

Supreme Court of Kosovo  
Api.-Kzi. nr. 02/2010  
08 June 2012

**IN THE NAME OF THE PEOPLE**

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge and with EULEX Judges Horst Proetel and Tore Thomassen and Supreme Court Judges Nesrin Lushta and Avdi Dinaj as members of the panel, assisted by EULEX Legal Officer Tara Khan as Recording Officer, in the criminal case against:

**B [REDACTED] K [REDACTED]**  
**[REDACTED]** Kosovo-Albanian;

Convicted on 19 September 2007 by the District Court of Peja/Pec (Kp. nr. 412/2006), as affirmed and modified by the Supreme Court of Kosovo on 12 January 2010 (Ap.-Kz. nr. 153/2008). of **Murder** contrary to Article 30 paragraphs (2) and (3) of the Criminal Code of the Socialist Autonomous Province of Kosovo (CC SAPK). **Attempted Murder** contrary to Article 30 paragraph (2) as read in conjunction with Article 19 of the CC SAPK. **Unlawful Possession of Weapons** contrary to UNMIK Regulation 2001/07, and **Unlawful Possession of Weapons** contrary to Article 328 paragraph (2) of the Provisional Criminal Code of Kosovo (PCCK). and sentenced to twenty-seven (27) years of imprisonment;

Deciding on the Appeal filed by Defence Counsel E [REDACTED] N [REDACTED] on 22 March 2010 and the Addendum to the Appeal filed by Defence Counsel B [REDACTED] K [REDACTED] on 12 September 2011;

After having received the opinion of the State Prosecutor of Kosovo, and having held sessions of the Panel on 15 May 2012 in the presence of the defendant B [REDACTED] K [REDACTED] and Defence Counsel B [REDACTED] K [REDACTED] and on 08 June 2012 in the presence of Public

Prosecutor Judit Tatrai, B [REDACTED] K [REDACTED] and Defence Counsel M [REDACTED] H [REDACTED], both sessions open to public;

Pursuant to Articles 392 and 430 paragraph (2) of the Kosovo Code of Criminal Procedure (KCCP), in public issued the following:

### JUDGMENT

The "Addendum to the Appeal" filed by Defence Counsel B [REDACTED] K [REDACTED] on 12 September 2011 is **DISMISSED** as **UNTIMELY**.

The Appeal filed by Defence Counsel E [REDACTED] N [REDACTED] on 22 March 2010 is **REJECTED** as **UNFOUNDED**.

The judgment of the District Court of Peja/Pec, Kp. nr. 412/2006 dated 19 September 2007, and the judgment of the Supreme Court, Ap.-Kz. nr. 153/2008 dated 12 January 2010, are **AFFIRMED** in full.

### Reasoning

#### I. Procedural History

1. The Public Prosecutor filed a Ruling on Initiation of Investigation against B [REDACTED] K [REDACTED] and two other suspects on 06 April 2004. On 08 October 2004, a Pre-Trial Judge of the District Court of Peja/Pec issued an arrest warrant for B [REDACTED] K [REDACTED]. However, he could not be located and arrested until 24 March 2006.
2. Indictment PP nr. 185/2004 was filed on 21 September 2006 charging the defendant with: Murder (count 1) pursuant to Article 30 paragraphs (2) and (3) of the CC SAPK for the killing of KP Officers S [REDACTED] T [REDACTED] and I [REDACTED] H [REDACTED] Attempted Murder (count 2) pursuant to Article 30 paragraph (2) of the CC SAPK

and Article for the attempted killing of KP Officer H [REDACTED] L [REDACTED] Causing General Danger (count 3) pursuant to Article 157 Paragraph (1) of the CC SAPK; Use of Unauthorized Weapons (count 4) pursuant to UNMIK Regulation 2001/07 for the use of weapons in the shooting ambush of the KP officers; and Unauthorized Possession of Weapons (count 5) pursuant to Article 328 Paragraphs (1) and (3) of the PCCK for the Beretta firearm found on his person when he was arrested. The Indictment was confirmed on all counts on 15 December 2007.

3. The main trial was held from 15 May 2007 to 19 September 2007. The Main Trial Panel found B [REDACTED] K [REDACTED] guilty of all five counts of the Indictment as enumerated above and sentenced him to a long-term imprisonment of 27 years.<sup>1</sup> The District Court further issued a separate ruling extending the detention on remand of B [REDACTED] K [REDACTED] until the verdict became final.
4. On 18 February 2008, Defence Counsel E [REDACTED] N [REDACTED] filed an appeal against the District Court judgment on behalf of the Defendant.
5. On 30 November 2008, B [REDACTED] K [REDACTED] escaped from the Dubrava Detention Center.
6. On 12 January 2010, whilst the defendant was still at large, the Supreme Court held a session in his absence to determine his appeal against the first instance verdict. The Supreme Court rejected the defendant's appeal and partially affirmed the District Court Judgment. The following modifications were made: Count 3 – Causing General Danger was absorbed by Count 1 – Murder; Count 4 – Use of Unauthorized Weapon was requalified as “Unlawful Possession of Weapon” pursuant to UNMIK Reg. 2001/07. The remainder of the District Court judgment was affirmed, including the sentence of 27 years of imprisonment.

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<sup>1</sup> Judgment KP nr. 412/2006 of the District Court of Peja/Pec. Note: All footnote document and page number references correspond to the English language versions.

7. On 22 March 2010, Defence Counsel E [REDACTED] N [REDACTED] filed an Appeal against the Supreme Court Judgment on behalf of B [REDACTED] K [REDACTED]. On 31 March 2011, the OSPK filed a Reply to the Appeal.
8. B [REDACTED] K [REDACTED] was recaptured on 17 December 2010 and has remained in detention since.
9. On 21 September 2011, Defence Counsel B [REDACTED] K [REDACTED] filed an "Addendum to the Appeal" against the Supreme Court Judgment on behalf of B [REDACTED] K [REDACTED]. The OSPK filed a Reply to this Addendum on 13 March 2012.
10. The Supreme Court held a session on 15 May 2012 in the presence of the Defendant and Defence Counsel B [REDACTED] K [REDACTED]. The OSPK did not attend the session. During the session, the Defence Counsel raised the issue that he had not yet consulted with his client prior to the session despite having been retained for the case as early as seven months prior to the session. The Defendant also voiced his concern that the Defence Counsel was not prepared to adequately represent him at that time. Therefore the Appeal Panel decided to adjourn the session until 08 June 2012 in order to allow for the Defendant to properly prepare his case.
11. On 08 June 2012, the second session before the Supreme Court was held in the presence of B [REDACTED] K [REDACTED], his new Defence Counsel M [REDACTED] H [REDACTED] and OSPK Public Prosecutor Judit Tatrai.

## II. Arguments Raised in the Appeal

12. The appeal filed on 22 March 2010 by Defence Counsel E [REDACTED] N [REDACTED] challenges the second instance judgment on the grounds of incorrect and incomplete determination of the factual situation and unfair or invalid imposition of the sentence of imprisonment. The Defence Counsel proposes to modify the second instance judgment and acquit B [REDACTED] K [REDACTED] of Counts 1, 2 and 3, or in the

alternative, to annul the second instance judgment with respect to Counts 1, 2 and 3 and return the case to the second instance court for retrial on those counts. It is also proposed that the second instance court schedule hearings in order to take new evidence pursuant to Articles 411(2) and 412 of the KCCP.

13. With regard to the incorrect determination of the factual situation:

- The Appeal alleges that the shooting did not occur from the white Audi which was found by police and determined by the Court to have been used in the perpetration of the crime, but rather from an unidentified Mercedes vehicle. The appeal points to statements of witnesses and forensics evidence concerning the age of the shell casings found in the Audi as support for its claim.
- The Appeal questions the description of the Audi given by witnesses and the identification of B█████ K█████ as the driver of the Audi, as well as the credibility of several witnesses.
- The Appeal questions the evidentiary value of the fingerprints found on the Audi because it the exact location on the car from where they were lifted was not established, and the age of the fingerprint is unknown. It also challenges the matching of the fingerprint to the Defendant.
- The Appeal alleges that both the crime scene and the location where the white Audi was discovered were not properly secured, and therefore contaminated.
- The Appeal challenges whether the elements necessary to constitute the criminal offence of Unauthorized Use of Weapons are established.
- Lastly, the Appeal also raises again the alibi defence of the Defendant.

14. With regard to the incomplete determination of the facts, the Appeal raises again the refusal of the court of first instance to hear certain witnesses proposed by the Defence.

15. With regard to the imposition of imprisonment, the Appeal deems that since it was not proven that B [REDACTED] K [REDACTED] committed the criminal acts, there are no grounds to impose punishment.
16. The Chief EULEX Prosecutor in his Reply filed on 31 March 2011 proposes that the Appeal be rejected as ungrounded because the majority of the arguments in the appeal were previously raised and correctly dealt with by the court of second instance. The Reply further opines that the factual situation was thoroughly reconstructed by the court of first instance based on statements by witnesses proposed by both the Prosecution and the Defence and supported by forensics evidence and reports.
17. On 21 September 2011, Defence Counsel B [REDACTED] K [REDACTED] filed an "Addendum to the Appeal" against the Supreme Court Judgment on behalf of B [REDACTED] K [REDACTED]. It raises arguments regarding the use of inadmissible evidence by the Court, irregularities during the appeal procedure against the first instance judgment, and unsubstantiated allegations against an international judge. The OSPK filed a Reply to this Addendum on 13 March 2012.

### **III. Permissibility of the Appeal and Addendum**

18. The Supreme Court judgment was served on Defence Counsel N [REDACTED] on 10 March 2010 and he filed his appeal on 22 March 2010, within the requisite time limit pursuant to Art. 398 as read with Art. 430 KCCP. Therefore the Appeal is timely. It challenges the judgment on the grounds of an erroneous or incomplete determination of the factual situation, which are permissible grounds pursuant to Art. 402 KCCP.
19. The defendant was at large at the time when the Supreme Court Judgment was issued, having escaped from Dubrava Detention Center. It is not known whether the procedure envisioned in Art. 127 Paragraph (4) KCCP was carried out in order to effect proper service on a defendant when his or her whereabouts are unknown.

After his recapture, B█████ K█████ was served the Judgment on 06 January 2011 whilst incarcerated at the Pristina Detention Center. Therefore his time to appeal expired on 21 January 2011.

20. The Addendum to the Appeal was filed by Defence Counsel B█████ K█████ on 21 September 2011, well after the time to appeal had expired. Thus, to the extent that the Addendum raises any new arguments or grounds for appeal, it must be rejected as untimely. Only portions of the Addendum which seek to add clarity to the arguments as already raised in the Appeal can be considered. Upon review, the Supreme Court finds that the Addendum consists only of new arguments and must therefore be rejected in its entirety as untimely.

#### IV. Findings of the Court

##### Incorrect Determination of Facts

21. With regard to the determination of the facts, the Court stresses that it is the role of the court of first instance to hear, assess and weigh the evidence at trial in order to establish the factual findings. Thus the appellate courts must afford a margin of appreciation to the trial court which, as the hearer of all the evidence, sits in the best position to perform such an assessment. The factual findings of the court of first instance should not be disturbed unless the appellate court finds that the evidence relied up or the conclusions drawn could not have been reached by any reasonable trier of fact.
22. The Court also notes that each of the specific facts alleged to have been incorrectly established were all previously raised in the Defendant's appeal against the District Court Judgment, and have thus already once been reviewed and pronounced upon by the court of second instance. It is further noted that the first and second instance judgments provide an exhaustive discussion of the evidence presented which clearly supports each of the conclusions reached. Nevertheless, each of the points raised in the Appeal will be addressed below.

23. *The Mercedes vs. the Audi.* The Appeal alleges that the District Court erred in finding that the shooting originated from a white Audi instead of a yet- unidentified Mercedes vehicle. The Court rejects this argument. As elaborated in Supreme Court Judgment Ap.-Kz. Nr. 153/2008, the District Court heard a large scope of evidence and provided a detailed evaluation of the evidence in establishing its factual finding regarding the involvement of the white Audi in the shooting. Their factual finding is supported by forensics reports regarding spent shell cartridges found inside the Audi and several witnesses [J B<sup>2</sup>, F Z<sup>3</sup>, R B<sup>4</sup>, Witness A,<sup>5</sup> R S (Witness B),<sup>6</sup> N L<sup>7</sup>] who all consistently described the vehicle as a light colored Audi and provided other distinguishing characteristics<sup>8</sup> which further established the identity of the car as the white Audi recovered by the police.

24. The description by witnesses A K (who described the color as light gray and identified the car as either an Audi or Mercedes)<sup>9</sup>, J F (who

<sup>2</sup> J B stated unequivocally that around 08.00 am he was passed by a speeding white Audi with several people inside. (Minutes of the Main Trial, 15 May 2007, pp. 6-19.)

<sup>3</sup> F Z heard gunshots around 07:45 am and approximately five minutes later saw a light yellow Audi 80 or 90 speed by with 3-4 persons inside, a flat front left tire and foggy windows. (Exhibit 8, Witness Statement to UNMIK Police dated 25 November 2003; Exhibit 9, Witness Statement to UNMIK Police dated 05 December 2003; Minutes of the Main Trial, 23 May 2007, pp. 19-21.)

<sup>4</sup> R B was on his tractor at approximately 07:30 am when a white Audi with a flat left tire passed by at a very high speed and nicked the tire of his tractor. (Exhibit 10, Police Statement dated 26 November 2003; Exhibit 11, Witness Statement to UNMIK Police dated 08 January 2004; Minutes of the Main Trial, 23 May 2007, pp. 24-28.)

<sup>5</sup> Witness A saw a white Audi with foggy windows overtake the KP officers' Jeep which he had noticed driving around the area for a week prior to the incident. (Witness Statement dated 29 November 2003, Witness Statement dated 04 December 2003, Witness Statement dated 19 December 2003.)

<sup>6</sup> R S heard gunshots and then saw a white Audi 80 or 90 with 3 persons inside and foggy windows speed past. (Minutes of the Main Trial, 27 June 2007, pp. 2-7.)

<sup>7</sup> N L described a white metallic Audi 80 race past him at approximately 07:55 am. (Witness Statement to UNMIK Police dated 17 December 2003.)

<sup>8</sup> Such characteristics include the sticker across the back window reading "No Fear", the flat tire and the foggy windows.

<sup>9</sup> Approximately one minute after hearing gunshots, A K saw a light gray Audi or Mercedes speed off of the road and get stuck, and then two men with short hair exited the vehicle and attempted to push it back on the road. (Witness Statement to UNMIK Police dated 25 November 2003; Witness Statement to UNMIK Police dated 22 December 2003.)



thought it looked like a BMW)<sup>10</sup>, I [REDACTED] B [REDACTED] (who described the vehicle as a white car similar to an Opel Ascona)<sup>11</sup> and V [REDACTED] H [REDACTED] (who cited a light metallic gray Mercedes)<sup>12</sup> do not raise significant doubt about the identification of the Audi vehicle and its involvement in the shooting. It is expected that witness accounts may differ slightly as to the make or model of a vehicle which was traveling at a fast speed or glimpsed for a short period of time. It also is understandable that different persons may describe the color of a vehicle in slightly different terms. Such discrepancies in the present case are greatly outweighed by the number of consistent and corroborating descriptions provided by the other witnesses and the fact that all of the witnesses corroborate each other on the color of the vehicle as being white or close to white.

25. Thus, the allegation in the appeal that there is "small or no chance that the vehicle Audi was involved directly in the murder" is completely ungrounded.
26. Furthermore, the possibility that there may have been a second vehicle, a Mercedes, also involved in the perpetration of the crime does not alter the Court's findings with regard to the presence and participation of the Audi in the criminal offence.
27. *Witness identification of B [REDACTED] K [REDACTED] as the driver of the Audi.* The Appeal questions the identification of B [REDACTED] K [REDACTED] as the driver of the Audi, as well as the credibility of several witnesses. The Court rejects this argument as well, for the same reason as above; The Court finds no compelling error in the District Court's evaluation and assessment of the evidence on this point, and is satisfied with its written analysis which led to its conclusion that the Defendant was the driver of the Audi.

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<sup>10</sup> J [REDACTED] F [REDACTED] witnessed two armed men exit a vehicle which he thought was a BMW and try to push it out of the mud. (Minutes of the Main Trial, 23 May 2007, pp. 3-11.)

<sup>11</sup> I [REDACTED] B [REDACTED] described the car as "a white vehicle which looked to me as an Opel Ascona". (Witness Statement to CCIU dated 19 December 2003.)

<sup>12</sup> Witness Statement to UNMIN Police dated 24 November 2003, Witness Statement to UNMIK International Police dated 27 December 2003.

28. As described in detail in the District Court Judgment (at pages 8-11, 15-18, and 32-33) and repeated in the Second Instance Judgment (at page 17), the description of the driver of the Audi as a young blond with short cropped hair and blue eyes was established and corroborated by witnesses A, R S, and B. Witness A and R S both identified B K from a photographic line-up.<sup>13</sup> KP Officer R B recalled stopping B K some months before driving a white or banana-colored Audi registered to a Serbian male. The white Audi discovered by the police after the shooting is registered to S F.
29. With regard to the credibility of the witnesses, the Court notes again that it is the first instance court as the trier of fact who is in the best position to assess the credibility of each witness and assign the corresponding appropriate weight to each piece of evidence. The Court is satisfied that the District Court of Peja/Pec more than adequately exercised this function and provided sufficient explanation of its assessment of each witness' credibility in the First Instance Judgment (at pages 8-18 and 22-29).
30. *Fingerprint Found on the Audi.* The Appeal questions the evidentiary value of the fingerprint due to its questionable age and unknown location on the Audi. The Appeal further attacks the identification of the fingerprint as belonging to the middle finger of the right hand of the Defendant. The court rejects these argument for the following reasons.
31. The District Court evaluated as evidence the live testimony of fingerprint expert N I, the written report of S I, and police photographs taken of the Audi. The defence made use of its opportunity to cross-examine the Mr. L during his testimony, and to pose specific questions about the age of the fingerprint. The expert also responded to questions from the representative of the

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<sup>13</sup> The Witness later recanted his identification of the Defendant from the photographic line-up, however the District Court provided a full reasoning as to why the witness' first statement to the police to be the true and accurate account of the event.

injured party, members of the Trial Panel, and the defendant himself. The evidence heard provides that the age and preservation of a fingerprint is dependent on the weather conditions to which it was exposed and the amount of sweat and other bodily fluids present on the person's finger.<sup>14</sup> Thus, while a precise age of a fingerprint could not be established, a short range of time could be relied upon, up to approximately two weeks depending on the above-mentioned conditions.<sup>15</sup> This fact, considered together with the expert report<sup>16</sup> which matched the fingerprint from the Audi with the middle finger of the right hand of the Defendant, constitute sufficient evidence on which the Trial Panel could conclude that the Defendant had had contact with the Audi at some point in a short time period prior to the discovery of the abandoned vehicle.

32. With regard to the location on the Audi from which the fingerprint was lifted, the evidence as well as the District Court judgment and the Supreme Court judgment are clear in that the fingerprint was lifted from the rear of the hatchback of the vehicle.<sup>17</sup>
33. The identification of fingerprint as a match for the middle finger of the right hand of the Defendant was established by the expert testimony and report of N [REDACTED] L [REDACTED]. The Defence has raised no convincing argument to discredit the identification.
34. *Contamination of the Crime Scene.* The Appeal alleges that both the crime scene and the location where the white Audi was discovered were not properly secured, and therefore contaminated. The Court rejects this point as it is merely a general allegation with no supporting argument or proof to indicate precisely how the crime scene or specific pieces of evidence could have been contaminated.

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<sup>14</sup> Minutes of the Main Trial, 22 May 2007, p. 8-9, 17.

<sup>15</sup> Minutes of the Main Trial, 22 May 2007, p. 8 & 17.

<sup>16</sup> Fingerprint Expert Opinion, AFIS file #03-255-CAF, 30 November 2003.

<sup>17</sup> Judgment Kp nr. 412/2006, District Court of Peja/Pec, 19 September 2007, p. 33-34; Judgment Ap.-Kz. Nr. 153/2008, Supreme Court of Kosovo, 12 January 2010, p. 18.

35. *Unauthorized Use of Weapons.* The Appeal alleges that even if B█████ K█████ had been the driver of the Audi, he could not be criminally liable for the charge of Unauthorized Use of Weapons because he could not have simultaneously driven the vehicle and fired the weapon at the KP Officers. The Defence misunderstands the manner of the perpetration of the offence.
36. As elaborated in the District Court judgment (at p. 38) and again in the Supreme Court judgment (at pages 22-23), the Defendant was not convicted of this charge on the basis of physically handling and firing the weapon. Rather, it was the Defendant's participation as the driver of the vehicle used to commit the attack which triggered his criminal liability. When B█████ K█████ drove the Audi, he did so with the knowledge that at least one passenger in the vehicle was in possession of a weapon and that this weapon was intended to be used to fire upon the Officers. In fact, the sole purpose of his driving the Audi was to accomplish the unlawful killings of the KP Officers. Further, this act could not be committed alone in such a manner, but necessitated the coordinated actions of at least two persons. Thus, B█████ K█████ willingly had the weapon within his sphere of influence (the Audi) and committed the act of Unauthorized Use of Weapons in concert with the physical shooter.
37. *The Defendant's Alibi.* The Appeal alleges that the witnesses in support of the Defendant's alibi were not properly credited by the Trial Panel. Once again, the Court must reiterate that the first instance court, as the trier of fact and the only body to hear the live testimonies, must exercise the role of evaluation of witness credibility. The second, and in this case third, instance court in turn assesses whether this evaluation was properly conducted. This Court is not persuaded that the evaluation of the credibility of the alibi witnesses by the District Court was faulty and will therefore not disturb its findings in this regard. The analysis of the District Court as to the credibility of each of the alibi witnesses is detailed in its judgment (at pages 26-29). In addition, the District Court provided a thorough

evaluation of the credibility of the testimony of the Defendant with regard to *inter alia* his alibi (at pages 25-26).

Incomplete Determination of Facts

38. In support of this ground, the Appeal raises the refusal of the District Court to hear the following witnesses proposed by the Defence during the main trial:

1. N [REDACTED] L [REDACTED]
2. S [REDACTED] Z [REDACTED]
3. B [REDACTED] F [REDACTED]
4. V [REDACTED] B [REDACTED]
5. I [REDACTED] B [REDACTED]
6. B [REDACTED] B [REDACTED]
7. KP Officer R [REDACTED] Z [REDACTED]
8. F [REDACTED] H [REDACTED]
9. KP Officer G [REDACTED] K [REDACTED]
10. KP Officer B [REDACTED] A [REDACTED]
11. KP Officer M [REDACTED] B [REDACTED]

39. All of these witnesses, with the exception of V [REDACTED] B [REDACTED], B [REDACTED] B [REDACTED] and F [REDACTED] H [REDACTED], were proposed by the Defence Counsel during the main trial on 03 July 2007, not to give live testimony but to have their prior statements read into the record. On that day, the following exchange transpired:

*Presiding Judge: I assume that these witnesses you proposed are not crucial witnesses, because if they were, you would have called them to testify before the Court.*

*Defence Counsel E [REDACTED] N [REDACTED]: I am not in the position to decide on that, as these are witnesses of the Public Prosecutor. The Public Prosecutor withdrew these witnesses and what I'm asking is to consider their statements as read into the minutes.*

*Presiding Judge: But you don't consider calling them to testify in Court.*

*E [REDACTED] N [REDACTED]: No.*

Thus the Defence Counsel clearly declined to propose these persons to be summoned as live witnesses during the main trial. As such, the defence can not now raise as a reversible ground of appeal that it was denied the opportunity to summon these witnesses to testify.

40. In addition, it is noted that the Defence Counsel was clearly asked by the trial panel to identify which persons it deemed as "essential" witnesses to its case. The Defence listed G. K., S. F., A. H., V. H. and N. L. as essential.<sup>18</sup> The prior statements of all of those witnesses with the exception of G. K. were then admitted into the evidence.<sup>19</sup>
41. With regard to V. B. and B. B., the Defence proposed these two as witnesses in a written submission dated 26 March 2007, prior to the commencement of the main trial. It is noted that there was no information provided as to the relevance of their testimony. Once the main trial began, the Defence did not propose these witnesses either to be summoned or to have their prior statements read into the record. F. H. was never proposed as a witness by the Defence during the main trial, and her name appears for the first time as a proposed witness in the Defence Counsel's Appeal against the first instance judgment, and then again in the Appeal against the second instance judgment.
42. This Panel notes that it is not within the purview of the third instance court to take new evidence, as it is prohibited from conducting a hearing (Article 430 paragraph (2) of the KCCP). Its scope extends only to examine whether the proposal of the named witnesses was adequately considered by the second instance court.

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<sup>18</sup> Minutes of the Main Trial, 03 July 2007, p. 5.

<sup>19</sup> Ruling KP nr. 412.2006, 03 July 2007.

43. With regard to these three persons, the second instance court stated that the precise nature of the request of the Defence was unclear, and noted that none of the three had been proposed as Defence witnesses during the main trial. The court furthermore stated that the appeal panel does not take new evidence during a session.<sup>20</sup>
44. This panel takes the view that by keeping silent at the first instance trial about these three witnesses, the Defence forfeited the right to summon them. Furthermore, upon proposing them at the second and third instance, the Defence failed to indicate to what specific facts these witnesses would testify which are of particular relevance to this case. Therefore the Appeal fails to establish that there has been an incomplete determination of facts due to the absence of the testimonies of these persons.

*Unlawful Imposition of Punishment*

45. The Appeal asserts that because of the erroneous and incomplete factual determination, there were no grounds to pronounce the Defendant guilty and therefore no grounds to impose punishment. As the Court has rejected all of the Appeal's arguments challenging the factual determination of the first instance court, and has affirmed the first instance judgment which convicts the Defendant of the charges, this assertion logically fails.
46. For all the foregoing reasons, it is decided as in the enacting clause.

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<sup>20</sup> Ap.-Kz. Nr. 153/2003 at p. 21.