Gjykata Supreme e Kosovës
AP – Kž. No. 128/2010
3 Gusht 2010

NË EMËR TË POPULLIT

Gjykata Supreme e Kosovës në kolegjin e përbërë nga Gjyqtari i EULEX-it Norbert Koster, Kryetar i Kolegjit, me Gjyqtarët e EULEX-it Maria Giuliana Civinini dhe Gjyqtarët e Gjykatës Supreme Marie Ademi dhe Nesrin Lushta, anëtare të kolegjit, të ndihmuar nga Jacqueline Ryan dheSvetoslava Savova, procesmbajtëse,

në lëndën penale kundër të pandehurës F B , emri i babait , emri i vajzërisë së nënës , e lindur më 12 Mars 1969 , e Kosovës, e martuar, e tre (3) fëmijëve), din shkrim dhe lexim, amvise, me gjendje ekonomike mesatare dhe asnjëherë më parë e dënuar, e akuzuar për veprën penale të vrasjes në kundërshtim me Nenin 146 të Kodit Penal të Kosovës (KPK), e mbajtur në paraburgim nga data 24 Maj 2007 deri më 23 Janar 2008,

duke vendosur sipas ankesave të paraqitura nga Avokati Mbrojtës Zeqir Bërdyna (të datës 23 Shkurt 2010) në emër të pandehurës si edhe nga Avokati Haxhë Nikçi (të datës 18 Shkurt 2010) në emër të palës së dëmtuar A B kundër aktgjykimit P. Nr. 145/2009 lëshuar nga Gjykata e Qarkut të Pejës më 14 Dhjetor 2009,

në seancën e mbajtur më 3 Gusht 2010, pas këshillimit dhe votimit, lëshon këtë,

AKTGJYKIM

Ankesa e avokatit mbrojtës Zeqir Berdyna është pjesërisht e pranuar dhe aktgjykimi i shkallës së parë ka modifikuar me sa vijon:

E akuzuara është fajtore për Vrasje të kryer në Gjendje të Afektit Mendor në shkelje të Nenit 148 të KPK.

Për këtë vepër penale të akuzuarës i është shqiptuar dënimi me burgim prej 3 (tri) vite e gjashtë (6) muaj.

Për veprën penale të Posedimit të Paautorizuar dhe Shfrytëzim të Armës, e akuzuara [illegible] tanimë ka marrë dënimin përfundimtar prej tetë (8) muaj burgim.

Në këtë mënyrë të akuzuarës i është shqiptuar dënim i përgjithshëm prej katër (4) vite burgim për të dy veprat penale.

Kohën të cilën e akuzuara e ka kaluar në paraburgim do të llogaritet.

Dënimi që e akuzuara të paguaj kompensim për palën e dëmtuar është anuluar. Pala e dëmtuar duhet të bëj kërkesën për kompensim përmes kontestit civil.

Ankesa e palës së dëmtuar është refuzuar si e pabazë.

Arsyetim:

I. Historia Procedurale

Më 24 Maj 2007 rreth orës 08:20 në viktima M B është qëlluar për vdekje. Gjuajtja ka ndodhur në shtëpinë e V B i cili është bashkëshorti i të akuzuarës.

Hetimet penale kundër të pandehurës dhe burrit kanë filluar më 25 Maj 2007. Hetimet kundër burrit të pandehurës më vonë kanë përfunduar. Me aktakuzën e datës 2 Gusht 2007 , Prokurori Publik i Qarkut të Pejës e ka akuzuar të pandehurën me Vrasje në shkelje të Nenit 146 të KPK dhe me veprën penale Mbajtja në pronësi, në kontroll, në posedim ose në shfrytëzim të paautorizuar të Armëve sipas Nenit 328 paragrafi 2 i KPK.

Aktakuza është konfirmuar nga Gjykata e Qarkut të Pejës me Aktvendimin e datës 18 Shtator 2007.

Shqyrtimi i parë gjyqësor është mbajtur i mbyllur për publikun prej datës 21 deri më 23 Janar 2008. E pandehura është shpallur fajtore për veprën penale të Mbajtjes në pronësi, në kontroll, në posedim ose në shfrytëzim të paautorizuar të Armëve dhe është liruar nga akuza për vrasje. E pandehura është dënuar me tetë muaj burgim. Prokurori publik dhe pala e dëmtuar kanë paraqitur ankesë kundër Aktgjykimit të datës 23 Janar 2008.

Me vendimin e datës 05 Shkurt 2009 (Ap - Kž Nr. 333/2008), Gjykata Supreme e Kosovës ka konfirmuar aktgjykimin e shkallës së parë në lidhje me dënimin. Sa i përket faljes, aktgjykimi i shkallës së parë është shfuqizuar dhe lënda është kthyer mbrapa për rigjykim. Gjykata Supreme e Kosovës ka udhëzuar Gjykatën e shkallës së parë që në mënyrë të qartë dhe gjithëpërfshirëse të deklaroj se cilat fakte i konsideron të vërtetuara ose jo të vërtetuara dhe arsyetimet në lidhje me te – posaçërisht në lidhje me situatën e mbrojtjes së nevojshme ne të cilën Gjykata e shkallës së parë ka konstatuar se e pandehura ka vepruar. Gjykata Supreme, në veçanti, ka urdhëruar

të kontrollohet thika e gjetur afër trupit të viktimës për gjurmë të gishtërinjve, që të shqyrtohet dhe vlerësohet raporti i autopsisë së trupit të viktimës dhe po që se e nevojshme të sigurohen deklarimet e ekspertëve të mjekësisë ligjore dhe balistikës.

Kryetarja e Asamblesë së Gjyqtarëve të EULEX-it duke u bazuar në kërkesën e paraqitur nga pala e dëmtuar, më 8 Prill 2009, ka lëshuar një vendim që kolegji të jetë i përbërë nga dy (2) Gjyqtarë të EULEX-it dhe një (1) Gjyqtarë vendor.

Rigjykimi është mbajtur i mbyllur për publikun në mes të datës 15 Shtator dhe 14 Dhjetor. Me aktgjykimin e datës 14 Dhjetor 2009, Gjykata e Qarkut të Pejës ka shpallur të akuzuarën fajtore për vrasje në kundërshtim me Nenin 146 të KPK dhe e ka dënuar me dhjetë (10) vite burgim. Përveç kësaj e pandehura është dënuar me pagesë prej dhjetë mijë (10 000) euro palës së dëmtuar si kompensim të pjesshëm për dëmtimin e vuajtur.

Aktgjykimi me shkrim u është dërguar palëve në mes të datës 9 Shkurt dhe 6 Mars 2010.

Më 22 Shkurt 2010 Avokati Mbrojtës Zeqir Bërdyna në emër të akuzuarës ka paraqitur ankesë kundër aktgjykimit.[1] Më 19 Shkurt 2010 avokati Haxhë Z. Nikçi përfaqësues i palës së dëmtuar A B ka paraqitur ankesë kundër aktgjykimit.

II. Çështjet e ngritura në ankesa:

Avokati Mbrojtës Zeqir Bërdyna propozon të lëshohet një vendim që do të ndryshonte aktgjykimin e Gjykatës së Qarkut të Pejës dhe e pandehura të lirohet 'nga aktakuza".

Ai pohon për shkelje esenciale të dispozitave të kodit të procedurës penale, shkelje të kodit penal, vërtetim të gabuar ose pjesërisht të gabuar të fakteve. Për më tepër, ai kundërshton llogaritjen e dënimit.
Avokati Mbrojtës Zeqir Berdyna në veçanti pretendon:

a. Dispozitivi i aktgjykimit ka mungesë të përshkrimit të fakteve, posaçërisht sa i përket vendit të krimit, mënyra dhe rrethanat tjera të kryerjes së veprës penale. Po ashtu motivi dhe dashja e të pandehurës nuk janë përmendur në aktgjykim.

b. Faktet nuk janë vërtetuar siç duhet. E pandehura e ka kryer krimin në një akt të vet-mbrojtjes së nevojshme. Viktima e ndjerë e kishte dhunuar atë më 2003 dhe herën e dytë më vonë, pasi që ai ishte liruar nga burgu ku kishte vuajtur dënimin për një vepër penale tjetër të rëndë. Ditën kritike ajo ishte e vetme në shtëpi. Kishte dalë në oborr kur kishte vërejtur, tani viktimën e ndjerë, duke u ngjitur shkallëve të

[1] Në bazë të vulës së Gjykatës, ankesa është pranuar më 22 Shkurt. Megjithatë, edhe ankesa me origjinal tregon datën 23 Shkurt 2010.

he had to serve a sentence for another serious criminal offence. On the critical day she was alone at home. She went out in the yard where she noticed the now late victim climbing the stairs to the men's guest room. At that moment she got depressed, wondering why this man destroyed her life. She went to her bedroom, took a hunting rifle loaded it and went to the men's guest room. She did not intend to kill the victim. She rather wanted to make him aware not to appear any more in her house as she had been raped two times by him already. She took the gun for self-defence because she knew that the victim had always been armed when raping her. She entered the men's guest room where she was told by the victim who stood at the window "Bitch, don't you think you can scare me with a weapon in your hands". At the same moment he took a knife out of his pocket and attempted to grab her arm with the other hand. She asked him three times to leave the room, but the victim did not go. Instead he approached her. When he was about two meters away she felt lost and aimed the rifle at the window in order to frighten the victim and make him step back. Then she fired at the window which was the same direction as the position of the victim. She does not remember two other shots. Neither does she remember how she left the men's guest room and walked down the stairs. After a short while police arrived and she got arrested.

Witnesses S T , R B , V B and A B are relatives of the late victim and attempted in their statements to degrade the defendant by pretending that she had been in love with the victim since 2003.

The defendant was in her house attacked by the victim three times and acted in an attempt to defend her life and her ethical and physical integrity.

The representative of the injured party proposes to amend the judgment of the first instance Court and to impose a more severe sentence onto the defendant. He contends that the defendant had planned the murder of the victim. Hence the imprisonment sentence of ten (10) years is not in proportion with the nature of the committed criminal offence. It should be taken into account that crimes committed out of blood feud should be treated as relicts of the past which do not have a place in a modern society.

The Office of the State Prosecutor of Kosovo (OSPK) with opinion, dated 7 May 2010, proposes to reject the appeal of the accused and to grant the appeal of the injured party and impose a more severe punishment onto the accused. The OSPK opines that the appealed judgment does not contain substantial violations of the provisions of criminal procedure. In particular the OSPK claims that the enacting clause does not contain internal contradictions or inconsistencies between itself and the grounds, and it is clear and comprehensible. Reasoning was provided

essential facts. Above that, the defense has not specified in the appeal other alleged violations of the provisions of criminal procedure.
The factual situation was correctly and completely determined and the conclusion of the Court of first instance that the accused has committed the criminal offence Murder pursuant to Article 146 CCK is accurate. The Court has correctly denied that the crime was committed in Necessary Defense.

III. Findings of the Supreme Court

1.

The appeal filed on behalf of the accused is timely filed, admissible and partially grounded.

a.

The Supreme Court of Kosovo finds that the enacting clause of the first instance judgment is not entirely in compliance with the provisions of the criminal procedure law.

The elements of a judgment are defined by Article 396 Paragraph 1 of the KCCP, according to which a judgment shall have an introduction, the enacting clause and a statement of grounds. The obligatory content of the enacting clause as the *tenor sententiae* is specified in Paragraphs 3 and 4 of Article 396 of the KCCP. Paragraph 4 of Article 396 of the KCCP provides that the enacting in case of a conviction shall contain the necessary data specified in Article 391 of the KCCP.

Article 391 of the KCCP in the respective part reads as follows:

> *(1) In a judgment pronouncing the accused guilty the court shall state:*
>
> > *1) The act of which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends;*
> >
> > *2) The legal designation of the act and the provisions of the criminal law applied in passing the judgment;*
> >
> > *3) .....*

Thus the enacting clause as the very essential part of the judgment has to contain not only the legal qualification of the act but also a precise and detailed description of a

facts and circumstances which are the basis for the application of the legal provisions. Any kind of ambiguity or contradiction renders the enacting clause incomprehensive[2].

In the case in question the enacting clause of the first instance judgment does not entirely reflect these legal requirements. The accused was found guilty

> *"Of the criminal offence of **Murder** of M* 8 *, pursuant to Article 146 of the PCCK, committed in on the 24th of May 2007."*

Only a small number of facts are mentioned in this enacting clause, namely the name of the victim as well as date and place of the crime. This is not fully sufficient. The required factual description of the concrete act committed by the accused, i.e. the way in which he deprived the victim of his live, is missing. The same applies to her premeditation which is a necessary precondition for murder, however not mentioned in the enacting clause at all[3].

As a result the enacting clause leaves it open in which way the victim was killed and in which manner exactly the accused executed that killing.

Pursuant to Article 403 Paragraph 1 item 12 of the KCCP it is an absolute substantial violation of the provisions of criminal procedure if the enacting clause of the judgment was incomprehensible. Pursuant to Article 424 Paragraph 1 of the KCCP this violation does not allow any other options for the Court of Appeal than annulling the judgment and returning the case for retrial. The possible exceptions – see Articles 424 Paragraph 2 and 426 Paragraph 1 of the KCCP – do not apply as they refer to violations of the provisions on criminal procedure governed by items 5, 8, 10 and 11 of Article 403 Paragraph 1 of the KCCP.

It might be argued that the only solution foreseen by the law – annulment of the judgment and retrial just for formal reasons – is too strict and needs a corrective interpretation of the law in order to avoid retrials for merely formal reasons. In the case in question, however, a precise and accurate statement of facts cannot be found in the grounds of the judgment either. On the contrary the lack of factual description in the enacting clause finds its correspondence also in the reasoning of the judgment which is not fully in compliance with the provisions of the law. Article 396 Paragraph 7 of the KCCP provides that the Court in the statement of grounds shall state

> *"clearly and exhaustively which facts it considers proven or not proven".*

Such statement, which has to be a precise, accurate and comprehensive factual description of the events, cannot be found in the first instance judgment. The grounds

[2] Supreme Court of Kosovo, Ruling dated 6 April 2010, AP Kž. No. 368/2009

[3] For the omission regarding the premeditation see also Momcillo Grubac and Tihomir Vasiljević, Commentary on the (until April 2004 applicable) Law on Criminal Proceedings, 2nd edition, 1[illegible], Paragraph 52 to Article 364 item 11; see also Supreme Court of Kosovo FN 2

are even lacking a summary of facts which were established beyond reasonable doubt or taken into account based upon the principle *in dubio pro reo*. The grounds are particularly unclear when it comes to the motive of the accused for depriving the victim of his life. The accused presented a specific explanation as motive for the crime: sexual violence committed by the accused against in the past. It is not clear whether the first instance panel deemed these facts as established or not. On the one hand it appears that the description given by the accused was accepted[4], whereas on the other hand the first instance panel did not seem to be sure[5]. In addition, when calculating the punishment the first instance panel took as mitigating circumstance into account

> *"the presence, in the past, of serious episodes of violence from M B against "*[6],

not assessing, however, whether these circumstances should have resulted in a conviction for a less serious crime such as murder committed in a state of mental distress.

Hence the grounds of the first instance judgment reflect an incomplete determination of facts. Since the accused gave a clear, detailed and plausible explanation for the crime, the Court of first instance was obliged by the principles of *presumption of innocence* and *in dubio pro reo* as the most fundamental rights of the defendant enshrined in Article 6 of the European Convention on Human Rights to determine whether the respective facts have to be established or should be dismissed based upon evidence which proves the narration of the accused untrue. These principles, which ensure that the rights of the defendant are fully respected in criminal trials, require that the Court is convinced beyond reasonable doubt that the defendant committed the crime. Any doubts to that regard have to be respected and taken into account in favor of the defendant.

Based upon these reasons in a case like the one in question, where the accused claims necessary self-defence or other reasons which might diminish his or her criminal liability, it falls too short to concentrate only on the fact that the accused without any doubt deprived the victim of his life. This in itself is not sufficient to establish the individual personal guilt of the accused. The law provides numerous legal provisions which allow different levels of classification of the act of killing another person. The range varies from aggravated murder as the most serious alternative to not even being a criminal act as the most favorable alternative, and consequently the law foresees different explicitly specified levels of personal guilt – aggravated murder, murder, homicide, murder committed in a state of mental distress - and even options which exclude guilt of the perpetrator and prohibit imposing a punishment – necessary self-defence or extreme necessity. The principles of *presumption of innocence* and *in dubio pro reo* require to establish beyond reasonable doubt the precise level of personal guilt of the defendant.

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[4] See 3.4.3.2. of the first instance judgment
[5] See 3.4.3.3. of the first instance judgment
[6] See 4 "The Punishment" of the first instance judgment

Hence a scope of review by a Criminal Court which referred only to the act of killing would not satisfy the requirements of a correct and complete determination of facts as it would not allow establishing the appropriate legal qualification of the act which is the necessary precondition for the correct determination of the personal guilt and consequently of the appropriate sentencing of the defendant.

The principle of *presumption of innocence* requires that the Court is convinced beyond reasonable doubt that alternatives which would result in an acquittal of the defendant can be excluded. Clearly this does not require the Court to *ex officio* consider all theoretically possible alternatives. In a situation, however, where the defendant in his or her defence gives a narration of the events, the Court is obliged to assess this narration with due diligence and full respect for the principle of *presumption of innocence*. Consequently the Court has to evaluate whether the description of the events by the defendant is plausible and reasonable and, if yes, whether there is evidence which allows the conclusion beyond reasonable doubt that the version submitted by the defendant is not true. Otherwise the burden of proof would be shifted on to the defendant who would have to proof his or her innocence[7].

Likewise, in accordance with the principle *in dubio pro reo* the Court is obliged to carefully evaluate whether the narration given by the defendant allows the application of a provision of the criminal law which would result in a less severe punishment. Consequently the Court has again to evaluate whether the description of the events by the defendant is plausible and reasonable and, if yes, whether there is evidence which allows the conclusion beyond reasonable doubt that the version submitted by the defendant is not true. Only this approach guarantees full respect for the principle *in dubio pro reo*.

To sum it up, an overall assessment of the presented facts, which might be legally relevant, in their entirety is required in order to correctly and precisely establish possible guilt and the appropriate sentencing of the defendant.

Based upon these principles the Court of first instance should in the case in question have determined whether the description of facts regarding the history of and the motive for the crime, as submitted by the accused, was accepted or disproved. The respective omission results in an incomplete determination of facts with the consequence that the first instance judgment would have to be annulled and the case sent back for retrial pursuant to Article 424 Paragraph 3 of the KCCP.

However, Article 424 Paragraph 4 of the KCCP provides that the Appellate Court shall not annul the judgment of the Court of first instance when the only reason for annulling it is an erroneous determination of the factual state of affairs and where all that is required for a correct determination is a different assessment of already determined facts and not the collection of new evidence or the repetition of previously produced evidence. In such cases the Appellate Court shall act according to Article 426 of the KCCP, i.e. modify the judgment of the Court of first instance.

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[7] Supreme Court of Kosovo, judgment dated 11 December 2009, PKL.-Kzz. No. 23/2009; the s[illegible] other European Countries - for the United Kingdom, for instance see http://www.cps.gov.uk/legal/s_to_u/self_defence/; to the prohibition in general to shift the burden of proof onto the accused see judgments of the European Court of Human Rights in the case[illegible] *Austria* and *Murray v. the United Kingdom*

The Supreme Court of Kosovo holds that the evidence produced in first instance is fully sufficient to correctly and completely establish the state of affairs. Thus the Supreme Court, notwithstanding the violations of the procedural law and based upon Article 424 Paragraph 4 of the KCCP as well as Article 6 of the European Convention of Human Rights, refrains from quashing the first instance judgment and sending the case back for another retrial, in doing so giving particular weight to the fact that the case was tried at first instance two (2) times already.

b.

Regarding the modifications of the first instance judgment the Supreme Court points out the following:

As mentioned above the narration presented by the accused regarding the events, which happened prior to the killing of the late victim, is detailed and absolutely plausible. Hence this narration has in a first step to be accepted by the Court, although the accused is not able to produce any evidence regarding the acts of sexual violence committed by the late victim against . Otherwise the burden of proof would be shifted onto the accused.

In a second step it has to be assessed whether there is evidence which allows disproving as untrue the narration of the accused beyond reasonable doubt. Such evidence, however, cannot be found in the case in question. The witness statements regarding an alleged love affair between the accused and the late victim are not credible. To this regard the panel of the Supreme Court refers to the respective assessment in the first instance judgment[8] in order to avoid mere repetitions.

As a result the description of facts presented by the accused – two (2) cases of sexual violence committed by the accused against and further threats – has to be accepted in accordance with the principle *in dubio pro reo*.

This modification of the factual situation requires also an adaption of the legal qualification.

To this regard the panel of the Supreme Court is, to begin with, in agreement with the first instance Court that the accused cannot successfully claim necessary self defence. Even taking into consideration that the victim might have entered the premises of the accused without permission, it must not be ignored that the accused took the hunting rifle from the bedroom, loaded it and then went to the victim although husband and mother in law were present nearby. This is not a situation in which an imminent attack of the victim against the accused can be established.

The deed of the accused, however, clearly shows the elements of murder committed in a state of mental distress pursuant to Article 148 of the CCK.

[8] See 3.4.2. of the first instance judgment

The accused, through no fault of her own, was in a state of severe shock caused by the acts of sexual violence committed by the victim against her and his announcements of repeating them. The victim had forced her two (2) times to sexual intercourse against her will. In addition he had taken a picture of her naked body which he kept in his camera, threatening her that he would publish this photograph on the internet in case she reported him. Moreover, the victim had threatened her that he would do the same to her daughter. Although the first case of forced sexual intercourse had happened years ago, there is a link between the events. Shortly after the first case the victim had for a few years to serve a punishment of imprisonment which was imposed onto him for another crime (robbery), a fact which made the accused hope that the violence against her would have come to an end. After his release from jail, however, and just a few weeks before the accused deprived him of his life, the second case of forced sexual intercourse happened, leaving no space for the accused to believe that the victim was willing to stop his violent behaviour. Even worse, shortly before this second case of violence the mother of the victim, whom the accused had asked for help after the first case, had died. Due to her death the accused did not have a person any more to which she would have dared to report the ongoing violence. Hence she felt helpless regarding further violence of the victim who did not fail to announce further acts of such violence against her.

On the critical day all of this amounted to a state of mental distress at the latest when the victim did not comply with her order to leave her house. The victim again had taken the liberty to enter the premises of the accused, he entered even the house and he again threatened her, that way clearly expressing that he would continue ignoring her will.

It is without any doubt plausible that the accused through this behaviour in the light of the previous acts of sexual violence against her reached the state of mental distress, and indeed she showed clear signs of such an exceptional mental state during and after the commission of the crime.

Witness V B , the husband of the accused, stated in the main trial on 22 September 2009 that he entered the room where the shooting happened after the second shot and saw his wife firing the third shot. He shouted at her and tried to grab her and take her away. She, however, did not react. It was not even clear to him whether she heard him because she did not even look in his direction. She just turned around without saying anything and, since the weapon followed her movement, somehow pointed the rifle at him. He was afraid she might shoot him and left the room. This testimony clearly reflects signs of mental distress of the accused who could not even be approached or reached by her husband. Also the behaviour of the accused right after the commission of the crime shows clear signs of mental distress. She left the house and sat outside on the stairs, still holding the rifle and not interested in anything that was going on around, somehow mentally absent and not even responding to her husband's questions. This corresponds with the partial lack of memory as mentioned by the accused herself. The accused stated that she remembers only the first shot and has no recollection whatsoever as to the following two shots and the events thereafter. It is noteworthy that the accused did not use this lack of memory as an excuse because she confessed the first - lethal - shot and never denied having deprived the victim of his life. In particular in the light of the testimony of her husband her statement regarding the lack of memory can be seen as credible. Sud[illegible]

partial lack of memory during the commission of an admitted crime is a typical sign of mental distress.

As a result the panel of the Supreme Court of Kosovo has no doubt that the accused acted in a state of mental distress. Consequently the Supreme Court modified the first instance judgment respectively pursuant to Article 424 Paragraph 4 and Article 426 of the KCCP and found the accused guilty of murder committed in a state of mental distress pursuant to Article 148 of the CCK.

In determining the appropriate punishment within the range of one (1) to ten (10) years imprisonment, foreseen by Article 148 of the CCK, the Supreme Court took into account all aggravating as well as mitigating circumstances.

In particular the Supreme Court noted as mitigating circumstances the family status of the accused and the fact that she does not have a criminal record. In addition it cannot be ignored that she and her family are now subject to threats and intimidations by the late victim's family.

Taking all relevant circumstances into account the Supreme Court of Kosovo imposed for the crime of murder committed in a state of mental distress a sentence of

three (3) years six (6) months imprisonment

upon the accused.

Since the accused was furthermore found guilty for the criminal offence of unlawful possession of a weapon and sentenced to eight (8) months imprisonment for that criminal offence, an aggregate punishment has to be determined pursuant to Article 71 of the CCK.

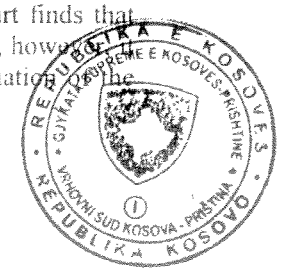
Pursuant to Article 71 Paragraph 2 of the CCK the aggregate punishment must be higher than each individual punishment but may not be as high as the sum off all prescribed punishments.

Within this range the Supreme Court of Kosovo again took all relevant aggravating and mitigating circumstances into account and imposed an aggregate punishment of

four (4) years imprisonment

upon the accused.

Regarding the condemnation of the accused to pay ten thousand (10 000) Euros as partial compensation to the injured party the panel of the Supreme Court finds that such condemnation in general cannot be objected. In the case in question, however, it is not possible to find any facts which would allow even a rough estimation of the



damage of the injured party. Thus the condemnation of the accused to pay partial compensation is quashed.

2.

Based upon the above reasons the appeal of the injured party is ungrounded.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
AP – Kž. No. 128/2010

Presiding Judge

Norbert Kosten

Panel Member

Maria Giuliana Civinini

Panel Member

Gerrit-Marc Sprenger

Panel Member

Marie Ademi

Panel Member

Nesrine Lushta

Supreme Court of Kosovo
AP – Kž. No. 128/2010

Dissenting opinion of Judge Maria Giuliana Civinini
in the case against F B charged with the criminal act of murder contrary to Article 146 of the Criminal Code of Kosovo (CCK)

In the session held on 3 August 2010 the Supreme Court of Kosovo rendered the judgment partially granting the appeal of defense counsel Zeqir Berdyna. The first instance judgment has been modified and the accused has been declared guilty of Murder committed in a State of Mental Distress in violation of Article 148 of the CCK.

The undersigning Supreme Court Judge, MG. Civinini, panel member in this case and present at all stages of the actual procedure before the Supreme Court, does not concur with the mentioned decision of the Supreme Court in particular when the Supreme Court decided that the crime committed by F B is to be qualified as "Murder committed in a state of mental distress" (art. 148 CCK).
Therefore, the following dissenting opinion, based on legal and factual considerations of the undersigning judge should be addressed:

1. The charge of murder in violation of Article 147 CCK brought against the defendant (according to the indictement filed on 2 August 2007 and confirmed on 18 September 2007) is to be considered as proven: on 24th 2007 F B , saw M B , cousin of her husband and neighbor, to enter in her house (through a window) and to head towards the upper floor and the guest room (the so called "men' room); she went to her apartment, took her husband' hunting rifle, loaded it and put some bullet in her pocket; then she joint the upper floor and from the door of the guests' room saw M B looking out of the window; as he turned towards her, she shot attending the victim at the stomach; he fall down on the belly; she reloaded the rifle and shot him twice in the back in a very quick sequence.
These facts have been correctly determined by the first instance Court as confirmed also by the appeal decision.
The statement of the defendant (to have been raped by the victim two or three [illegible] year 2000 and the crime) is not supported by credible information neither evid[illegible]s.

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2. The criminal conduct of the accused cannot be qualified as Murder committed in a state of mental distress ex Article 148 CCK.

3. Article 148 CCK is not an autonomous crime but a special mitigating circumstance of the crime of murder. In this sense the following considerations should be addressed: 1) Article 148 CCK does not contain an autonomous description of the criminal conduct either of the objective and subjective elements of the criminal offense (*dolus*, intention); 2) the *"legally protected interest"* is the similar for murder and for Article 148 CCK (human life); 3) there is a complete overlap between the criminal offense of murder and conduct described in Article 148 CCK; 4) Article 148 CCK includes elements that are not required to conclude that indeed the crime of murder has been committed; 5) the cause of *stress/shock* additionally described in Article 148 is an external element to the conduct of murder, an antecedent of it that does not justify (like in case of self-defense) the conduct itself but implies a reduction of penalty.

4) This appreciation has relevant consequences regarding the burden of the proof: the public prosecutor has the burden to provide full evidence of the objective elements (conduct), subjective elements (guiltiness), the absence of justification (any just cause for committing an act that otherwise would be a crime) and the aggravating circumstances but the public prosecutor does not have the burden to prove the attenuating circumstances; in this sense, the attenuating circumstances imply a special penalty in favor of the defendant and therefore it is up to the defendant to prove it (or at least to present detailed and credible facts that allow a meaningful investigation with the consequence of adverse inference if the party fails to propose such facts).

5) To put the burden of the evidence of a mitigating circumstance on the party who propose it is not contrary to article 6 ECHR and the principle of presumption of innocence with the corollary of the principle *in dubio pro reo*. Actually, it is not the evidence of the crime but the evidence of factual elements having effects only on the penalty. This is confirmed by the discipline of the so called "alibi" (*id est*: "When a person, charged with a crime, proves (*se eadem die fuisse alibi*) that he was, at the time alleged, in a different place from that in which it was committed, he said to prove an alibi, the effect of which is to lay a foundation for the necessary inference [illegible]

he could not have committed it."), art. 308 CPCK ("No later than eight days after the defense counsel receives the materials provided for under Article 307 of the present Code from the prosecutor or no later than at the confirmation hearing or, where there is no such hearing, before the beginning of the main trial, whichever is later, the defense shall, where appropriate: 1) Notify the prosecutor of the intent to present an alibi, specifying the place or places at which the defendant claims to have been present at the time of the alleged criminal offence and the names of witnesses and any other evidence supporting the alibi; 2) Notify the prosecutor of the intent to present a ground for excluding criminal liability, specifying the names of witnesses and any other evidence supporting such ground; and 3) Provide the prosecutor with the names of witnesses whom the defense intends to call to testify.")

6) And, in this case, the defendant has not provided the slightest evidence of the mitigating circumstance of *stress/shock* established in Article 148 CCK. The single statement/allegation of the defendant cannot be taken into any consideration; it is just a statement and has to be supported by appropriate evidence. If we affirm that in these kind of cases (when we only have a simple statement, no evidence) we should apply the principle *in dubio pro reo*, we place the burden of a negative evidence (absence of attenuating circumstances) on the public prosecutor. The consequences of the general application of this reasoning would be of serious concern: a murder can escape the right penalty with a simple allegation of the defendant.
Besides, in relation to the statement of the defendant (which is not enough *per se* to justify the application of Article 148 CCK), it should be observed that there is not only no evidence of rape (two episodes allegedly committed by the victim after the war and some time before the murder) the more several credible witnesses have affirmed that there was a love affair between the two (the fact that the witnesses are relatives or friend of the victim and under the stress of loosing a young member of the family is not enough to consider the witnesses not credible at all).
In this sense, a relevant fact that has been proven: when the victim was attacked and killed, he was at the defendant's place without shoes and looking out of the window in a very relaxed manner. This fact clearly shows that the stressful environment of fear/threat described by the defendant to justify the application of Article 148 never existed.

7) In any case, even in the eventuality of the episodes of rape in the past, there was [illegible] immediate reaction (whatsoever) following the rape; on the contrary the *stress/shock* [illegible] long time after the events that haven't the characteristics of systematic [illegible] happened.

maltreatments. This creates a delicate situation because by assuming that the single statement of the defendant should be considered as enough evidence and a justification to apply article 148 CCK surreptitiously introduces in the criminal system a *"honor cause"* (-revenge) as mitigating circumstance of the murder of a rapist (or, even worse, in cases of the murder of the lover of a married woman). In this sense the European countries who had this *"honor cause"* as mitigation circumstance in their criminal legislation abolished it long time ago for not to link anymore *"ethic/honor"* and consideration for human life. It has to be considered also that article 147 n. 9 CCK considers revenge and other basic (evil) motives as an aggravated circumstance. If between the conduct of the murder and the one of the victim there is not a relation of action/reaction (that exists also in case of habitual and ongoing maltreatments), the crime falls rather under article 147 n. 9 then under article 148 CCK.

Prishtina, 13/09/2010

Marja Giuliana CIVININI

REPUBLIKA E KOSOVËS
GJYKATA SUPREME E KOSOVËS-PRISHTINË
VRHOVNI SUD KOSOVA-PRIŠTINA
REPUBLIKA KOSOVO

Supreme Court of Kosovo
AP – Kž. No. 128/2010

Dissenting opinion of Judge Maria Giuliana Civinini
in the case against F 8 charged with the criminal act of murder contrary to Article 146 of the Criminal Code of Kosovo (CCK) on the point of the legality of the enacting clause.

In the session held on 3 August 2010 the Supreme Court of Kosovo rendered the judgment partially granting the appeal of defense counsel Zeqir Berdyna.

On the point, raised by the defense counsel, of the invalidity of the enacting clause (depending from lacks a description of facts, in particular with regard to the crime scene, the way and other circumstances of the commitment of the criminal offense), in the reasoning it is affirmed:

"Only a small number of facts are mentioned in this enacting clause, namely the name of the victim as well as date and place of the crime. This is not fully sufficient. The required factual description of the concrete act committed by the accused, i.e. the way in which he deprived the victim of his live, is missing. The same applies to her premeditation which is a necessary precondition for murder, however not mentioned in the enacting clause at all.
As a result the enacting clause leaves it open in which way the victim was killed and in which manner exactly the accused executed that killing. Pursuant to Article 403 Paragraph 1 item 12 of the KCCP it is an absolute substantial violation of the provisions of criminal procedure if the enacting clause of the judgment was incomprehensible. Pursuant to Article 424 Paragraph 1 of the KCCP this violation does not allow any other options for the Court of Appeal than annulling the judgment and returning the case for retrial. (....) It might be argued that the only solution foreseen by the law – annulment of the judgment and retrial just for formal reasons – is too strict and needs a corrective interpretation of the law in order to avoid retrials for merely formal reasons. In the case in question, however, a precise and accurate statement of facts cannot be found in the grounds of the judgment either. (....) The Supreme Court of Kosovo holds that the evidence produced in first instance is fully sufficient to correctly and completely establish the state of affairs. Thus the Supreme Court, notwithstanding the violations of the procedural law and based upon Article 424 Paragraph 4 of the KCCP as well as Article 6 of the European Convention of Human Rights, refrains from quashing the first instance judgment and sending the case back for another retrial, in doing so giving particular weight to the fact that the case was tried at first instance two (2) times already.".

I unfortunately cannot concur in the finding that the enacting clause is invalid in view of the following.

1. The reasoning is inconsistent with the enacting clause that doesn't contain the declaration of invalidity of the first instance enacting clause. It doesn't comply either with not in compliance with the procedural rules (articles 120 and 121 PCCK).

2. The general legal requirements of enacting clauses as a part of the judgment ha[illegible] clarified (see also Supreme Court, I. Xh 12 April 2010) :

a) The first instance judgment shall be composed of: an introduction, the enacting clause and a statement of grounds (art. 396, par. 1 CPCK); the enacting clause has to include the personal data, the decision (condemnation or acquittal) and in case of conviction: the act of which the defendant has been found guilty with indication of the relevant criminal offense and the essential fact and circumstances and the punishment (art. 396 par. 3 and 4 in connection with art. 391 CPCK); the statement of grounds has to indicate the factual and legal base of the decision, of the evaluation of evidences, and of the circumstances which are seen as being relevant to the punishment (art. 396 par. 6 to 10).

b) The judgment is considered as a unique by art. 402 and 403

c) Based on art. 403 par 1 point 12, a judgment can be challenged on the ground of a substantial violation of the provision of criminal procedure if "the enacting clause of the judgment was incomprehensible or internally inconsistent or inconsistent with the grounds for the judgment . "

e) Taking in consideration that the enacting clause is an integral part of the judgment it has to be read and interpreted in connection with the other parts of the judgment especially with the statement on grounds

f) Based on the general principle that an act is to be interpreted in the way in which it has a meaning and not in the way in which it has no meaning, the enacting clause and the statement of grounds have to be read together (the law prescribes that they have to be consistent with each other); only if the enacting clause remains incomprehensible or inconsistent after having been read in connection with the statement of grounds, it can be declared unlawful and the judgment can be annulled on the base of this contradiction.

g) This conclusion is based also on the principle of judicial economy which has to be applied keeping in mind the aim of the dispute settlement system. The aim is to resolve the matter at issue and *"to secure a positive solution to a dispute"*. In assessing the allegation of legal error, it has to be considered whether all the elements of the judgment required by law are present in the challenged decision. To annul and send back for retrial a judgment that doesn't contain elements or information that can be easily found in the statement of grounds would.

3. The enacting clause of the District Court judgment is clear and understandable; it is true that it doesn't contain a reasoning or it lacks reasons related to decisive facts, but it has to be underlined that the CPCK prescribes that the reasons of the decision have to be given in the statement on grounds and not in the enacting clause as such.
The reasoning of the first instance judgment is very accurate; all evidence are analyzed carefully and the facts are well established (the judgment of the appeal court is based on the same facts to which a different qualification is given). No substantial violation related to the rights of the defendant can be detected.

I cannot concur neither on the finding that the enacting clause can be declared invalid without ordering the retrial based on article 424 par. 4 PCCK. This rule (*"Where the only reason for annulling the judgment of the court of first instance is an erroneous determination of the factual state of affair and where all that is required for a correct determination is a different assessment of already determined facts and not the collection of new evidence or the repetition of previously produced evidence, the court of second instance shall not annul the judgment of the court of fist instance, but shall act according to article 426 of the present Code"*) refers to the second part of art. 424 par 1 (the court of second instance annuls and return the case for retrial only *"if it considers that a new main trial before the court of first instance is necessary because of an erroneous or incomplete determination of the factual situation"*) and not in the ca

annulment because *"there exists a substantial violation of provisions of criminal procedure"* (art. 424 par. 1 first part). Article 6 ECHR neither can give a legal base to an abrogative interpretation of article 424 par. 1. Actually, the retrial is not a violation of article 6 ECHR in itself; even if its application leads necessarily to delay the trial. In case of relevant violation of procedural rules the retrial is an instrument to grant and guarantee the right of defense.
The Court should be aware that an extreme formalistic application of procedural rules creates a violation of the basic principles contained in article 6 ECHR and finally prevents justice to be done.

The member panel
Maria Giuliana Civinini

Pristina, 22 September 2010

REPUBLIKA E KOSOVES
GJYKATA SUPREME E KOSOVES-PRISHTINE
GJYKATNI SUD KOSOVA - PRIŠTINA
REPUBLIKA KOSOVO

Supreme Court of Kosovo
AP – Kž. No. 128/2010

Partially dissenting opinion of Judge Gerrit-Marc Sprenger pursuant to Article 420 paragraph 3 of the Kosovo Code of Criminal Procedure (KCCP):

In the above case against F B as being charged with the criminal act of Murder contrary to Article 146 of the Criminal Code of Kosovo (CCK), the Supreme Court panel on appeal against the 1st Instance Judgment of the District Court of Peje/Pec has found a decision on the facts of the respective deed as well as on the guilt of the defendant.

However , the question of the enacting clause being or being not in compliance with the requirements of Article 396 paragraphs 3 and 4 as read with Article 391 paragraph 1 of the KCCP as the latter being raised by the Defense Counsel in his appeal against the 1st Instance Judgment, has not been elaborated by the Panel to the intensity and content as reflected in the reasoning of the Supreme Court Judgment.

The Defense Counsel in his appeal in particular has stressed that as to his legal opinion *the enacting clause ... of the judgment lack description of the fact of the scene of the criminal offence from which could be found out the features of the criminal offence, the way and other circumstances of the commitment of the offence which will lead to a proper accuracy of the criminal offence (p. 2 of the appeal; English version).*

In reference to the respective point of the appeal, the reasoning of the Judgment now states as follows:

The Supreme Court of Kosovo finds that the enacting clause of the first instance judgment is not entirely in compliance with the provisions of the criminal procedure law (p. 5 of the English version).

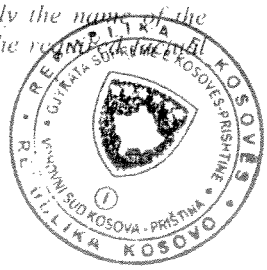
Then reference is made to Article 396 paragraphs 3 and 4 and to Article 391 paragraph 1 items (1) and (2) of the KCCP. On this background, the reasoning continues as follows:

Thus the enacting clause as the very essential part of the judgment has to contain not only the legal qualification of the act but also a precise and detailed description of all facts and circumstances which are the basis for the application of the legal provisions. Any kind of ambiguity or contradiction renders the enacting clause incomprehensive.

In the case in question the enacting clause of the first instance judgment does not entirely reflect these legal requirements. The accused was found guilty

> *"Of the criminal offence of Murder of M B , pursuant to Artilcle 146 of the PCCK, committed in on the 24th of May 2007".*

Only a small number of facts are mentioned in this enacting clause, namely the name of the victim as well as date and place of the crime. This is not fully sufficient. The r



description of the concrete act committed by the accused, i.e. the way in which he deprived the victim of his live, is missing. The same applies to her premeditation which is a necessary precondition for murder, however not mentioned in the enacting clause at all.

As a result the enacting clause leaves it open in which way the victim was killed and in which manner exactly the accused executed that killing.

Pursuant to Article 403 Paragraph 1 item 12 of the KCCP it is an absolute substantial violation of the provisions of criminal procedure if the enacting clause of the judgment was incomprehensible. Pursuant to Article 424 Paragraph 1 of the KCCP this violation does not allow any other options for the Court of Appeal than annulling the judgment and returning the case for retrial. ...

The reasoning then continues saying that:

It might be argued that the only solution foreseen by the law – annulment of the judgment and retrial just for formal reasons – is too strict and needs a corrective interpretation of the law in order to avoid retrials for merely formal reasons. In the case in question, however, a precise and accurate statement of facts cannot be found in the grounds of the judgment either. ... (p. 5-6 of the English version).

The undersigned does not agree to the legal opinion as mentioned in the above reasoning of the Judgment that the enacting clause is not in compliance with the KCCP up to a content that it would be needed of being considered invalid.

The undersigned is of the opinion that the enacting clause of the 1st Instance Judgment at least fulfills the minimal requirements of the KCCP and that it is comprehensive because it is not ambiguous or in contradiction with the rest of the 1st Instance Judgment.

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

> *(3) The enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused or by which he or she is acquitted of the charge for that act or by which the charge is rejected.*
>
> *(4) If the accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code. ...*

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

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

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

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

The respective 1st Instance Judgment as to the point under discussion indeed reads as follows:

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF PEJE/PEC ... in the criminal case against the accused F B ... (personal data) ... charged, according to the Indictment PP. Nr. 2002/2007 dated 2/8/2007 with the following criminal offence:

Murder pursuant to Article 146 of the Provisional Criminal Code of Kosovo because on the 24th of May 2007, at 8.15, in the village of , in the guest room of her house, F B intentionally murdered M B , farmer, 28 years old, from the same village.

In particular, F B noticed the deceased M B entering her house, she went to her bedroom and got the hunting rifle GA, serial number 146143, caliber 12 mm, and went to the guest room and from a distance of twoo meters shot M B at the chest and, after the victim fell down to the floor, the defendant shot twice more at his back, thus causing the death of M B as a result of the wounds caused by the gunshots.

Crime punishable by five to twenty years of imprisonment.

After having held the main trial hearings in public ... after the trial panels deliberation and voting ... pronounces in public and in the presence of the accused the following

VERDICT

F B is

FOUND GUILTY

Of the criminal offence of Murder of M B , pursuant to Artilcle 146 of the PCCK, committed in on the 24th of May 2007.

Therefore the accused is

SENTENCED

to TEN (10) years of imprisonment.

1. The undersigned is of the opinion that the respective enacting clause, although itself lacking more detailed reasons on decisive facts which Article 396, paragraph 1 of the KCCP requires to be listed in full in the "*statement of grounds*" part of any judgment, in a sufficiently clear, precise

requirements of Article 396 paragraphs 3 and 4 as read with Article 391 paragraph 1 of the KCCP.

The enacting clause of the 1st Instance Judgment at least mentions as facts of the crime the name of the victim as well as the place and time of the deed. In this context it is worth mentioning that the respective judgment as an additional part of the introduction, which in this way is not required by the law, gives the details of the criminal offence.

It in particular it can not be *ratio legis* of the respective provisions of the KCCP to have the facts quoted several times in the enacting clause and the statement of grounds part of the judgment, just for formalistic reasons or to include large and necessary parts of the reasoning of the judgment also into the enacting clause. While the enacting clause at hand is clear and understandable, a judgment has to be considered as being a unique document composed of three parts as there are introduction, enacting, and statement of grounds (Article 396 paragraph 1 of the KCCP). Since the enacting clause is an integral (and most decisive) part of the judgment it has to be read and interpreted in connection with all the other parts of the judgment.

In this context it is noteworthy that even the Supreme Court Judgment itself in its reasoning states that *the evidence produced in the first instance is fully sufficient to correctly and completely establish the state of affairs (p. 9 of the English version).*

2. Moreover, the respective Supreme Court Judgment under the reasoning as discussed gives the impression of being inconsistent in itself contrary to Article 396 paragraph 1 of the KCCP. Whilst the enacting clause of the Judgment does not declare any invalidity of the enacting clause of the 1st Instance Judgment, the reasoning underlines that *... (p)ursuant to Article 403 Paragraph 1 item 12 of the KCCP it is an absolute substantial violation of the provisions of criminal procedure if the enacting clause of the judgment was incomprehensible. Pursuant to Article 424 Paragraph 1 of the KCCP this violation does not allow any other options for the Court of Appeal than annulling the judgment and returning the case for retrial....*

Considering the possibility that this part of the reasoning could be understood as an introduction for the interpretation of the law as it is given afterwards, saying that .. *(i)t might be argued that the only solution foreseen by the law – annulment of the judgment and retrial just for formal reasons -- is too strict and needs a corrective interpretation of the law in order to avoid retrials for merely formal reasons ...*, it needs to be underlined that this – according to the Supreme Court Judgment - explicitly does not comply with the case at hand. The reasoning insofar says that *... in the case in question, however, a precise and accurate statement of facts cannot be found in the grounds of the judgment either. On the contrary, the lack of factual description in the enacting clause finds its correspondence also in the reasoning of the judgment, ...* A conclusion up to this regard is not drawn by the Supreme Court Judgment.

However, with the reasoning given, the only decision possible for the Supreme Court would have been annulment of the 1st Instance Judgment and sending the case back for retrial again.

In sum, the undersigned considers that the Supreme Court Judgment is inconsistent as to the decisive consequences of the reasoning described above.

3. In any case, as of the opinion of the undersigned, the only practicable solution to handle the issue of enacting clauses is a wide understanding of the requirements of Article 391 paragraph 1 item (1) of the KCCP. Consequently, reading the 1st Instance Judgment as comprehensive, not ambiguous, and consistent in itself, there is no need for the undersigned to declare that enacting clause of the 1st Instance Judgment as not properly drawn-up and consider the case for sending to re-trial.

Gerrit-Marc Sprenger
Panel Member

Prishtine/Pristina, 27 September 201