Supreme Court of Kosovo
Ap.-Kž. No. 1/2009
7 October 2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judges Guy van Craen, Emilio Gatti, Ferdinando Buatier de Mongeot and Angela Kaptein as members of the panel, assisted by Valentina Gashi as court recorder,

in the criminal case against the accused M. V , nickname 'M ', father's name M. V . mothers maiden name B J , born on in the village of , a S Kosovan of Municipality, widower with two sons, literate, current employment unknown, having completed technical high school, completed his military service at in , of unknown economic status and without previous convictions,

charged with five (5) counts of war crime as defined in Article 142 in connection with Articles 22 and 26 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY),

deciding upon the appeals of the defence counsels and of the accused against the verdict handed down by the District Court of Mitrovicë/Mitrovica, dated 23 May 2008 (P. No. 48/01), namely the one lodged by attorney Milan Vujin from Belgrade, dated 03 November 2008, the one lodged by the attorney Miro Delevic from Zvečan/Zveçan, dated 03 November 2008, the one lodged by attorney Bogdan Vladisavljevic from Mitrovicë/Mitrovica, dated 04 October 2008, and on the appeal lodged by the accused himself, dated 10 November 2008,

after hearing the appeals in the session held on 9 June 2009, and after a deliberation and voting held on 9 June, 14 September and 7 October 2009, renders this

VERDICT

The appeals filed by and on behalf of the accused against the Verdict of the District Court of Mitrovicë/Mitrovica, dated 23 May 2008 (P. 48/01) are granted. The Verdict of first the first instance Court is **amended** and the accused **acquitted** of all charges.

Reasoning:

I. Procedural History

The appeals before the Supreme Court pertain to a judgment that was rendered after the second re-trial of the same matter.

1. The first trial before the District Court

The first trial was held before the panel of the District Court of Mitrovicë/Mitrovica composed of one local professional judge as presiding judge, one international judge and three lay judges. That panel on 18 January 2001 convicted the accused for the criminal act of genocide in complicity pursuant to Article 141 as read with Article 22 of the CLFSRY and sentenced him to 14 (fourteen) years of imprisonment.

2. The first decision of the Supreme Court of Kosovo

The Prosecutor filed an appeal requesting that a more severe prison sentence be imposed. Defence attorneys and the defendant himself filed appeals against the verdict claiming essential violations of the law on criminal procedure, an erroneous and incomplete establishment of the facts, violations of the criminal code and a disproportionately severe punishment. The Appellants sought an acquittal from the all charges or a cancellation of the verdict together with an order remanding the case for re-trial. The Public Prosecutor of Kosovo in his opinion dated 30 August 2001 proposed that the appeals of the Defence Counsel be approved and that the case to be returned to the first instance court for retrial.

At the panel session held on 31 August 2001 the Supreme Court of Kosovo reviewed the case file and examined the contested verdict pursuant to Article 385 of Law on Criminal Proceedings (LCP). It found that the court of first instance violated the criminal law by convicting the accused of the criminal offence of genocide without proving the intent of the accused to destroy an ethnic group in whole or in part as is required in order to prove the subjective element of the crime. The panel of the Supreme Court further maintained that the offences alleged did not contain the elements of the crime of genocide, but rather should have been qualified as a war crime under Article 142 of the CLSFRY. Additionally, the panel of the Supreme Court found essential violations of the law on criminal procedure, regarding the establishment of the state of facts, due to the fact that the credibility of certain witnesses was not sufficiently assessed, and certain witnesses proposed by defence were not heard.

Therefore, the Supreme Court accepted the appeals filed by the defence and overturned

the verdict. The appeal of the Prosecution was rejected as inadmissible.

3. The second trial before the District Court

The re-trial was held before a panel composed of three professional judges, two of whom were international judges. After forty-four (44) sessions the court announced its verdict on 25 October 2002, by which the accused was pronounced guilty of committing the criminal offence of war crimes against the civilian population in complicity with others, pursuant to Article 142, paragraph 1 of the CLFSRY, in conjunction with Article 22 CLFSRY in relation to the following acts:

a. Illegal and self-willed destruction of property, as per Article 142 in conjunction with Article 22 of the CLFSRY and encompassed by Article 147 of the Fourth Geneva Convention of 1949 (Grave Breach);

b. Stealing on a large scale of property, as per Article 142 of the CLFSRY in conjunction with Article 22 of the CLFSRY and as encompassed by Article 4, Paragraph 2 (g) of Additional Protocol II (1977) to the Geneva Conventions of 1949;

c. Application of measures of intimidation and terror and endangering the safety of other persons, as per Article 142 of the CLFSRY in conjunction with Article 22 of the CLFSRY and as encompassed by paragraph 1 (a) of Common Article 3 to the Geneva Conventions of 1949, Article 4, Paragraph 2(a) of Additional Protocol II (1977) to the Geneva Conventions of 1949.

The court of first instance sentenced the accused to twelve (12) years of imprisonment.

4. The second decision of the Supreme Court

Appeals against this second verdict were filed by the defence counsels and the accused.

The Defence alleged a number of violations of procedural and substantive law.

The main issue raised by the Defence was the trial court's evaluation of the credibility of the prosecution witnesses. The Defence maintained that the court was wrong in attributing the reasons for the discrepancies and contradictions found in the statements of the different witnesses, and between the statements given by the same witnesses at different stages of the proceedings, to psychological factors, such as stress fear and trauma, and to different level of accuracy in the taking of the minutes of their examinations. The Defence claimed that the discrepancies in the witnesses testimony resulted from the fact that they acted according to a pattern of inculpation motivated by ethnic intolerance.

Accordingly, the Defence challenged the credibility of the prosecution witnesses with reference to numerous contradictions and discrepancies allegedly found in their statements.

In addition it was argued that the District Court was brought to establish the culpability of the accused as a result of bias and prejudice against him, thus violating Article 6 of the European Convention on Human Rights (ECHR), Article 364 paragraph 2 of the LCP and the principle of the presumption of innocence (Article 3 of the LCP). The defence alleged that the court of first instance showed bias because it applied a double standard in the evaluation of the credibility of the evidence by emphasizing the contradictions between the statements of the accused and of the defence witnesses when minimizing the contradictions of the statements given by prosecution witnesses.

Furthermore the Appellants objected to the conclusion drawn by the court of first instance that the accused committed the criminal acts jointly and on behalf of the Yugoslav armed forces, an element that was decisive for the criminal acts to be qualified as a war crime instead of an ordinary criminal offence.

The Appellants pointed out that according to both applicable international and the domestic law, a perpetrator of the offence of war crimes must be either a member of a military, political or administrative organization taking part in a conflict or a person in their service, or alternatively, in the commission of the crime he must act on behalf of the armed forces (a military, political or administrative organization taking part in a conflict). The Defence argued that circumstantial evidence presented by the prosecution witnesses to support the stand that the accused committed the crimes as a member of the armed forces or on behalf of them could not completely exclude a different interpretation and conclusion. In sum, the Defence alleged that facts were incompletely and wrongly established since the court of first instance failed to prove beyond a reasonable doubt that the accused was either a commanding officer who issues orders for the commission of war crimes, or a member of a military or political organizational structure belonging to a party to the armed conflict, or any person being in their service.

The Defence moreover alleged numerous violations of criminal procedure. The defence also contended that the verdict failed to evaluate each piece of evidence, providing specifically an assessment of the credibility of contradictory evidence. In this context the Defence claimed that the court of first instance violated its obligation to establish truthfully the facts and circumstances (Article 15 paragraph 1 and 2 of the LCP) and to evaluate the evidence individually and in connection with each another (Article 347 paragraph 2 LCP), when it based its verdict on the parts of the statements of some of the witnesses and not on their complete testimonies.

As to violations of the criminal law the Defence contended that forcible expulsion of civilians is not included in the definition of a war crime in Article 142 CLFSRY. The Defence argued that Common Article 3 of the Geneva Conventions does not explicitly

forbid the expulsion of the civilian population. Even though the case-law of the *Ad Hoc* International Tribunals has established cases of forcible expulsion of civilians to be qualified as a war crime, this jurisprudence could not be applied in Kosovo pursuant to the principle of legality and the application of the more favorable criminal law, foreseen by Article 4 of the CLFSRY.

Furthermore, the Defence highlighted that international humanitarian law applicable to international armed conflicts protects properties belonging to the civilian population only in cases of occupation by a foreign entity. Since Kosovo was still an integral part of the sovereign territory of FRY, the situation in the armed conflict in Kosovo did not qualify as occupation. Accordingly, the looting and destruction of the properties of the Kosovar Albanians did not constitute the criminal act of war crime as per Article 142 of the CLFSRY.

The Defence disputed the reasoning of the court in which the court referred to the ICTY jurisprudence, namely the verdict in the *Celebici* case, where the ICTY considered the cited Geneva Conventions to be so fundamental that they were deemed valid in both international and internal armed conflicts. In the view of the Defence, the ICTY case law in *Celebici* case did refer to a situation of occupation, which was not the case during the armed conflict in Kosovo. The Defence's view was that the implementation of Common Article 3 of the Geneva Conventions was only legitimate in the present case, and this Article does not refer to protected property, but only to protected persons.

The Supreme Court of Kosovo with verdict issued on 15 July 2004 found that the conviction against the accused was again based on an incorrect and an incomplete evaluation of the evidence with the implicit inaccurate establishment of facts (Article 366 of the LCP). In making this determination the Supreme Court considered numerous discrepancies and inconsistencies found in the incriminating evidence relied upon by the trial court, which undermined the overall factual foundation of the charges. Accordingly, the Supreme Court again decided to quash the verdict and to return the case for retrial in accordance with Article 385 Paragraph 1 of the LCP. In order to provide guidance for the re-trial the Supreme Court expressly addressed selected points of law which were deemed to be relevant in further proceedings.

To that regard reference has to be made to the verdict of the Supreme Court, dated 15 July 2004, which in parts reads as follows:

"The Supreme Court agrees with the District Court that the presence of contradictions or inconsistencies does not automatically and *a limine* disqualify the witness testimony. In general, the court should not treat minor discrepancies between the evidence of different witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence as a whole where that witness has nevertheless recounted the essence of the incident charged in acceptable detail. However, this approach should vary according to the quality of that witness' evidence in relation to the essence of the

incident charged. The Supreme Court stresses that in every instance the court needs to examine the nature of the contradictions, such as: whether they concern substantive or secondary factual elements, whether they are explicable or not and whether, in the light of the overall circumstances, they point to a deliberate untruthfulness of the witness.

Irrespective of whether the contradictions and discrepancies are justifiable or not, if pertinent to constituent elements of the criminal act, they must be explained to such a degree that the evidence eventually leaves no doubt as to the presence of these elements. Otherwise, in accordance of the presumption of innocence, the court must act *in dubio pro reo*. Where the main issue determinant for the question of responsibility is the identification of the accused in the criminal event, contradictions pertaining to factual elements such as criteria relating to the recognition of the accused among other perpetrators, specific actions attributed to the accused and certainty of the statement of time and place of such actions in confrontation with the alibi of the accused must not be easily disregarded.

The Supreme Court also agrees with the District Court in that inconsistencies and contradictions in witness evidence can result from natural vagaries of human perception, especially in witnesses who had undergone traumatic events and who due to procedural circumstances had to give their account of the same event on several occasions. Having, however, accepted that with the passage of time people naturally forget facts, and that the condition of severe exasperation impedes the perception and memorization of facts, the trial court may justifiably expect imprecision, distortion of chronology and confusion of the elements of different events. An opposite phenomenon – improving of the testimony, providing more details as the proceedings progress, should call for a specific explanation. In particular, the court should apply careful scrutiny in cases where a pattern of increasing inculpation is detected in the witness testimony, including where the recognition of the accused or attribution of the commission of specific criminal activity is built into the testimony only in subsequent hearings.

Furthermore, the Supreme Court appreciates the importance of a detailed and reliable investigative record for the fact-finding by the trial court. Indeed, this is the rationale behind the provision that serious charges should be, as a rule, preceded by an investigation - Article 161 LCP. Consistent with the requirement of conducting the investigation in serious and complex cases, there are several guarantees attaching to the procedure of conducting the investigative actions, which are designed to ensure their accuracy, such as: that the investigation is carried out by a judge, that the testimony is sanctioned for perjury, that the parties have the right to be present and ask questions, that they have access to the record and the right to seek corrections and that upon completion the record is read and signed by the witness. As a consequence, whenever the organs of the administration of justice contented themselves with the content and form of the investigative records, substantive discrepancies that subsequently occur between the investigative and the trial testimony should not be automatically and collectively disregarded to the effect

of favouring the prosecution. Rather, in accordance with the presumption of innocence and the burden of proof resulting thereof, it is incumbent upon the trial court to eliminate with certainty that the discrepancies occurred irrespective of the witnesses' sincerity and reliability. The same rule, should apply even more rigidly at the re-trial in relation to the testimony elicited in the first trial. To accept an opposite approach, i.e., to disregard repeating discrepancies and contradictions in prior statements until the witnesses work out a consistent incriminating testimony would belie both the rationality of the evaluation of evidence and the presumption of innocence.

Finally, the Supreme Court agrees that the reliability of witnesses, including any motive they may have to give false testimony, is a determination that must be made in the case of each individual witness. It would be neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he or she is a member of particular ethnic group, nor even if a victim of crimes committed by persons of the same ethnic group as the accused. That is not to say that ethnic hatred cannot ever be a ground for doubting the reliability of any particular witness. Such determination can be made in the light of the circumstances of each individual witness, his or her involvement in the event and interest in the proceedings and such concerns as could be substantiated upon evidence. With this in view the Supreme Court finds that District Court failed to sufficiently justify the rejection of the Defence's claim about the fabrication of the charges, especially in the light of the following circumstances:

- That all the witnesses during the conflict had been directly injured by the actions of the Serb forces, moreover, they raise claims for compensation. The accused is has property in the area. Thus the witnesses they my be personally motivated to incriminate the accused;
- That the testimony of five [5] of the prosecution witnesses who had directly implicated the accused in serious crimes was entirely discredited by the trial court and that without identifying on their part any individual motive for the false inculpation of the accused - hence indicating the probability of conspiracy;
- That the most of the witnesses upon whose testimony the court relied for the conviction were neighbors and were related to one another [basically, save A J , they belong to two families: the B and the S] and that the witnesses whose testimonies were discredited by the court, save one, were also the S . The witnesses who were found non credible had testified, in different configurations, as to the same set of events as the witnesses who were found credible, implicating the accused and attesting as to one another's presence at the scenes of alleged crimes.
- That there were other witnesses who had incriminated the accused, of whom the Prosecution resigned, apparently because of the lack of credibility, as the record of prior hearings reflect major contradictions in their testimony;
- That the prosecution witnesses upon whom the trial court relied in order to convict the accused was found by the same court to be non-credible in the attribution of a leadership position to the accused. This element indicates that the

witnesses were prone to inculpate the accused beyond their knowledge and experience.

In the Supreme Court's opinion the aforementioned circumstances called for an overall evaluation of the witness testimony in the aspect of possible conspiracy in addition to evaluating them in an atomized manner for the aspect of internal consistency.

Moreover, the Supreme Court scrutinized the records of the file in order to verify whether the court of first instance correctly asserted that discrepancies and contradictions in the statements of these witnesses on whom the court relied were indeed irrelevant and justifiable by circumstances.

...

The Supreme Court does not purport to exhaust all the contradictions in the testimony relied upon by the trial court. Those discussed *supra* are sufficient to call into question the approach by which the trial court attributed them collectively to the lack of accuracy in the investigation and the factor of stress during the traumatic events. Consequently, the accuracy of the trial court's findings is undermined.

The Supreme Court expects that in the re-trial the District Court will re-evaluate the witness testimony. The re-evaluation shall be done for each of the witnesses individually and shall include such factors as: the reliability of the identification of the accused, when applicable, taking into consideration physical conditions in which the witness claims to have recognized the accused; internal consistency of the testimony, including justifiability of differences between the different versions of the same event; consistency with the testimony of other witnesses, inclusive of the indication on whose testimony the court chose to rely in cases of differing accounts of the same event or the statement that the evidence was inconclusive. In assessing the credibility of the witnesses the District Court shall take into account general factors that may have a bearing on the credibility (identified supra on page 13 of this opinion) and shall specifically discuss them in the aspect of the Defence's claim about the conspiracy among the witnesses.

In case the trial court finds proven some or all of the specific acts averred to in the indictment, it shall assess whether the evidence supports the presence of elements determinant for the thesis that the accused was acting on behalf of, and in concert with, the Yugoslav forces."

5. The third trial before the District Court

The second retrial was held before a panel composed of three (3) international Judges between 16 August 2007 and 22 May 2008.

The court of first instance again heard numerous witnesses, in the end believing in the credibility of only two prosecution witnesses, G. B and S. A. The testimonies of not less than twenty-three (23) other prosecution witnesses were qualified as either irrelevant or not credible. The alibi raised by the accused was dismissed by the court of first instance, although it had been confirmed by not only a few witnesses.

With verdict, dated 23 May 2008, the court of first instance found the accused guilty of

Pillage, as recognized by Article 142, in conjunction with Articles 22 and 26 of the Criminal Code of Yugoslavia (YCC), and encompassed by Article 4, Paragraph 2 (g) of Additional Protocol II to the Geneva Conventions of 1949

and

Application of Measures of intimidation and terror, as recognized by Article 142, in conjunction with Articles 22 and 26 of the YCC, and encompassed by Article 13, Paragraph 2 of Additional Protocol II to the Geneva Conventions of 1949.

As to the remaining three (3) counts of the indictment the accused was found not guilty and acquitted from these charges.

The panel imposed sentences of five (5) and seven (7) years of imprisonment on the accused, resulting in an aggregated sentence of eight (8) years of imprisonment.

The verdict was appealed by the defence counsels - Miro Delevic, Bogdan Vladisavljevic, Milan Vujin - and the accused himself.

6. Issues raised in the appeals

The arguments in the appeals are to a large extent similar the submissions in the previous appeals and hence shall only be briefly summarized.

a.

Defence Counsel Miro Delevic in his appeal, dated 3 November 2008, contends:

1. that the verdict is unclear and incomprehensible in both the enacting clause and the reasoning. The verdict is also unclear when it comes to the legal qualification of the act and application of substantial laws;

2. that the clashes between KLA and the Serbian armed forces could not be characterized as international armed conflicts and that the accused was a civilian with the consequence that he cannot have committed war crimes;

3. that the physical disability of the accused at the time the alleged crimes were committed was not taken into account and that the District Court failed to duly examine the health problems raised by the accused.

b.

Defence Counsel Bogdan Vladisavljevic in his appeal, dated 4 October 2008, contends:

1. that the verdict pronounced on 23 May 2008 is not identical to the written verdict. The discrepancies are of substantial relevance, for example when the pronounced verdict said the accused "forcibly entered" the premises, whereas the written verdict uses the words "broke into", or when the pronounced verdict said the accused had "taken it out of the latter", whereas the written verdict uses the words "taken it away from there";

2. that the enacting clause is unclear as there is no reference to particular provisions specifying the criminal act the accused was convicted for in both counts of the enacting clause;

3. that the enacting clause also lacks motives;

4. that the enacting clause does not refer to provisions that were used as a ground in rendering the sanction against the defendant and it also does not present the manner in which the aggregate punishment was rendered;

5. that the verdict exceeded the indictment in stating that the widely spread terror was directed against the entire ethnic community although the indictment identified the civilian population as the protected object;

6. that the court failed to identify the co-perpetrators and to establish the joint intention;

7. that witnesses G B and S A are not credible;

8. that the court ignored the alibi of the accused and failed to assess and to take properly into consideration the specific health condition of the accused at the time the crimes occurred.

c.

Defence Counsel Milan Vujin in his appeal, dated 3 November 2008, contends:

1. that the indictment was amended numerous time, lastly on 6 May 2008, that way impeding the proper preparation of the defence;

2. that the enacting clause is unclear, contradictory to itself and the reasoning thereof does not offer explanations about the essential facts. In particular the value of the goods, allegedly taken by the accused, was never established although plunder refers to property of great value;

3. that the court overstepped the indictment in convicting the accused for war crimes, committed on 15 April 1999, although in relation to this day the accused was charged merely with causing general danger;

4. that witnesses G. B. and S. A are not credible.

d.

The accused in his appeal, dated 10 November 2008, contends:

1. that the statements of witnesses G. B and S. A cannot be trusted;

2. that on 15 April 1999 he was at work as ambulance driver of the hospital for 24 hours;

3. that due to a leg injury he is physically disabled with a degree of 80 percent and hence was not able to commit the alleged crimes.

The State Prosecutor of Kosovo with opinion, dated 2 March 2009, submits that the verdict does not contain any of the violations raised in the appeals. In particular the State Prosecutor opines that the enacting clause of the verdict is clear, contains logical reasons and is fully supported by the convincing arguments in the reasoning. Furthermore the court of first instance fully complied with the instructions given by the Supreme Court of Kosovo regarding the evaluation of witness statements.

II. Findings of the Supreme Court

1.

The appeals are timely filed and admissible.

a.

Applicable law in the case in question is the Law on Criminal Proceedings (LCP), which was in force as procedural law until the Provisional Criminal Procedure Code of Kosovo (PCPCK, now Kosovo Code of Criminal Procedure - KCCP) entered into force on 6 April 2004. Pursuant to Article 550 of the KCCP criminal proceedings at first instance, in which the indictment was filed before the date of entry into force of the PCPCK but which not have been completed by this date, shall be continued according to the provisions of the previous applicable law until the criminal proceedings are dismissed in a final form by a Ruling or until the judgment rendered at the main trial becomes final.

The indictment against the accused was filed long time before 6 April 2004. Since Article 550 of the KCCP refers to the time the indictment was "filed" it is irrelevant that the indictment during the course of the proceedings was amended numerous times, even after 6 April 2004. Hence the criminal proceedings until the judgment becomes final follow the law in force before 6 April 2004, i.e. the LCP. In accordance with the jurisprudence of the Supreme Court of Kosovo this applies also to the proceedings before the court of second or third instance in order to avoid unsolvable conflicts which would arise from the application of different procedural laws at different stages of the main trial proceedings.

b.

Pursuant to Article 359 Paragraph 1 of the LCP an appeal has to be filed within 15 days from the day the written verdict was delivered.

The verdict of the first instance court was served upon Defence Counsels Miro Delevic and Bogdan Vladisavljevic on 21 October 2008. Since the verdict could not be served upon the accused, who had fled the country before the last day of the main trial, the verdict was posted on the bulletin board of the District Court of Mitrovicë/Mitrovica on 29 October 2008 in accordance with Article 123 Paragraph 4 of the LCP. It is not clear when the verdict was served upon Defence Counsel Milan Vujin. A delivery slip or any other kind of proof of delivery cannot be found in the case file.

Defence Counsel Miro Delevic filed his appeal with the District Court on 5 November 2008 and hence within the period of 15 days. The same applies to the appeal of Defence

Counsel Bogdan Vladisavljevic[1], who posted the appeal on 5 November 2008 in accordance with Article 90 Paragraph 3 of the LCP, and to the appeal of the accused which was filed with the District Court on 11 November 2008 and hence within the period of 15 days after the verdict was posted on the bulletin board of the District Court of Mitrovicë/Mitrovica. The appeal lodged by Defence Counsel Milan Vujin has in any case to be accepted as timely filed because it is not clear when the written verdict was delivered to him.

2.

The appeals are also grounded pursuant to Article 363 item 3 and Article 366 Paragraph 1 of the LCP, because the Court of first instance again did not correctly establish the state of facts.

a.

The Supreme Court of Kosovo in its previous decision, dated 15 July 2004, gave – as above described in detail - clear instructions as to the required scrutiny with which the statements of the witnesses had to be assessed during the second retrial. The Supreme Court gave an exhaustive reasoning for this opinion which is fully sustained by this panel of the Supreme Court.

Particular difficulties regarding the evaluation of witness statements in this case arise from numerous peculiarities. Naturally the events themselves make it very difficult for witnesses to recall with the required certainty singular incidents including the identification of one of the perpetrators and specific acts committed by this person.

A village was shelled, then entered by groups of armed men who, accompanied by the frequent or perhaps even permanent use of firearms, looted and burnt down many houses. The witnesses had to fear for their lives. Many of them lost all their belongings. Most of the witnesses were neighbors and mainly belonged to only two (2) families what suggests as natural that the events were followed by an intense communication among the witnesses regarding their observations, their ideas, guesses and impressions. The witnesses were questioned for the first time by KFOR only months after the events. During the following years they were interrogated again and again, not least due to the fact that the case was twice sent back for retrial and consequently tried three (3) times before the court of first instance. Against this background there is no question that numerous inconsistencies and discrepancies were to be expected which, as the Supreme Court in it previous decision pointed out, do not automatically render the statements as

[1] The date of his appeal "4 October 2008", which can be found on the Serbian as well as the English version, is obviously a typo.

not credible, but require a particularly careful assessment by the court in order to establish the guilt of the accused.

In addition the defence strategy of the accused – conspiracy against him since he had been well known by the witnesses - had to be taken into account, the more so as he had been displayed on TV as "Serbian war criminal" shortly after April 1999.

b.

A careful review of the appealed verdict of first instance, however, reveals that the principles of a thorough examination of evidence were not respected to a fully satisfying extend by the court of first instance.

aa.

The court of first instance after again interrogating most of the prosecution witnesses came to the conclusion that the testimony of only two witnesses is credible: G B and S A .

The fact that the court of first instance in the end believed only these two witnesses, whereas the testimony of not less than twenty-three (23) witnesses was qualified either as not credible or irrelevant, would have been even a stronger reason to assess the testimony of these two (2) witnesses with particular care in order to explain why especially those witnesses had told the truth.

Such careful assessment, however, cannot be found in the appealed verdict. As an example for the lack of the required scrutiny reference has to be made to the evaluation of witness G B testimony. The statements given by him during the course of the criminal proceedings[2] show numerous contradictions with regard to the alleged deeds of the accused.

For example, G B in his statement given on 18 September 1999 testified that two men called "B " and "S ," set the house of X Z on fire, whereas in his testimony given on 10 June 2002 he testified that it had been the accused who had set the house on fire. In his statement given on 25 June 2002 he again blamed a man called "B " with looting and burning X Z house; he specifically even testified that he had not seen the accused looting Z house. In his statement on 17 September 2007 on the other hand he again testified that it had been the accused, now together with "B " who had burnt down the house, this time allegedly after taking out an old woman - B Z - a detail the witness had never described before.

These contradictions, which pertain to the identification as well as the specific participation of the accused, would have required a sound justification in order to accept

[2] in the first instance verdict (English version) described on pages 48 through 51

the testimony of witness G B . as credible. They would also have required an overall assessment together with the testimony of all the other eye-witnesses in order to establish which of the various versions in G B s testimony was to be assigned credibility.

Such assessment, however, is not reflected in the first instance verdict. Instead it is stated that "his testimony on 17th of September 2007 corroborated his above testimonies, i.e. that accused V and B were the persons who entered X Z house; they took out B Z from the house; they returned and set the house on fire; he could not single out who burned X Z 's house but M [3] and B entered the house together and when they left, the house was already on fire"[4].

The glaring contradictions in G B 's testimony, as described above, are not even mentioned in the evaluation of his testimony. On the contrary the verdict states that "all his testimonies are consistent in all material facts ....."[5], and as conclusion the verdict continues that "for all the above reasons the Court finds G B a credible witness and attaches credibility to all his testimonies. ...."[6].

This conclusion cannot be accepted, because logic does not allow that all statements of this witness including their drastic contradictions can be seen as credible.

As mentioned above, the way in which the statements of witness G B was assessed by the court of first instance is just one example for the in general not fully satisfying level of scrutiny with which the evidence was evaluated. The panel of the Supreme Court does not pursue to exhaust all contradictions, inconsistencies and discrepancies of this and the other witnesses, because other aspects of the instructions given by the Supreme Court in its previous decision are not fully respected in the verdict of first instance either. In particular a thorough assessment of the testimony of witnesses G P and S A considering the discrepancies and contradictions between the statements of these two witnesses cannot be found, let alone the required overall assessment of all witness statements together.

As a result the panel of the Supreme Court finds that the evaluation of the prosecution witnesses did not fully follow the guidance given by the Supreme Court of Kosovo.

bb.

Furthermore, the alibi raised by the accused was not duly assessed by the court of first instance.

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[3] The nickname of the accused
[4] See page 52 paragraph 3 (English version)
[5] Se page 52 paragraph 6 (English version)
[6] See page 53 paragraph 12 (English version)

The accused asserted that due to a car accident in December 1970 he had been suffering from a permanent injury of his left leg that had since been disabling him to walk without the support of crutches and consequently made it physically impossible for him to commit the alleged crimes.

In relation to this statement the court of first instance heard two (2) medical experts, Dr. A V and Dr. B B , and additionally thirteen (13) witnesses, namely H S , Dr. D F , Dr. A P , D R , V I , P M , J D , S V , Z R , V M , M M , X B and D K .

Both medical experts presented as results of their assessments similar – nevertheless with certain variations as to some details – findings which can be summarized that way that the accused had been suffering from the leg injury since the time of the car accident. This leg injury made it impossible for him to walk without crutches (Dr. V) or at least to walk more than two hundred (200) or three hundred (300) meters without crutches (Dr. B).

These findings were to a large extend corroborated by most of the witnesses who testified that the accused needed somehow – as to the details there were some discrepancies - the support of crutches, at least when walking longer distances or moving on difficult terrain such as stairs. Only two (2) witnesses, Dr. F F and Dr. A P , testified that they had never seen the accused using crutches.

This evidentiary situation would have required a two-step approach in order to establish beyond reasonable doubt the guilt of the accused: in a first step it would have been necessary to scrutinize all these witness statements as well as the findings of the two (2) experts in order to get as precisely as possible a picture of the physical condition of the accused at the critical time, followed by the second step whether it was still possible to uphold the credibility of witnesses G B and S A in the light of the findings regarding the health condition of the accused.

The panel of the Supreme Court finds that the verdict of first instance cannot be seen as satisfying in assessing these alibi questions.

The verdict of first instance under the headline "findings"[7] is confined to referring mainly to the statements of witnesses Dr. D F and Dr. A P , additionally mentioning only witnesses D R , V I and P M . The relevant testimony of not less than seven (7) other exonerating witnesses is not even mentioned in this context, let alone taken into consideration.

The first instance verdict furthermore holds that the statements of the witnesses who were taken into account "are in agreement with the findings and the testimony of the expert Dr.

[7] Page 83 of the English version

B [8], whose findings in the following paragraph are somehow overruled by the first instance panel based on its own observation during the main trial that "during the last two (2) hearings ..... (the accused) suddenly sprung from his seat and tried to approach the Court to show his left leg and foot"[9].

Based upon this evaluation the court of first instance reached the "considered opinion that given the health condition and physical disability of V in 1999, his physical disability was compatible with his commission of the crimes charged against him"[10].

Due to numerous reasons this cannot be seen as a correct determination of facts.

As a matter of course the court of first instance was obliged to consider all witness statements, not only the statements of a selection of witnesses. Simply ignoring the statements of witnesses who testified in favor of the accused is an intolerable violation of his rights.

Secondly, the statements of the few witnesses used by the first instance court are anything but consistent. Witness D F and A P stated that they never had seen the accused with crutches, whereas witness D . R stated that the accused used crutches when climbing up the stairs and when having difficulties in walking. Witness V I also stated that the accused was limping and using crutches. Similarly witness P M stated that the accused was limping and only able to make a few steps without crutches. Nevertheless an assessment of these conflicting statements and a reasoning as to which facts the court established on the basis of their testimony cannot be found in the first instance verdict.

Thirdly, in the light of the discrepancies between the statements of witnesses F and P on the one hand and witnesses R , I and M on the other hand the conclusion of the first instance panel that the testimony of all these witnesses is "in agreement with the findings and the testimony of Dr. B ", is not understandable.

Fourthly, the court of first instance in the end even overruled Dr. B s as well as Dr. V 's findings - that the accused was at least not able to walk more than a few hundred meters without the support of crutches - by replacing the experts' findings with the own medical "expertise" gained through the observation that the accused was able to move within the courtroom without crutches. In doing so the court of first instance overstepped the scope of its own professional competence and at the same time misjudged the difference between moving a few meters in a courtroom and committing the deeds as described by the eye-witnesses of the alleged criminal acts, i.e. walking down a hill on uneven grounds, carrying a heavy automatic rifle, searching a village while frequently, if not continuously, shooting, entering houses, taking out heavy items etc., all of this taking hours and without using any type of walking aids.

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[8] Page 83 of the English version
[9] Page 84 of the English version
[10] See footnote 8

As a result the panel of the Supreme Court finds that the verdict of first instance also failed to correctly and completely establish the facts pertaining to the alibi raised by the accused. Above all, the thorough and satisfying overall assessment of all incriminating and exonerating evidence together, as demanded by the Supreme Court in its previous decision, cannot be found in the verdict of first instance either.

It might be arguable if each of these flaws regarding the evaluation of evidence, individually seen, would be sufficient to challenge the correct and complete establishment of the state of facts. There is, however, no dispute that the flaws in total and in particular the way in which the alibi of the accused was dismissed by the court of first instance render it impossible to sustain the facts as correctly and completely established.

Hence the appeals were to be granted in accordance with Article 366 Paragraph 1 of the LCP.

3.

As consequence the verdict in accordance with Article 385 Paragraph 1 of the LCP should be quashed and the case sent back to the court of first instance for retrial. The wording of the procedural law clearly does not provide any other remedy. In particular it does not allow amending the first instance verdict.

However, this procedural provision has to be interpreted in the light of the European Convention on Human Rights (ECHR), specifically Article 6 of this Convention which states that every defendant is entitled to criminal proceedings "within reasonable time".

In the case in question another retrial would result in a violation of this right of the accused and hence not be justifiable.

The accused was tried not less than three (3) times at first instance level and not less than three (3) times at the Supreme Court of Kosovo. All three (3) first instance verdicts had to be quashed because the court of first instance did not correctly establish the facts. The criminal proceedings against the accused commenced in 1999, not less than ten (10) years ago. Notwithstanding the fact that during these criminal proceedings until now a large number of conflicting and contradictory evidence was produced, a situation which would be likely to get even worse during a fourth first instance trial, the period of "reasonable time" has clearly elapsed. The number of retrials in combination with the elapse of ten years marks an intolerable delay of proceedings and consequently requires that the criminal proceedings against the accused are brought to a termination in order to protect his basic Human Rights.

Thus the Supreme Court, in order to respect the internationally recognized standards of Human Rights and sustaining its previous jurisprudence[11], refrained from sending the case back for another retrial. Instead, the Supreme Court, applying the principle *in dubio pro reo,* modifies the verdict of first instance in total and acquits the accused from all charges.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
Ap.-Kž. No. 1/2009

Presiding Judge

Norbert Koster

Panel Member

Guy Van Craen

Panel Member

Emilio Gatti

Panel Member

Ferdinando Buatier de Mongeot

Panel Member

Angela Kaptein

[11] See, for example, verdict of the Supreme Court of Kosovo in the case against S F *et al.*, dated 26 June 2008, AP-Kz 393/2006.