Supreme Court of Kosovo
Prishtinë/Priština
Case File No. Api-Kzi 11/2011

IN THE NAME OF THE PEOPLE

SUPREME COURT OF KOSOVO in the panel composed of
Maria Giuliana Civinini EULEX Supreme Court Judge and Presiding Judge
Lars Dahlstedt EULEX Judge – panel member
Marije Ademi Supreme Court Judge - panel member
Nesrin Lushta Supreme Court Judge - panel member
Salih Toplica Supreme Court Judge – panel member

assisted by EULEX Legal Officer Maria Rosa del Valle Lopez as recording officer, EULEX court recorder Robina Struthers and Tsvetelina Zhekova and EULEX interpreter Altina Ruli-Williams.

In the presence of EULEX Prosecutor Jakob Willaredt, defense counsel Xhefer Maliqi, legal representative of the injured party, lawyer Abit Asllani, and defendant Xhevat Haxha.

In the session held on 29 March 2011 at 11a.m. at the Supreme Court of Kosovo in the criminal case against the defendant:

XH

Charged with the criminal offences of Attempted Murder in violation of Article 146 PCCK and Unauthorized Ownership, Control, Possession and Use of Weapons in violation of Article 328 paragraph 2 PCCK.

Deciding upon the appeal filed by the defense counsel of the defendant XH , lawyer Xhefer Maliqi, against the judgment of the District Court of Mitrovice/Mitrovica P. No. 127/2008, dated 16 September 2010.

Issues the following:

JUDGMENT

To **PARTIALLY APPROVE** the appeal filed by the defense counsel of the defendant X H , lawyer Xhefer Maliqi.

The first instance court's verdict is amended in respect to sentencing and penalty in the following terms:

- For the criminal offense of attempted murder the defendant is sentenced to six (6) years of imprisonment.

- For the criminal offense Unauthorized Ownership, Control, Possession and Use of Weapons the defendant is sentenced to two (2) years of imprisonment.

- The court imposes an **Aggregated Punishment Of Seven (7) Years** of imprisonment.

The rest of the Judgment of the District Court of Mitrovicë/Mitrovica P. No. 127/2008, dated 16 September 2010 is AFFIRMED.

The time already spent in detention will be also counted as part of the punishment.

REASONING

1. Procedural history

On 24 November 2008 the Public Prosecutor filed with the District Court of Mitrovicë/Mitrovica the indictment PP. nr. 108/08 against X H , charging him with Attempted Murder under Article 146 as read in conjunction with Article 20 PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 paragraph 2 PCCK.

On 16 September 2010 the District Court of Mitrovicë/Mitrovica rendered a judgment p. Nr. 127/2008

and found XH guilty of the criminal offences of Attempted Murder and Unauthorized Ownership, Control Possession or use of Weapons and sentenced the accused to fifteen (15) years of imprisonment according to Article 71 paragraph 1 and 2 of the PCCK.

The defense counsel of the defendant, lawyer Xhefer Maliqi filed an appeal dated 11 November 2010 against the judgment of the District Court of Mitrovice/Mitrovica P. No. 127/2008, dated 16 September 2010.

The legal representative of the injured party, lawyer Abit Asllani filed an answer to the appeal dated 5 January 2011; the Public Prosecutors also filed an answer to the appeal dated 3 March 2011.

The present judgment decides on the appeal dated 11 November 2010 filed by the legal representation of the defendant, lawyer Xhefer Maliqi against the judgment of the District Court of Mitrovice/Mitrovica P. No. 127/2008, dated 16 September 2010.

2. Reasoning

The defense counsel of the defendant raises in his appeal the following issues: (1) erroneous/incomplete determination of the factual situation, (2) applicability of Article 8.3 CCK: exceeding the limits of the necessary defense and (3) inappropriate decision on sentencing: excessive punishment.

2.1. Erroneous/incomplete determination of the factual situation.

According to the defense counsel of the defendant, the first instance judgment does not provide a reasoning for every count of the judgment nor convincing reasons for the conviction; in his opinion the judgment does not assess in an accurate manner the grounds and veracity of evidence, on the contrary, the judgment is unstable in relation to the main facts.

In this respect, the judgment of the District Court Mitrovicë/Mitrovica p. Nr. 127-2008 establishes the following facts: *"on 9 October 2008, NM and AB were sitting in front of their shops An argument developed between XH and NM over the issue of parking of vehicles. AB heard the argument and placed himself between the two men in order to separate tem. XH pulled out his piston –a Zastava M-70 9x19mm calibre handgun. M was unarmed. The two men were a few meters apart when H*

began firing his weapon. H[illegible] fired at least three bullets in the direction M[illegible]. M[illegible] tried to run away and take cover behind a vehicle, but was hit by at least three bullets in the left hand, the left shoulder and the left side of his head.

The evidence that supports the facts established by the first instance court is extremely clear and undoubtedly shows the defendant as perpetrator of the crimes:

The defendant himself gave the following statement to Mitrovicë/Mitrovica Regional Police Directorate on 10th October 2008: *"Yesterday 09.10.2008, at approximately 16:00 hours I went home from my business property where I work and am owner (...). I had on my hand gun caliber 9x19mm of Zastrava make, black color. (...) While approaching him (injured party N[illegible] M[illegible]) I asked: "what have I done that you are swearing at me? N[illegible] replied: "I will screw (fuck-up) your wife and children"; Then I said to N[illegible]: "shame on you for swearing by my wife and kids in their presence". Then N[illegible] tried to punch me and at that point* ***I pulled my hand gun out and loaded it. I shouted: "My God spell blindness on you" and shot at him.*** *I cannot remember how many shots I fired, two or three. When I fired a shot, the distance between him and me was about one meter. After firing a gun shot, I noticed N[illegible] fell down as I'd shot him. Straight away I went to my daughter's, [illegible] flat situated above my shop, where I stayed up until police arrived and arrested me. I handed my hand gun to them (police)."*

The defendant confirmed his own declaration on 13.11.2008 to the District Public Prosecutor of Mitrovicë/Mitrovica Shyqyri Syla during the suspect questioning at Vushtrri Municipal Court Office; he also added to his previous statement: *"(...)* ***the gun was without any permission from the competent authorities".***

This declaration is fully corroborated in the "Crime Scene Report" dated 9.10.2008 issued by the Regional Forensics, Regional Crime Squad of Mitrovicë/Mitrovica where pictures numbers 47, 48, 49, 50 clearly show the hand gun Crvena Zastrava M70 PARABELLUM caliber 9x19 described by the defendant and three bullet shells marked with number D4, D5 and D6 found in the crime scene.

In this respect, the Report of Forensic Examination, Central Forensic Laboratory of Kosovo Police dated 26.12.2008 examines the above-mentioned bullet shells and arrive to the conclusion (page 3) that *"Delivered evidence D4, D5 and D6 are 3 shells of fragments of bullet of caliber 9x19mm,* ***fired by pistol CRVENA ZASTRAVA M70 PARABELLUM of caliber 9x19*** *without serial number".*

Besides, the first instance judgment makes a very detailed assessment of the testimony of the injured party N M and witnesses E H , N S , Z T , B H and A B

In this sense, witnesses N S and A B declared to the police and also during the main trial that they saw the defendant shooting the victim N M .

In the same sense, witnesses E H , Z T and B H in their respective statements to police declared that they saw the defendant shooting N M ; nevertheless during the main trial these three witnesses changed their testimony and indicated that they didn't see it.

The first instance court makes a detail assessment of the evidence and gives credibility to the testimonies of the injured party N M , the testimonies of witnesses N S and A B and to the police declarations of witnesses E H , Z T and B H . This Court fully shares and accepts the assessment of evidence made by the District Court of Mitrovicë/Mitrovica.

According to the Supreme Court, the facts have been correctly and clearly established by the first instance court and the commission of the crimes by the defendant is uncontested and absolutely proven.

2.2. Applicability of Article 8.3 CCK: exceeding the limits of the necessary defense.

According to the defense counsel of the defendant: *"If it is taken as proven the fact that the accused has committed the criminal offense he is charged with, on the basis of witness statements given to the police, then undoubtedly it is concluded that the accused did undertake the action because the victim has said to him "(...) I will fuck your mother if you park again (...)" and because the victim had thrown a stone on the vehicle of the accused, then it results that the accused had acted on the limits of exceeding the necessary defense or in a disproportionate manner with a degree of danger, by exceeding the limits on the basis of the proven facts, for which the court had violated the criminal law the detriment of the accused, due to non-application of article 8.3 CCK in conjunction with criminal offence under article 146 in conjunction with article 20 CCK."*

Necessary defense is a cause, reason or justification for the commission of a criminal offence otherwise punishable by law. Necessary defense affects criminal liability and a clear definition of its bounds is essential. In this respect, there are two main requirements that must be met: (a) an unlawful aggression and (b) rational need for the means employed to avoid or repel the aggression.

In the present case, none of the two requirements are met. First, not any kind of aggression allows the justification of a criminal activity; the aggression must generate a rational conviction of imminent and real danger. In this sense, the conduct of the victim N M was not in any case a threat or a danger to the defendant; swearing, cursing or causing low intensity damage to property is not the unlawful aggression required by Article 8 CCK.

Second, the defendant shot several times, even in the head, an unarmed person that tried to run away and hide behind a vehicle. In this respect, **the conduct of the defendant is an autonomous criminal action of extreme violence and not a self-defence of any kind, either proportionate or disproportionate**.

2.3. With regards to the decision on punishment the appeal is grounded.

In relation to the Attempted Murder, according to Article 146 CCK the criminal offense of Murder shall be punished with a minimum of five (5) years of imprisonment. Article 20.2 CCK establishes that an attempt to commit a criminal offense punishable by imprisonment of at least three (3) years shall be punishable; the limit of the punishment for the attempt is three quarters of the maximum punishment prescribed for the criminal offence according to Article 65.2 CCK. Besides, the maximum term of imprisonment allowed by law is twenty (20) years.

With regards to the Unauthorized Ownership, Control, Possession or Use of Weapons, according to Article 328.2 CCK it shall be punished by a fine of up to 10.000 Euro or by imprisonment of one to eight years.

The District Court of Mitrovicë/Mitrovica decided to punish with twelve (12) years of imprisonment the criminal act of Attempted Murder, four (4) years of imprisonment the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons and imposed an aggregated punishment of fifteen (15) years of imprisonment according to Article 71 CCK.

The Supreme Court has decided to review and modify the penalty imposed by the District Court of Mitrovicë/Mitrovica reducing the number of years of imprisonment in the following terms:

- For the criminal offense of attempted murder the defendant is sentenced to six (6) years of imprisonment.

- For the criminal offense Unauthorized Ownership, Control, Possession and Use of Weapons the defendant is sentenced to two (2) years of imprisonment.

- The court imposes an **Aggregated Punishment of Seven (7) Years** of imprisonment.

In order to decide the reduction of the number of years of imprisonment, the Supreme Court has taken into consideration the range between the maximum and the minimum penalty, all relevant circumstances in this case and has carefully considered its previous judgments in similar cases. Particularly, the Supreme Court has taken into consideration that, even though the consequences of the criminal action are especially serious, there is no evidence of permanent disability of the injured party as a result of the attack; in the same sense, even though the action was extremely violent, it was not the result of a premeditated plan but an action upon a sudden impulse. The Supreme Court has assessed in the past similar circumstances and 12 years of imprisonment is not in the usual range of punishment adopted in similar cases; for these reasons, the Supreme Court has decided the reduction of the punishment and has imposed an aggregated punishment of seven (7) years of imprisonment.

SUPREME COURT OF KOSOVO

On 22 April 2011

Presiding judge:

Maria Giuliana Civinini
EULEX Judge

Members of the panel:

Lars Dahlstedt
EULEX Judge

Nesrin Lushta
SC Judge

Salih Toplica
SC Judge

Marie Ademi
SC Judge