

COURT OF APPEALS

Case number: PAKR 547/14

Date: 12 June 2015

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Radostin Petrov as Presiding and Reporting Judge, and Kosovo Court of Appeals Judges Xhevdet Abazi and Abdullah Ahmeti as Panel Members, with the participation of Alan Vasak and Anne-Gaëlle Denier, EULEX Legal Officers, as the Recording Officers,

in the criminal proceedings against

A.C., father's name [], mother's name [], born on [] in [];

R.O., father's name [], mother's name [], born on [] in [];

charged under the Indictment of the State Prosecutor no. PP. 465-6/09 filed on 13 August 2009, confirmed on 5 October 2009 as follows: **A.C.** with **Aggravated Murder** under Article 147(9) of the Provisional Criminal Code of Kosovo (hereinafter "PCCK", in force from 6 April 2004 to 31 December 2012), and **Unauthorized Possession of Weapon** under Article 328(2) PCCK; and **R.O.** with **Assisting Aggravated Murder** under Article 147(9) PCCK in connection with Article 25 PCCK; and adjudicated in first instance by the Basic Court of Pristina with the Judgment PKR no. 383/2009, dated 9 September 2014 as follows:

- **A.C.** was found guilty of and convicted for the criminal offences of aggravated murder under Article 3(2) of the Criminal Code of the Republic of Kosovo (hereinafter "CCRK"), in conjunction with Article 147(9) PCCK, and unauthorized possession of weapon under Article 374(1) CCRK because in the Basic Court's assessment it was found that on Friday 22 May 2009 at about 13:40 in the village of Zabel i Ulët, municipality of Drenas, **A.C.** was in possession of an automatic firearm AK-47 without authorization, intentionally fired four shots with the AK-47 at R.A. who was standing in front of the mosque's yard, causing him deadly injuries which led to his instant death. He was sentenced to an aggregate punishment of twenty five (25) years of imprisonment and ordered to reimburse the sum of EUR 100 as part of the costs of the criminal proceedings;

- **R.O.** was found not guilty and acquitted of all charges pursuant to Article 364(1.3) of the Criminal Procedure Code - Law no. 04/L-123 (hereinafter “CPC”). The Basic Court found that it was not proven beyond reasonable doubt that **R.O.** was present and assisted **A.C.** on the day the murder occurred;

deciding upon the following appeals, filed against the Judgment of the Basic Court of Pristina PKR no. 383/2009 dated 9 September 2014

- **appeal of the State Prosecutor, filed on 24 October 2014**
- **appeal of defence counsel Destan Rukiqi on behalf of the defendant A.C., filed on 27 October 2014**

having reviewed the motion of the Appellate Prosecutor filed on 25 November 2014;

after having held a public session of the Appellate Panel on 10 June 2015;

having deliberated and voted on 12 June 2015;

pursuant to Articles 389, 390, 394, 398 and 401 CPC;

renders the following

JUDGMENT

- I. The appeal of defence counsel Destan Rukiqi for defendant A.C. is hereby rejected as unfounded.**
- II. The appeal of the State Prosecutor is hereby rejected as unfounded.**
- III. The Judgment of the Basic Court of Pristina PKR no. 383/2009 dated 9 September 2014 is hereby affirmed.**

REASONING

I. RELEVANT PROCEDURAL BACKGROUND

The events giving rise to this criminal case occurred on Friday 22 May 2009 at about 13:40 in the village of Zabel i Ulët, municipality of Drenas. **A.C.** was in possession of an automatic firearm AK-47 without authorization, intentionally fired four shots with the AK-47 at **R.A.**, his father-in-law, who was standing in front of the mosque's yard, causing him deadly injuries which led to his instant death.

On 22 May 2009 the defendants **A.C.** and **R.O.** were arrested and placed in detention on remand. The detention on remand against the two defendants has been extended periodically several times since that period. **A.C.** has been on detention on remand from 22 May 2009 until the announcement of the Judgement. On 14 June 2014, the Basic Court ordered the termination of the detention on remand of **R.O.**.

On 24 May 2009 the Kosovo Police filed a criminal report no. 2009-AG-0424 to Pristina Public District Prosecution Office.

On 13 August 2009 Pristina Public District Prosecution Office filed the Indictment PP. no 465-6/09 charging **A.C.** with Aggravated Murder in violation of Article 147(9) PCKK and Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328(2) PCKK, and **R.O.** with Assistance to the commission of the criminal offence Aggravated Murder in violation of Article 147(9) PCKK in connection with Article 25 PCKK. On 5 September 2009 the Basic Court confirmed the Indictment in its entirety. The case proceeded to main trial with a trial panel composed of local judges. On 8 October 2013, however, and upon a request from the defendants, the President of the Assembly of EULEX Judges, pursuant to the Law on Jurisdiction, Case Selection and Case Allocation on EULEX Judges and Prosecutors in Kosovo (Law No. 03-L-053), decided to assign the case to EULEX Judges in order to prevent further prolonging of the proceedings.

The main trial in the case was held on 15, 18 November and 11 December 2013, and 17, 21, 23 January, 13 February, 7 March, 11 April, 2 July and 5 September 2014 with deliberations and vote on 5 September 2014 and the verdict announced on 9 September 2014. On 9 September 2014, the trial panel also extended detention on remand against **A.C.** until the judgment becomes final.

The written judgment was served to **R.O.** and his defence counsel on 16 October 2014, to **A.C.** on 20 October 2014 and to his defence counsel on 13 October 2014, and to the State Prosecutor on 10 October 2014. On 24 October 2014 the State Prosecutor filed an appeal against the Judgment. On 27 October 2014 **A.C.**, through his defence counsel, also appealed the Judgment.

On 12 November 2014 the defence counsel of **R.O.** filed a response to the State Prosecutor's appeal.

The case was transferred to the Court of Appeals for a decision on the appeals on 7 November 2014.

On 25 November 2014 the Appellate State Prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 10 June 2015 in the presence of **A.C.**, his defence counsel and the counsel for the injured party Rame Gashi. **R.O.** and his defence counsel, as well as the State Prosecutor, were absent.

The Appellate Panel deliberated and voted on 12 June 2015.

I. SUBMISSIONS OF THE PARTIES

A. Appeal of A.C.

Defence Counsel Destan Rukiqi on 27 October 2014 filed an appeal dated 24 October 2014 with the Basic Court on behalf of the defendant **A.C.** on the grounds of:

- Substantial violation of the provisions of criminal procedure
- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Error in the decision on criminal sanctions

Concerning **violations of the provisions of criminal procedure**, the defence counsel submits that the judgment exceeded the scope of the Indictment, in violation of Article 384(1.10) CPC, given that the Prosecution's case in the Indictment was that **A.C.** committed the criminal offence because of "unscrupulous revenge" but never for any other "low motives". In his view, the unscrupulous revenge is a motive in itself. Furthermore, he argues that the judgment violated Article 384(1.12) CPC because it was not drafted in accordance with Article 370(2) to (8) CPC. In particular, he contends that: (i) the judgment is missing the date of compilation and only provides the date of announcement; (ii) the enacting clause of the judgment is unclear and contradictory with the one in the Indictment; (iii) the enacting clause of the judgment indicates that **A.C.** committed the criminal offences "in co-perpetration" which cannot stand given that the second defendant **R.O.** got acquitted of the charges; and (iv) the factual description of the acts of **A.C.**, as provided in the enacting clause of the judgment, corresponds to the legal qualification of murder under Article 146 PCKK and not to the one of aggravated murder under Article 147(9) PCKK.

With regard to the **erroneous and incomplete determination of the facts**, the defence counsel contends that the Basic Court did not evaluate all the evidence administered at trial in a fair manner and as a whole. According to him, while it is not contested that **A.C.** deprived R.A. of his life, the evidence does not confirm that he did it because of unscrupulous revenge. The defence counsel further argues that the evidence, notably the testimonies of O.M., the sisters of the defendant, **R.O.** and the expert psychologist shows that R.A. interfered in the matrimonial life of the defendant and had a hostile behavior. He also points out that the defendant's ex-wife, Q.A., did not take care of her children.

With respect to **violations of the criminal law**, the defence counsel contends that the Basic Court erred in finding that the elements of the criminal offence of aggravated murder for unscrupulous revenge pursuant to Article 147(9) PCKK were met. He adds that the murder of R.A. was committed as "revenge" but did not constitute "unscrupulous" revenge to constitute aggravated murder under Article 147(9) PCKK. The defence counsel claims that the criminal offence should be requalified as murder under Article 146 PCKK.

Finally, as to the **decision on criminal sanctions**, the defence counsel argues that the Basic Court erred in imposing an aggregate sentence of 25 years given that pursuant to Article 38(1) PCKK the punishment of imprisonment cannot exceed 20 years. In addition, he contends that the Basic Court did not properly evaluate the mitigating circumstances concerning the defendant. He also points out that the time spent in detention on remand should also have impacted the sentence as it constitutes a violation of the defendant's right to be tried within a reasonable time. The defence counsel argues that the Basic Court erred in relying on the unscrupulous revenge as an aggravating circumstance given that it is an element of the offence. He further argues that the criminal offence of unauthorized ownership, control or possession of weapons under Article 374(1) CCRK falls within the Amnesty Law No. 04/L-209 and the judgment should be rendered dismissive in that regard pursuant to Article 363(1.3) CPC.

For all these reasons, the defence counsel requests the Court of Appeals to annul the judgment and to return the case to the Basic Court for retrial.

B. Appeal of the State Prosecutor

State Prosecutor Fikrije FEJZULLAHU on 24 October 2014 filed an appeal with the Basic Court on the grounds of:

- Erroneous or incomplete determination of the factual situation
- Violation of the criminal law
- Error in the decision on criminal sanctions

More specifically, the State Prosecutor argues that the Basic Court did not determine correctly the factual situation concerning the defendant **R.O.** given that the evidence confirms beyond any grounded suspicion that he assisted **A.C.** in committing the criminal offence of aggravated

murder, notably the testimony of witness F.F. or the fact that some gunpowder residue was found on the hands of the defendant. The State Prosecutor further submits that the Basic Court erred in not considering the aggravating circumstance for **A.C.** that he committed the criminal offence by unscrupulous revenge.

For these reasons, the State Prosecutor proposes that the Court of Appeals amend the judgment, return the case for retrial or impose to the defendants a higher punishment by imprisonment.

C. Response of **R.O.**

Defence Counsel Ibrahim Z. Dobruna on behalf of the defendant **R.O.** filed a response on 12 November 2014 to the appeal. He objects to the appeal of the State Prosecutor on the ground that there was no evidence adduced at trial beyond the grounded suspicion to prove that **R.O.** was at the crime scene at the critical moment and committed the criminal offence he was charged with. Notably, he contends that witness F.F. was never sure in his testimony that there was a second person in the vehicle and in any event he never identified this person as being **R.O.** He points out that other witnesses such as S.G., O.M., A.J. and A.H., confirmed on the contrary that they saw only one person at the crime scene. Defence counsel submits that the Basic Court properly assessed the evidence in acquitting **R.O.** He therefore proposes the Court of Appeals to confirm the judgment rendered by the Basic Court.

D. Motion of the Chief State Prosecutor

Appellate Prosecutor Idain Smailji on 25 November 2014 filed a motion requesting the Court of Appeals to approve as well-founded the appeal of the State Prosecutor and to reject as ungrounded the appeal of **A.C.** More specifically, he contends that based on the evidence, the actions of **R.O.** contain all the substantial elements of the criminal offence of assisting aggravated murder, notably from the statement of witness F.F.. In addition, he argues that the Basic Court violated Article 73 CCRK in failing to take into consideration the gravity of the offence when determining the sentence of **A.C.**, and should have imposed a longer period of imprisonment. The Appellate Prosecutor further contends that contrary to what **A.C.** argues, the Basic Court correctly assessed the factual situation as constituting the criminal offences of aggravated murder and unauthorized ownership, control, possession or use of weapons. In this regard, he submits that the latter cannot be covered by an amnesty as **A.C.** deprived a person of her life when using the said weapon.

II. FINDINGS OF THE APPELLATE PANEL

A. Competence of the Panel

Pursuant to Article 472(1) CPC the Panel has reviewed its competence and since no objections were raised by the parties the Panel will suffice with the following. The Court of Appeals is the competent court to decide on the appeals pursuant to Articles 17 and 18 of the Law on Courts (Law no. 03/L-199).

The Panel of the Court of Appeals is constituted in accordance with Article 19(1) of the Law on Courts and Article 3 of the Law No. 03/L-053 on Jurisdiction and Competencies of EULEX Judges and Prosecutors in Kosovo.

B. Admissibility of the appeals

The impugned Judgment was announced on 9 September 2014. The written Judgment was served to **A.C.** on 20 October 2014, to his defence counsel on 13 October 2014, and to the State Prosecutor on 10 October 2014. All appeals were filed within the 15-day deadline pursuant to Article 380(1) CPC. The two appeals were filed by the authorized persons and contain all other information pursuant to Article 376 *et seq* CPC. They are therefore admissible.

C. Findings on the merits

The Appellate Panel will discuss all grounds of appeal raised under relevant headings below. The Panel will first turn to examine the appeal of the State Prosecutor as it deals with the distinct issue of the acquittal of the defendant **R.O.**. Secondly, the Panel will discuss the challenges raised in the appeal of the defendant **A.C.**: (i) substantial violation of provisions of criminal procedure; (ii) erroneous or incomplete determination of factual situation; (iii) violation of criminal law; and (iv) error in the decision on the criminal sanction.

1. Appeal of the State Prosecutor

The Appellate Panel has carefully reviewed the statements given by the witness F.F. to the Police on 22 May 2009 and to the Prosecution office on 12 June 2009, as well as his testimony during the main trial on 17 January 2014, and notes that the account he makes of the events of 22 May 2009 is similar in each instance, namely, that he thinks but he cannot be certain that he saw two persons in the vehicle. In any event, the Panel further notes that at no occasion did F.F. identify this second individual as being **R.O.**. Therefore, the Appellate Panel concurs with the assessment of the Basic Court that this evidence fall short of establishing beyond reasonable doubt that **R.O.** was also in the vehicle and assisted **A.C.** in the commission of the criminal offence.

As to the fact that some gunpowder residue was found on the hands of **R.O.**, the Court of Appeals concurs with the Basic Court's assessment that the evidence presented, notably the different expertise reports, does not allow to establish beyond reasonable doubt that **R.O.** was present with **A.C.** and assisted him in the commission of the criminal offence. The evidence rather indicates that handshaking between **R.O.** and **A.C.** could explain the presence of gunshot residue particles on **R.O.**'s right hand since the particles can be transferred by handshake.

In conclusion, the Appellate Panel rejects the appeal of the State Prosecutor as unfounded and affirms the acquittal of **R.O.** as decided by the Basic Court.

2. Appeal on behalf of **A.C.**

(i) Allegations of substantial violations of the provisions of criminal procedure

First, contrary to what **A.C.** asserts, the Panel does not find that the Judgment exceeded the scope of the Indictment. In the Indictment, it is clearly indicated that **A.C.** is charged with Aggravated Murder under Article 147(9) PCCK. However, it is not specified whether it is for unscrupulous revenge and/or low motives. In the view of the Panel, the enacting clause of the Judgment does not depart from what is stated in the Indictment and did not extend the charges contained in the Indictment given that both "unscrupulous revenge" and "other base motives" are encompassed within Article 147(9) PCCK.

Turning now to the alleged violation under Article 384(1.12) CPC that the impugned Judgment was not drawn up in accordance with Article 370 CPC, the Appellate Panel rejects this ground of appeal as unfounded.

The Panel first finds that, while it is true that the date when the Judgment was drawn up in writing is missing from the Judgment, the parties were served with a written copy of the Judgment from 13 October 2014. Thus, it can be estimated that the Judgment was drawn up shortly prior to that date. Recalling that pursuant to Article 369(1) CPC the reasoned judgment in detention cases should be drawn up within 15 days from the announcement of the verdict, but that when a case is complex, this deadline may be extended by up to 60 additional days, the Panel notes that on 23 September 2014 the Presiding Judge was granted permission to extend the deadline to draw up the Judgment in accordance with this provision. The Appellate Panel is therefore satisfied that the Judgment was drawn up within this extended deadline and that the fact that the date is missing from the Judgment constitutes a minor, unsubstantial mistake that has no impact on the defence rights in the proceedings. The Panel thus finds that a *de minimis* rule should apply. In any event, it is noteworthy that the defence fails to demonstrate any prejudice for the defendant resulting from the missing date in the Judgment.

The Court of Appeals dismisses as unsubstantiated and undeveloped the defence's argument that the factual description of the enacting clause is "totally different" from the one in the Indictment.

As for the contention that the enacting clause of the Judgment is contradictory and unclear, the Panel considers on the contrary that the enacting clause is clear, logical and does not contradict itself or the reasoning. It provides a comprehensive description of the decisive facts and contains all the necessary data prescribed by Article 370(3) and (4) CPC in conjunction with Article 365 CPC.

Furthermore, and contrary to **A.C.**'s submission, the enacting clause of the Judgment does not state that the defendant committed the criminal offences in "co-perpetration". The reference to the term "in concurrence" in the English version of the Judgment simply refers to the fact that the Panel found that **A.C.** committed the two criminal offences for which he was tried at the same time in a single instance.

While it is true that the enacting clause does not specifically mention the unscrupulous motives behind the action of **A.C.**, the Appellate Panel is of the view that this constitutes only a minor discrepancy and that a *de minimis* rule should be applied. The Panel finds that the enacting clause remains fully coherent with the reasoning of the impugned Judgment and that, read in combination, it clearly reflects the findings elaborated therein and that the Judgment as a whole renders the decision of the trial panel clear. Therefore, the Court of Appeals rejects the defence's contention that the factual description of the acts of **A.C.** provided in the enacting clause corresponds to the legal qualification of Murder as per Article 146 PCK.

The Appellate Panel recalls that whether the conclusions of the Basic Court on determination of facts were correct and complete is a separate issue and this will be assessed in the next section of this judgment.

(ii) Allegations of erroneous and/or incomplete determination of the factual situation

Before assessing the merits of the arguments presented by the defence counsel, the Appellate Panel recalls the standard of review regarding the factual findings made by the trial panel. It is clear from the definitions of "erroneous determination of the factual situation" and "incomplete determination of the factual situation" provided in Article 386 CPC that it is not sufficient for the defendant to demonstrate only an alleged error of fact or an incomplete determination of fact by the trial panel. Rather, given that the criminal procedure code requires that the erroneous or incomplete determination of the factual situation relates to a "material fact", the defendant must also establish that the erroneous or incomplete determination of the factual situation indeed relates to a material fact, namely, a fact that is critical to the verdict reached. Furthermore, it is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the trial panel because it is the trial panel which is best placed to assess the evidence. The Appellate Court has an obligation to ensure that the facts which are important to rendering a lawful decision are established truthfully and completely.

In light of the above, and after having thoroughly reviewed the evidence and the analysis made by the Basic Court of this evidence, the Court of Appeals is not persuaded by the submission of the defendant **A.C.** It is on the other hand fully persuaded by the conclusions and reasoning of the Basic Court in the impugned Judgment. The Appellate Panel is further satisfied that the trial panel performed a careful and meticulous analysis of the evidence administered at trial as a whole and in a fair manner. Contrary to the defence's contention, the Panel does not find that the Basic Court assessed the witnesses' testimonies selectively.

More specifically, concerning witness O.M., the Panel, after having reviewed his testimony of 7 March 2014, finds that, because the witness insisted that he forgot many things and that he was not willing to delve into the nature of the conflict between R.A. and **A.C.** as he remained a mediator for the reconciliation of both families, his testimony is of low probative value in order to demonstrate the alleged absence of unscrupulous revenge on behalf of **A.C.** The Appellate Court concurs with the Basic Court's assessment that O.M.'s testimony nevertheless confirms that the victim R.A. was not a dangerous person and was not preventing his daughter Q.A. to continue her marriage with **A.C.**

While the Panel observes that the impugned Judgment does not expressly refer to the incident involving R.A. reported by the sisters of **A.C.** A. and M.C. during their testimonies at trial on 17 January 2014, the Panel is nevertheless satisfied that the Basic Court assessed their testimonies as a whole and does not consider that that this element could have constituted a material fact critical to the outcome of the trial. In the view of the Court of Appeals, their statements do not undermine the factual finding of the Basic Court that **A.C.** murdered his father-in-law with unscrupulous revenge. In addition, it is noteworthy that the existence of difficult relations between the families of **A.C.** and R.A. is an undisputed fact in the impugned Judgment. Also, the Appellate Court finds that the hostile behavior on behalf of the victim R.A. or that he would have been an obstacle for the couple to get back together as alleged by **A.C.** is not substantiated by the evidence administered at trial. In this respect, the Panel recalls that it is not disputed that **A.C.** physically and psychologically abused Q.A. and that he was convicted for domestic violence.

In any event, the Panel concurs with the Basic Court's position that even if the evidence adduced at trial were to suggest that the victim exercised pressure so that his daughter left **A.C.**, the criminal offence of Aggravated Murder for unscrupulous revenge would still be established.

As to the testimony of the psychological expert N.M. on 17 January 2014, while the expert acknowledged that the situation with his family might have created frustrations for **A.C.**, she was categorical as to the fact that this circumstance "could not decrease his critical attitude towards things". She also stressed during her testimony that **A.C.** did not suffer from any mental disorder or psychiatric illness, such as personality disorder.

The Panel is not persuaded that the fact that the defendant suffered from emotional liability and egocentrism as found by the expert prevented him from killing his father-in-law for unscrupulous revenge or impacted in any manner his ability to commit this criminal offence. Therefore, the Appellate Panel strongly rejects the defence's contention that the defendant was "on the verge of dementia".

Furthermore, as to the fact that Q.A. did not take care of her children, the Panel observes that the Basic Court took note in the Judgment of the family situation of the defendant and of the fact that he retained custody of his children. The defence counsel fails to point out to any error on behalf of the trial panel in this regard, and does not substantiate how this element could be of material importance to the outcome of the trial.

In conclusion, the Appellate Panel is satisfied that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeal filed on behalf of **A.C.** do not undermine these findings.

(iii) Allegations of violations of criminal law

Now turning to whether the Basic Court erred in not requalifying the offence as "Murder" pursuant to Article 146 PCK, the Appellate Court is satisfied the evidence administered at trial establishes beyond reasonable doubt that the defendant **A.C.** committed the criminal offence of Aggravated Murder for unscrupulous revenge pursuant to Article 147(9) PCK.

While the defence counsel is correct when asserting that not every kind of revenge qualifies as "unscrupulous" pursuant to Article 147(9) PCK, the Court of Appeals nevertheless finds that in the circumstances of the present case, unscrupulous revenge is characterized by the evidence, and not only mere revenge.

The Panel observes, from the own admission of the defence counsel in his appeal, that **A.C.** deprived the victim R.A. of his life "for revenge" because of their hostile relations and because he was holding his father-in-law responsible for ruining his relationship with his wife. The Appellate Court concurs with the trial panel's opinion that depriving the victim of his life for these reasons constitutes an extreme, widely disproportionate, and irreversible reaction, characterizing the unscrupulousness of the crime. This is further confirmed by the demeaning cold blooded SMS **A.C.** sent to Q.A. immediately after the crime. In addition, his actions were premeditated, a fact not disputed by the defendant.

Therefore, the Court of Appeals finds that the Basic Court did not err in finding the defendant **A.C.** guilty of Aggravated Murder under Article 147(9) PCK and in not requalifying the criminal offence as Murder under Article 146 PCK.

(iv) Allegations on account of decision on criminal sanction

The Panel first rejects the submission that the Basic Court erred in imposing an aggregate sentence of 25 years. Given that Article 147 PCCK states that for Aggravated Murder a punishment of a long-term imprisonment shall be imposed and given that pursuant to Article 37(2) PCCK the punishment of long-term imprisonment has to be between 21 and 40 years, the imposed sentence of 25 years therefore appropriately falls within this range.

Furthermore, and contrary to the defence's contention, the Court of Appeals is satisfied that the Basic Court respected the provisions of Article 370(5) CPC and Article 71(2)(1) PCCK as it indicated in the enacting clause the overall aggregate punishment of 25 years as well as the punishment for each separate offence, namely two years for Unauthorized ownership, control or possession of weapons, and 25 years for Aggravated Murder.

The Panel has carefully reviewed the mitigating circumstances established by the Basic Court and the challenges raised by the defence in this regard. It finds that, contrary to the defence's submissions, it properly took into consideration the fact that the defendant was the father of underage children. The Basic Court also took note of the fact that **A.C.** cooperated during the proceedings as a mitigating factor. Therefore, the Appellate Panel does not find that the Basic Court erred in evaluating the personal circumstances of the defendant as mitigating circumstances.

In addition, the Panel rejects the defence's assertion that the time spent by **A.C.** in detention on remand should have impacted the sentence. While the Court of Appeals is aware of the time the defendant has been spending in detention, it does not consider that it is among the factors that can amount to mitigating circumstances. It further rejects as unsubstantiated and undeveloped the argument that the time spent in detention on remand constitutes a violation of the right of **A.C.** to be tried without undue delay.

The Appellate Panel observes that the Basic Court seems to have taken into consideration the fact that the murder was committed for "unscrupulous revenge" as an aggravating circumstance when determining the sentence in the present case. These circumstances are already elements of the criminal offence for which **A.C.** was found guilty, namely, Aggravated Murder for unscrupulous revenge. Hence, these circumstances are exhausted when it comes to the determination of punishment because the elements of a crime are already reflected in the range of punishment of the criminal offence. It is a general rule and a legal consequence of the principle *ne bis in idem* or double-jeopardy that circumstances which constitute elements of a criminal offence for which the defendant is found guilty cannot additionally be considered for

the determination of punishment at the sentencing stage.¹ The Panel therefore finds that the Basic Court impermissibly double-counted an element of the criminal offence as an aggravating factor.

However, after having carefully reviewed the circumstances of the case and the aggravating circumstances, and keeping in mind the general rules on punishment prescribed by Article 64 PCK, the Court of Appeals observes that the sentence of imprisonment imposed on **A.C.**, 25 years, is fair given the circumstances of the case and given the range of punishment prescribed by Article 147 PCK, namely between 21 and 40 years of imprisonment for long-term imprisonment. The Panel is therefore convinced that the error of the Basic Court has no impact and that the sentence imposed on the defendant has been appropriately determined by the Basic Court.

In this respect, and in light of this finding of error, the Panel rejects the State Prosecutor's contention that the Basic Court erred in not considering the aggravating circumstance for **A.C.** that he committed the criminal offence by unscrupulous revenge.

Contrary to the defence's contention, the Appellate Court finds that in the circumstances of the case, the criminal offence of Unauthorized ownership, control or possession of weapons under Article 374(1) CCRK does not fall within the Amnesty Law No. 04/L-209. Indeed, as provided in Article 4(1.3) of the Amnesty Law No. 04/L-209, amnesty will not apply for criminal offences that resulted in grievous bodily injury or death. Given that **A.C.** was found to have caused the death of the victim R.A. using an automatic firearm AK-47 without authorization, therefore, the Appellate Panel finds that the Basic Court did not err in convicting him of Unauthorized ownership, control or possession of weapons under Article 374(1) CCRK.

In light of the mitigating and aggravating circumstances correctly established by the Basic Court and giving due regard to the fact that unscrupulous revenge cannot be considered as an aggravating factor, and considering that the maximum punishment prescribed for the criminal offence for Aggravated Murder is 40 years for long-term imprisonment pursuant to Article 147 PCK, the Panel finds that the sentence of 25 years of imprisonment imposed by the Basic Court is not disproportionate and reflects an appropriate punishment in view of the circumstances of the case.

III. CONCLUSION

The Court of Appeals, for the reasons elaborated above, rejects the State Prosecutor's and the defence's appeals and affirms the impugned Judgment.

¹ See e.g., PAKR 1122/2012, Judgment, 25 April 2013, para. 58.

Done in English, an authorized language. Reasoned Judgment completed on 5 August 2015.

Presiding Judge

Radostin Petrov
EULEX Judge

Panel member

Xhevdet Abazi
Kosovo Court of Appeals Judge

Panel member

Abdullah Ahmeti
Kosovo Court of Appeals Judge

Recording Officer

Anne-Gaëlle Denier
EULEX Legal Officer

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12.06.2015