent of the lawmaker is to sanction a murder more severely when committed in a **despicable manner**. Such an unscrupulous behaviour is not present if the perpetrator kills an adversary spontaneously and without premeditation, especially when he acted in a state of diminished mental capacity. This reasoning also applies to the qualifying element of **unscrupulous revenge** under Article 147 item 9.

34. Finally, the requirements under Article 147 item 11 are not met in the case at hand, as the objective act that the perpetrator "commits two or more murders" is lacking. This assertion is confirmed by the commentaries of the Criminal Code of Serbia under Article 47 mentioned in the Third Instance Judgment. The Supreme Court Panel particularly refers to the part of the commentaries in the newer version: "this criminal act exists only when **at least two or more persons have been deprived of life**. If only **one person** has been deprived of life and another subject of an **attempt to deprive of life**, that only shall amount to the aggravated murder in the sense of item 11 if the perpetrator **premeditated**

²⁷ Supreme Court of Kosovo, Api-Kzi no. 09/2009, case O [REDACTED] Z [REDACTED] Third Instance Judgment, December 2010, page 24

²⁸ Supreme Court of Kosovo, Ap-Kz no. 481/2009, case O [REDACTED] Z [REDACTED] Second Instance Judgment, 2009, page 2; Reasoning pages 5, paras 9 and following



the murder of several persons; if opposite is the case, that shall be considered a real concurrence between a committed and an attempted murder".²⁹

35. Contrary to the legal opinion of the Defence, O [REDACTED] Z [REDACTED] cannot benefit from the application of Article 148 of the PCCK providing that the perpetrator has deprived another person of his life in a state of mental distress. It is already questionable that such state exists if the provocation to the Defendant has occurred years ago. Even if this would be considered due to the specifics of PTSD disorder, the Defendant's state has not been reached "through no fault of his or her own". Lastly, as rightly pointed out by the State Prosecutor, the application of Article 148 of the PCCK is evidently excluded for the attempted murder of [REDACTED] n. r.

36. With regard to the question of the intent and premeditation, the Supreme Court of Kosovo is of the opinion that though O [REDACTED] Z [REDACTED] has acted in a state of diminished mental capacity, there is no doubt that he intentionally fired on H [REDACTED] and M [REDACTED] R [REDACTED]. Pursuant to Article 15 paragraph 1 of the PCCK, a criminal offence may be committed with direct or eventual intent. The lawmaker describes in Article 15 paragraph 2 the direct intent as when a person "is aware of his or her act and desires its commission". The Defendant was fully aware of the fact that he shot the two persons aiming at killing them. Even considering his statement in court that he felt transferred back to the time of war, he had the willingness to kill his alleged adversaries with his weapon knowing that shots fired from short distance would have high probability to cause the death of the attacked persons. At least, he acted with eventual intent in the sense of Article 15 paragraph 3 of the PCCK, being aware that the prohibited consequences could occur and he acceded to their occurrence. Finally, the Supreme Court Panel holds that the criminal offences of Murder and Attempted Murder under Article 146 of the PCCK do not require premeditation.

37. Taking into consideration the above, in particular the statement of the Defendant, the Supreme Court modified the legal designation of the acts as in the enacting clause: On 10 October 2005 at about 16:20 hrs in the market of [REDACTED] village, Prizren municipality, O [REDACTED] Z [REDACTED] acting in concert with an unknown co-perpetrator for the purpose of deliberately depriving another person of his life, namely [REDACTED] intentionally shot at and killed [REDACTED] and for the purpose of deliberately attempting to deprive another person of his life, namely [REDACTED] intentionally shot at and wounded [REDACTED]. O [REDACTED] Z [REDACTED] committed two distinct criminal offences of Murder under Article 146 of the PCCK and of Attempted Murder under Article 146 read with Article 20 of the PCCK, in co-perpetration under Article 23 of the PCCK. The mental state of the Defendant at the time of commission requires the application of Article 12 Paragraph 2 of the PCCK. H. R. H. R. N. R.

38. In respect to the offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 1 of the PCCK (amended by the Second

²⁹ Commentaries of the Criminal Code of Serbia, Article 47, Srzentic Nikola Ljubisa [REDACTED] Edition in Savremena Administracija, Belgrade, item 9 – emphasis added



Instance Court to Unauthorized Ownership, Control, Possession or Use of Weapons in violation with Article 328 paragraph 2 of the PCCK), the Supreme Court considers that the use of weapon is subsumed under the offences of Murder and Attempted Murder. This Panel confirmed the decision of guilt as to the count 4 (Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the PCCK) as he was in possession of a weapon for which he had no authorization to possess or use when arrest by the police in April 2007.

III.D. The decision on criminal sanctions

39. As the findings of the Supreme Court of Kosovo with regard to the criminal liability of O [REDACTED] Z [REDACTED] and the legal qualification differ from the previous ones, the decision on criminal sanctions needs to be reviewed.

40. It is noted that in first instance the Defendant was convicted to a term of twenty-five years of imprisonment for Aggravated Murder, a term of twenty-five years of imprisonment for attempted Aggravated Murder, a term of six years and of three years of imprisonment for the weapon charges (two counts). The imposed aggregated punishment was twenty-five years. This sentencing was not modified by the Second Instance Court in its 2009 Judgment.

41. The Supreme Court Panel takes into consideration for the awarding of penalty that the criminal offence has been re-classified. Moreover, there are mitigating circumstances, i.e. the admission of the facts by the Defendant and that he acted while being in a diminished mental capacity as foreseen under Article 12 paragraph 2 of the PCCK. As to the aggravating circumstances, they are the following: seriousness and gravity of the offences of Murder and Attempted Murder, the fact that they were committed in a dense area, the fact that O [REDACTED] Z [REDACTED] was found in possession of weapons at the time of his arrest.

42. The Supreme Court of Kosovo sentenced the Defendant to fourteen years of imprisonment for counts 1 and 2 and to two years of imprisonment for count 4, and imposed an aggregated punishment of fifteen years of imprisonment pursuant to Article 71 of the PCCK. In this Panel's opinion, this range of punishment corresponds to the purposes of punishment envisaged under Article 34 of the PCCK.

43. The Supreme Court of Kosovo decides that the time spent in detention on remand by O [REDACTED] Z [REDACTED] since 19 April 2007 be credited pursuant to Article 73 of the PCCK, and rejects as unfounded the Motion of the Defence filed on 6 November 2012 to terminate the detention on remand of O [REDACTED] Z [REDACTED].

44. It has been decided as in the enacting clause.



Presiding Judge

[Signature]
EULEX Judge Horst Proetel

Panel member

[Signature]
Supreme court Judge Emine Kaqiku

Panel member

[Signature]
Supreme Court Judge Avdi Dinaj

Panel member

[Signature]
Supreme court Judge Marije Ademi

Panel member

[Signature]
EULEX Judge Tore Thomassen

Recording clerk

[Signature]
Legal officer Chiara Rojek



Supreme Court of Kosovo
Ap-Kz no. 110/2011
Prishtinë/Priština
6 November 2012