

SUPREME COURT OF KOSOVO

PKL-KZZ-36/11

Date: 05 July 2011

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Lars Dahlstedt as Presiding Judge, with EULEX Judges Gerrit Marc-Sprenger and Charles L Smith III and Kosovo Judges of the Supreme Court of Kosovo, Emine Kaciku and Valdete Daka as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk, in the criminal case P nr 203/2005 of the District Court of Prishtine/Prishtina against the defendant:

Shi M born on . in / village, father's name  
, mother's name , maiden name  
, previously , in /

Charged with the criminal offences of Aggravated Murder and Attempted Aggravated Murder from Article 30 paragraph 2 item 2 and 6 of the Criminal Law of Kosovo (hereafter "CLK") in conjunction with Articles 19 and 22 of the Socialist Federal Republic of Yugoslavia Criminal Code (hereafter "SFRY CC"), Unauthorized Possession of Weapons from Section 8.2 and 8.6 of UNMIK-reg 2001/7 in conjunction with Article 22 SFRY CC and Unlawful Possession of Weapons from Article 328 paragraph 2 of the Provisional Criminal Code of Kosovo (hereafter "PCCK"<sup>1</sup>).

Deciding upon the Requests for Protection of Legality filed by defense counsel Av Teki BOKSHI on behalf of defendant Sh M, against the Judgment of the District Court of Prishtine/ Prishtina P nr 2003/2005 dated 09 November 2005, against judgment of the Supreme Court of Kosovo, Ap 190/2009, dated 27 January 2010 and against the Judgment of the Supreme Court of Kosovo, API 01/2010 dated 26 November 2010,

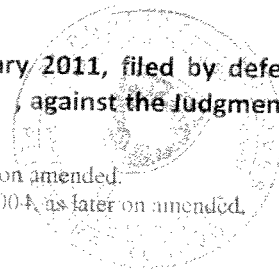
Pursuant to Article 454 paragraph 1 of the Provisional Criminal Procedure Code of Kosovo (hereafter "PCPCK"<sup>2</sup>), after a session on deliberation and voting held on 05 July 2011, the Supreme Court of Kosovo issues the following:

JUDGMENT

To reject the Request for Protection of Legality dated 21 February 2011, filed by defense counsel Av Teki BOKSHI on behalf of defendant Sh M, against the Judgment of

<sup>1</sup> The Provision Criminal Code of Kosovo entered into force on April 2004, as later on amended.

<sup>2</sup> The Provisional Criminal Procedure Code of Kosovo entered into force on April 2004, as later on amended.



the District Court of Prishtine/ Prishtina P nr 2003/2005 dated 09 November 2005, against judgment of the Supreme Court of Kosovo, Ap 190/2009, dated 27 January 2010 and against the Judgment of the Supreme Court of Kosovo, API 01/2010 dated 26 November 2010, as unfounded and to confirm the Judgment of the Supreme Court according to Art 456 of the PCCK.

## REASONING

### I. Procedural background

On 23 March 2004 at about 21:45 hrs, a police unit, composed of three police members of a combined international and local police team, and a language assistant was subject of an attack on a public road near Sh. village, P /P . Two official persons, an international Police Officer K (UNMIK Police Officer) and a local police officer A Rr were shot dead at the spot. Language Assistant R Z was hit by a bullet in his left shoulder and metallic particles got struck in his head. Nevertheless R Z survived. The other member of the team, police officer B M had fortunately survived a life endangering ambush without injuries.

During the course of the attack the police officer B M had opened the rear door of the right side jumping out of the car. In that moment B M started to shoot back towards the assailants. Two (2) of his shots -he fired up to ten (10) shots in total- hit assailant A S who passed away later on.

The investigations had been initiated and conducted by the Office of International Public Prosecutors against several individuals.

On 07 April 2005 upon conclusion of the investigations, the indictment was filed against eleven (11) accused. Several amendments to the indictment had subsequently been made since then.

On 09 November 2007 the District Court of Prishtine/Prishtina found the defendant Sh M guilty for having committed criminal offences of Aggravated Murder and Attempted Aggravated Murder from Article 30 paragraph 2 item 2 and 6 of the Criminal Law of Kosovo (hereafter "CLK") in conjunction with Articles 19 and 22 of the Socialist Federal Republic of Yugoslavia Criminal Law (hereafter "CL SFRY"), Unauthorized Possession of Weapons from Section 8.2 and 8.6 of UNMIK-reg 2001/7 in conjunction with Article 22 SFRY CC and Unlawful Possession of Weapons from Article 328 paragraph 2 of the PCCK. Pursuant to Article 48 of CL SFRY the court imposed onto the accused an aggregated punishment in duration of thirty (30)

years of imprisonment in which is calculated the time he spent in the detention on remand since 07 April 2004.

On 27 January 2010 the Supreme Court of Kosovo rejected the appeals of the defendant Sh. M and dismissed the appeal filed by his father as inadmissible whereas affirmed partially the appeals of the defense counsels of the defendant, Av Teki Bokshi and Av. Metush Sadiku thus modifying the appealed judgment only with regard to the legal qualification of the criminal offences. The defendant was nevertheless again imposed an aggregated sentence of thirty (30) years of imprisonment.

By Judgment API nr 1/2010 dated 26 November 2010 the Supreme Court of Kosovo rejected the appeal of the defense counsel of the defendant and dismissed the appeal filed by father of the defendant as inadmissible. The judgment of the Supreme Court of Kosovo challenged by defense counsel in the third instance was affirmed.

Defense counsel on behalf of the defendant, Av Teki Bokshi filed a Request for Protection of Legality against the final judgment P nr 203/2005 of the District Court of Prishtine/Prishtina dated 09 November 2007, against Judgment Ap nr 190/2009 of the Supreme Court of Kosovo dated 27 January 2010 and against the Judgment API nr 1/2010 of the Supreme Court of Kosovo dated 26 November 2010.

Defense counsel requested modification of the challenged judgments; to acquit defendant of all criminal charges or to return the matter for reconsideration to the court of the first instance.

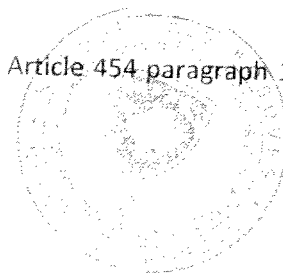
The case was sent to the OPSK for an opinion.

By submission KMLP. II. Nr 38/11 dated 28 April 2011 the Office of State Prosecutor filed a reply and proposed that the request for protection of legality be rejected as ungrounded.

## **II. Supreme Court findings**

In assessing the Request for Protection of Legality, the Supreme Court of Kosovo established the following:

- a. The Request for Protection of Legality is admissible. The request is filed with the competent court pursuant to Article 454 par 1 and within the deadline pursuant to Article 452 par 3 of PCPCK.
- b. The Supreme Court of Kosovo decided in a session as prescribed by Article 454 paragraph 1 of the PCPCK. The parties' notification of this session was not required.
- c. The request for Protection of Legality is ungrounded.



The Request for Protection of Legality alleges Violations of Criminal Law, Essential Violations of the Law on Criminal Procedure and Decision on Criminal Sanction.

Defense counsel alleges a number of violations some of which had been also raised and submitted during the course of proceedings in the second and third instance. Defense maintains that those allegations raised in previous instances be considered by the court as a part of the request for protection of legality.

From the very outset the Supreme Court of Kosovo notes that parts of the request for protection of legality and of the previous appeals which the defense submits to be considered as part of the request for protection of legality mainly refer to the factual situation. The Supreme Court of Kosovo however is confined in its assessment by Article 451 and Article 455 of PCPCK. The defense counsel may not file a request for protection of legality on the ground of an erroneous or incomplete determination of the factual situation. Consequently contestation of the factual situation at this stage of the procedure is inadmissible.

The Supreme Court of Kosovo after examination of the file records finds that appealed judgments rendered in previous instance do not warrant an *ex officio* intervention. Accordingly, pursuant to Article 455 of PCPCK, the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his request.

In the request for protection of legality defense counsel contended the following:

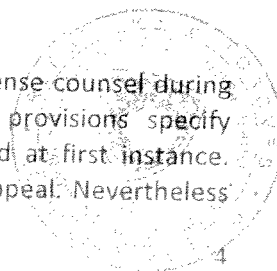
**A. SUBSTANTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE AND OTHER VIOLATIONS OF THE PROVISIONS OF CRIMINAL PROCEDURE.**

1. Defense counsel alleges violation of the procedure by the court in previous instances when rendering the appeal filed by father of the defendant as inadmissible. Defense contends that the alleged crime occurred before entry of the current procedure code and pursuant to the Criminal Procedural Law of the former SFRY the appeal filed by the father of the defendant is admissible. Therefore since those appeals filed by father of the defendant Sh M had not been taken into consideration, defense requests to review and consider those appeals as integral part of the defense counsel's request for protection of legality.

In answering this question, it is crucial to emphasize that the applicable procedural law in this criminal matter is PCPCK. There is no contestation on the applicability of the procedure law even by defense counsel. Article 399 paragraph 1 of the PCPCK states:

(1) *"An appeal may be filed by the parties, the defense counsel, the legal representative of the accused and the injured party".*

In the case at hand, the defendant was represented by a professional defense counsel during the course of whole criminal proceedings. The applicable procedural provisions specify authorized persons who may file an appeal against a judgment rendered at first instance. Clearly father of the defendant was not an authorized person to file an appeal. Nevertheless

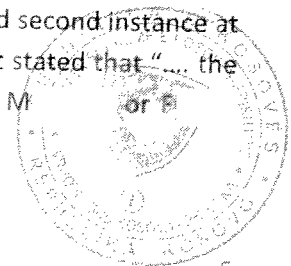


should the father of the defendant want to address the court undoubtedly he had ample of opportunities to transmit through the defense counsel representing the defendant. The professionalism and competency of the defense counsel representing the defendant are at no doubts. Therefore this panel opines that the appellate court had correctly decided when rendering the appeals filed by father of the defendant inadmissible. The Supreme Court of Kosovo concedes with defense counsel that in the event of a change in the law applicable to a given case prior to a final decision, the law more favorable to the perpetrator shall apply. However this principle applies to criminal law and not the procedural law.

2. Defense counsel claims that the judgments dealt with are based on indirect and/or circumstantial evidences in violation of the provision of Article 157 of the PCPCK. Defense counsel maintains that the court shall not find the accused guilty based solely or to a decisive extent on a single evidence as it is the case with the challenged judgments which are mainly based on interceptions. Since the judgments are based only in the telephone interceptions or to this evidence was given the decisive importance, the court could not find the defendant guilty by virtue of Article 157 of the PCPCK.

In addressing the appellant allegation the Supreme Court of Kosovo concurs with the defense counsel that the court shall not find the accused guilty based solely or to a decisive extent on testimony or other evidence which could not be challenged by the defendant or defense counsel through questioning during some stage of the criminal proceedings. The panel however notes that the first instance court did not rely solely or to a decisive extent on evidence that was not challenged by the defense counsel during the course of the criminal proceedings. Defense counsel did not specifically indicate the evidence and/or evidences that the court relied upon which eventually defense counsel had not been given the opportunity to challenge. This panel opines that allegations generally submitted are without merit. Evidently the defense counsels had been given ample opportunities to challenge the evidences presented during the main trial. The Supreme Court of Kosovo notes that the judgment of the first instance court makes an adequate reference to evidences relied upon which were properly obtained, administered and evaluated by the trial court.

3. Defense counsel claims that the enacting clause of the challenged verdicts rendered in the previous instances are incomprehensible, internally inconsistent or inconsistent with the grounds of the verdicts; in particular, the enacting clause and the reasoning of the verdicts is contradictory with content of the material evidence and the testimonies in the minutes of the review. That constitutes according to the defense counsel serious violations of the provisions of the criminal procedure namely, Article 403, Par.1, Item 12 of the PCPCK. Further defense counsel argues contradiction between the judgment of the first instance and second instance at the part that the court of the first instance on the page 36 of the judgment stated that "... the trial panel notices that there are no single direct evidence that Sh E belonged to the group of the attackers...".



The Supreme Court of Kosovo notes that the content of a judgment is outlined in Article 396 of the PCPCK. This Article stipulates that there should be an introductory part, the enacting clause and the reasoning. Each of these parts must contain specific information outlined in the rest of the provisions which also include the reasoning regarding the sentence.

The obligatory content of the enacting clause is provided for by Article 396 of PCPCK, specifically the paragraphs (3) and (4)...

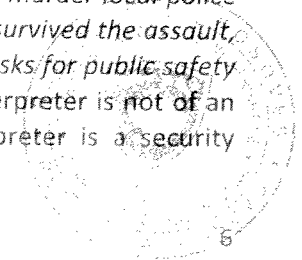
(3) *“the enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused or by which he or she is acquitted of the charge for that act or by 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, and if he or she was acquitted or the charge was rejected, the enacting clause shall contain a description of the act with which he or she was charged and the decision concerning the costs of criminal proceedings and the property claim if such claim was filed”.*

In reviewing this point the Supreme Court of Kosovo could not establish any substantial deficiency as regards to the enacting clause of the appealed judgments. The Supreme Court of Kosovo finds that in this case the enacting clauses of the challenged judgments are sufficiently clear. They make an adequate reference to provisions of the criminal law, so clarifying what form of culpability was determined by court for the defendant.

Defense counsel refers to page 36 of the judgment in which it was stated that “... the trial panel notices that there are no single direct evidence that Sh M , or F E belonged to the group of the attackers...”. It is the opinion of the Supreme Court of Kosovo that a selective reading of judgment and extracting sentences out of general context makes an argument without merit. The enacting clause and reasoning are organic and indivisible parts of a judgment. As such the judgment must be read in its entire context. The Supreme Court of Kosovo finds that reading in its entirety there is no discrepancy and/or inconsistency between the enacting clause and reasoning of the challenged judgment. Therefore allegation of the defense counsel about the inconsistency of the judgment is ungrounded.

4. Defense counsel claims violation of the procedure since the court in the previous instances erroneously ruled that the defendant Sh M along with other persons had shot with automatic weapon AK-47, with intent to murder all persons inside the vehicle. Defense maintains that description made by the court in the following *“they tried to murder local police officer, B M (KPS) and the interpreter R Z (UNMIK), which survived the assault, both of them at that time as official persons which were performing their tasks for public safety and rule of law”*, is in contradiction with the law since the status of an interpreter is not of an official person provided for by the law. The justification that the interpreter is a security employee is entirely inconsistent.



In order to be able to respond to the Applicant's allegation the Supreme Court needs first to examine whether the status of a Language Assistant has fulfilled the legal requirements of an official person as laid down in the law.

The Supreme Court of Kosovo notes that PCCK defines the status of an official person. Article 107 reads:

- (1) The term "Official Person "means
  - (1) A person elected or appointed to a public entity;
  - (2) An authorized person in a business organization or other legal person, who by law or by other provision issued in accordance with the law, exercises public authority, an who within this authority exercises specific duties;
  - (3) .....
  - (4) A person who is a member of UNMIK personnel or KFOR, without prejudice to the applicable privileges and immunities accorded to such person;
  - (5) .....
  - (6) A person in a public international or supranational organization who is recognized as an official or other contracted employee within the meaning of the staff regulations of such organizations;

This panel respectfully disagrees with defense counsel that by virtue of law only police officers may be considered to have a status of an official person in providing security.

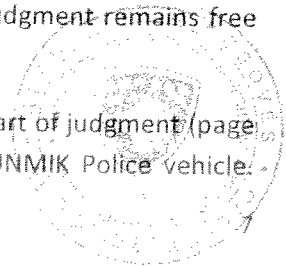
The Supreme Court of Kosovo holds that it is irrelevant the rank and/or position of a person in an organization for purpose of determination of the official status of a person. All organizations including the police forces have a management structure that determines relationships between functions and positions, and subdivides and delegates roles, responsibilities, and authority to carry out defined tasks, etc.

As long as someone legally holds an office and/or a function or mandate, in an organization or government and participates in the exercise of authority entrusted to him or her, that person is considered as an official person.

In the case at hand, evidently the language assistant was not at the crime scene by coincidence. Contrary in the critical day he was assigned to assist the mixed team consisting of international and local police officers. At no doubts, the language assistant was employed by UNMIK and was an official member of that organization.

Therefore the Supreme Court of Kosovo considers that the challenged judgment remains free from error as regards the allegation raised by the defense counsel.

5. In the request for protection of legality defense counsel refers to the part of judgment (page 36) that deals with an issue of ambush allegedly planned against the UNMIK Police vehicle.



Defense counsel submits that the appellate court erroneously approved the viewpoint of the court of first instance when rendering that the ambush made by the defendant is proven based on the testimonies of R. Z. and B. M., which according to the court of the first instance gave concordant testimonies. Defense counsel claims that in page 45 of the judgment of the first instance it is specifically stated "it could happen that an ambush against the UNMIK Police was planned but even this could not be found beyond the reasonable doubt", which undoubtedly is in contradiction with reasoning of the judgment issued by the court of the second instance.

At outset, the Supreme Court of Kosovo notes that such allegations are directly related to determination of factual situation, a ground for which a request of protection of legality may not be filed under the provisions of the PCPCK.

The respective Article 451 (2) reads:

*(2) A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation...*

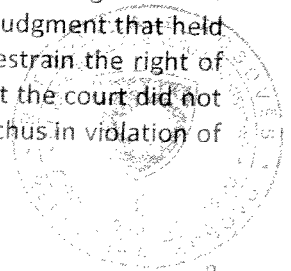
Furthermore, Article 456 of PCPCK states:

*The Supreme Court of Kosovo shall, by a judgment, reject a request for protection of legality as unfounded if it determines that the violation of law alleged by the requesting party does not exist or that a request for protection of legality is filed on grounds of an erroneous or incomplete determination of factual situation (Article 405 and Article 451 paragraph 2 of the present Code).*

It is not the task of the Supreme Court to assess the factual situation established in previous instances at this stage of the procedure, unless there is clear new evidence showing that such decisions have been rendered in an obviously unfair and inaccurate manner. The Supreme Court of Kosovo notes that defense counsel did not state any other new facts but those correctly addressed and dealt with in previous instances.

Based on above reasons, the Supreme Court of Kosovo considers that on this part the request for protection of legality falls outside the scope of review at this stage of the procedure. Therefore on this part it is rejected as inadmissible.

6. Defense counsel argues that the findings of the appellate court that the trial held in Dubrava prison was regular are erroneous and in contradiction with the reports of serious organizations such as OSCE, etc. Defense counsel maintains that finding of the challenged judgment that held the following "These measures were not of that nature so can prevent or restrain the right of full exercise of defense", does not stand. Further defense counsel claims that the court did not exclude a public from part of the session to the detriment of the defendant thus in violation of the provisions of the criminal proceedings.





In addressing this point the Supreme Court of Kosovo refers to a decision of 09 June 2006 of the United Nations Special Representative of the Secretary General (SRSG) that approved the change of venue in order to conduct the trial proceedings in Dubrava prison. As indicated by the court in other instances, with which this panel fully agrees, undoubtedly the SRSG has been the proper authority for such approval according to UNMIK Regulation 1/1999 Section 1.

Based on the case file documentation, no infringement of the defense rights guaranteed to the defendant under the applicable law could be detected in this case. This panel finds that the procedure has been conducted in accordance to the provisions of the procedure in full respect of the defendant's rights.

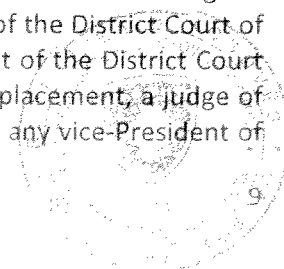
Evidently the trial proceedings had been postponed after a trial panel had learned from the Chief of Security that the security circumstances due to lack of space in the so called court room did not permit the removal of the handcuffs of the accused during the session. The panel decided to adjourn the main trial until necessary measures that allowed the removal of the handcuffs had been implemented. This indicates the trial panel's compliance with the human rights standards contemplated in various international instruments especially the European Convention for Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

Therefore the Supreme Court of Kosovo finds that the trial panel acted in accordance to the law. The issue whether the location in which the trial took place met all the standards for a fair trial, the panel finds that the issue goes beyond criminal procedure followed; consequently outside the scope of review of the Supreme Court of Kosovo.

As far as the second part of the question dealing with exclusion of public is concerned, the Supreme Court of Kosovo notes that as a rule the trial proceedings need to be public. Failure to comply with such rule constitutes a violation of the criminal procedure provisions and also violation of various international instruments. Exclusion of the public is an exception which applies only when specifically foreseen by the law. Article 329 of PCPCK specifically enumerates cases when public may be excluded from whole or part of the main trial. The Supreme Court of Kosovo notes that the first instance court had correctly ruled on refusal of the request of the defense counsel for exclusion of the public. None of the criteria for partial and/or full exclusion of the public from the main trial are met in the request of the defense counsel.

Therefore the Supreme Court considers this point as ungrounded

7. Defense counsel claims that the composition of the trial panel was not in compliance with the law. Defense argues that the defendant Sh M had requested disqualification of the trial panel prior start of the main trial and the request was not dealt with in a regular procedure. There was a request also for disqualification of the President of the District Court of Prishtine/Prishtina, Mr. Anton Nokaj, therefore on behalf of the President of the District Court regarding the request for disqualification of the trial panel decided his replacement, a judge of that court. Defense counsel maintains that the PCPCK does not recognize any vice-President of



the court and to such entity does not attribute any authorization in this sense. The replacement never can decide regarding the disqualification of the President. With the law decisively and accurately is determined who decides regarding the disqualification. The President of the District Court was disqualified and nobody can decide instead of him.

The Supreme Court of Kosovo notes that defense counsel incorrectly argues that the request on exclusion of the President of the District Court of Prishtine/ Prishtina was decided by the Deputy President of the District Court of Prishtine/Prishtina.

As indicated in the judgments of the court of second and third instance, the deputy President of the District Court of Prishtine/Prishtina ruled upon a request for disqualification of the trial panel in the absence of the President of the District Court. The Supreme Court of Kosovo disagrees with the defense counsel that a deputy who was replacing the President of the District Court of Prishtine/Prishtina did not have a power to decide over the request for disqualification of the trial panel. This panel finds that the courts correctly ruled that in absence of the President of the District Court, a person replacing him had a power and responsibility to exercise functions that enables a proper flow of activities within a court.

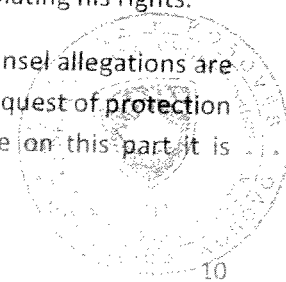
Therefore the Supreme Court considers this point as ungrounded.

8. Defense counsel argues that the judgment is based on inadmissible evidence since the phone interceptions- respectively the covert measures in entirety had been unlawfully performed. Defense counsel incorporates by reference the arguments submitted by the appeals in the previous instances as part of the request for protection of legality.

On the specific above point, suffice it to say for the Supreme Court of Kosovo that defense counsel just generally argues that the evidence had been unlawfully obtained. Therefore the conclusions of the previous instances that evidences were properly obtained, administered and evaluated by the trial court is pertinent and it is shared by the Supreme Court of Kosovo.

9. Defense counsel claims that the radio-connection, Motorola, even if there would have been evidence indicating that the radio belonged exactly to the former KPS police officer Mr. Sh. M. and still there is evidence in the case file which prove that the Motorola was not in possession of Sh M. in the last six months before the incident. Defense counsel maintains that such evidence is in the written form and is part of the case file but the court had failed to comment on it. According to the defense counsel the non-examination of that evidence prevented the defendant to review it before the court thus violating his rights.

In addressing this point, the Supreme Court of Kosovo finds that defense counsel allegations are directly related to determination of factual situation, a ground for which a request of protection of legality may not be filed under the provisions of the PCPCK. Therefore on this part it is rejected as inadmissible.



10. Further defense counsel argues that the interception of telephone conversation between the client and the lawyer was unlawful and such evidence cannot be used as evidence by the court. Thus defense counsel maintains that the court should have rendered that evidence as inadmissible and to separate it from the case file. It is not irrelevant according to the defense counsel that the lawyer was not the defense counsel of the defendant Sh M. The defense counsel intercepted was a defense counsel in this matter and the legal interests of the defendant Sh M and the client that lawyer was representing were identical.

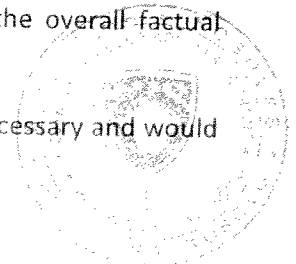
The Supreme Court of Kosovo respectfully disagrees with the defense counsel that interception of the defendant while the defendant Sh M was communicating with a lawyer different of his own was unlawful. This panel agrees with the third instance court that being a lawyer does not entail immunity from telephone interceptions. As indicated by the Supreme Court of Kosovo, with which this panel fully agrees, the exception to the rule is meant to protect that special relation defendant/lawyer and not to serve to the shared interests of the parties. The concept of shared interests of the defendants in a criminal case is very relative. It might be that defendants share same interests just as it is possible that their interests are diametrically different although again co-defendants in a criminal matter. The Supreme Court has referred to the jurisprudence of ECHR. Therefore this panel considers that this point of the request for protection of legality is ungrounded.

#### **B. THE ERRONEOUS APPLICATION OF THE CRIMINAL CODE OF KOSOVO**

11. Defense counsel argues that the court of first instance with insufficient and erroneous determination of the facts reached the erroneous finding that the accused Sh M have committed the criminal offence for which he was finally found guilty with the judgment of the District Court in Prishtine/Prishtina amended with judgment of the Supreme Court of Kosovo which with this request is being challenged. Consequently defense counsel claims that decision for punishment is not legal since the defendant is not guilty.

As regards contestation concerning the existence of decisive facts relied upon by the courts, the Supreme Court of Kosovo finds it crucial to reiterate again that the contestation of the judgments at this stage of the procedure on ground of factual situation is inadmissible pursuant to Article 451 (2) of PCPCK. Defense counsel generally argues incorrect and incomplete evaluation of the evidence. Such allegations have been already addressed and properly dealt with in the course of appellate proceedings. The Supreme Court of Kosovo finds nothing new from previous allegations raised by the defense counsel that undermine the overall factual foundation of the charges.

Therefore this panel opines that any further elaboration on this point is unnecessary and would be superfluous.



12. Lastly defense counsel claims that by the judgment of the Supreme Court of Kosovo that was challenged by the appeal, the second instance court had amended the legal qualification of acts. The second instance court different from the first instance court found the defendant guilty of the criminal act pursuant to Article 30, Paragraph 2, item 2 of the CLK in conjunction with Article 22 of the CC of the SFRY. This means, according to the defense counsel that the court withdrew the aggravating circumstance from item 6 of the CLK. Nevertheless such mitigation circumstance had not been reflected in the amount (lowering) of the punishment.

The Supreme Court of Kosovo respectfully disagrees with the view of the defense counsel with regard to length of the sentence. This case is particularly serious and demanded a serious sentence. As far as the type and length of sentence is concerned, the Supreme Court of Kosovo notes that there is no obligation for the court to reduce the sentence due to the partial acquittal and/or modification. The court is only bound by the maximum penalty.

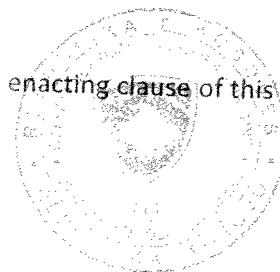
As matter of fact, second instance court found the defendant guilty of the criminal act pursuant to Article 30, Paragraph 2, item 2 of the CLK in conjunction with Article 22 of the CC of the SFRY. The amendment of first instance court judgment in relation to paragraph 6 does not change the qualified form of the criminal offence as provided for by the law. Taking into account the circumstances related to the case, the manner in which the crime was committed – *modus operandi* as well as the intensity of the social risk of the criminal offence, this court concludes that the imposed punishment is fair and lawful, i.e. in compliance with the purpose of punishment, as foreseen by the law. Therefore the Supreme Court finds that the court of second and third instance has fully and correctly examined all relevant circumstances when imposing the type and length of the punishment.

### III. Conclusion of the Supreme Court of Kosovo

For the reasons above, the Supreme Court of Kosovo concludes:

The Requests for Protection of Legality filed by defense counsel Av Teki BOKSHI on behalf of defendant Sh M , against the Judgment of the District Court of Prishtine/ Prishtina P nr 2003/2005 dated 09 November 2005, against judgment of the Supreme Court of Kosovo, Ap 190/2009, dated 27 January 2010 and against the Judgment of the Supreme Court of Kosovo, API 01/2010 dated 26 November 2010, is unfounded.

In light of the above, the Supreme Court of Kosovo has decided as in the enacting clause of this judgment.



SUPREME COURT OF KOSOVO

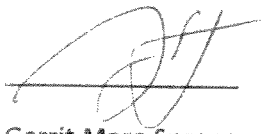
PKL-KZZ 36/11, date 05 July 2011

Presiding judge:



Lars Dahlstedt

EULEX Judge



Gerrit Marc-Sprenger

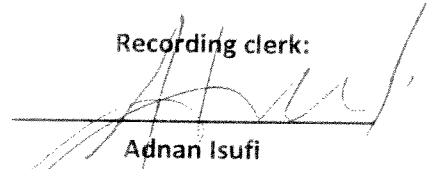
EULEX Judge



Emine Kaciku

Supreme Court Judge

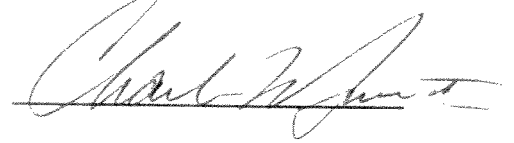
Recording clerk:



Adnan Isufi

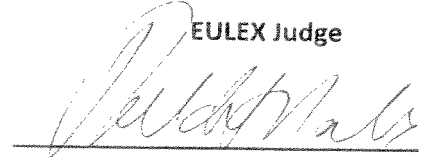
Legal Advisor

Members of the panel:



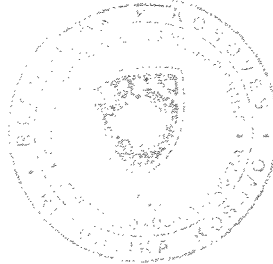
Charles L Smith III

EULEX Judge



Valdete Daka,

Supreme Court Judge



**Legal Remedy:** No request for protection of legality may be filed against a decision of the Supreme Court of Kosovo in which a request for protection of legality was decided upon (Article 451 paragraph (2) of the KCCP).