SUPREME COURT OF KOSOVO
Ap-Kz no. 129/2012
24 July 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Horst Proetel as Presiding Judge, Supreme Court Judges Nesrin Lushta and Marije Ademi, and EULEX Judges Anne Kerber and Martti Harsia as panel members, assisted by Legal Officer Chiara Rojek acting in the capacity of recording clerk,

In the criminal case against
S U nickname , born on in
father's name mother's name , of Kosovo citizenship,
And J V , born on in
father's name mother's name , of Kosovo citizenship, residing in

Charged as per in the Indictment PP no. 479/10 dated 23 May 2011 as amended on 3 November 2011 with the criminal offence of Murder contrary to Article 146 of CCK (against S U), and with the criminal offence of Unauthorized ownership, control, possession or use of weapons contrary to Article 328 Paragraph 2 of the CCK (against J V),

Acquitted in first instance by Judgement P no. 259/2011 of Pejë/Peć District Court dated 30 November 2011 of the offence of Murder contrary to Article 146 of the CCK pursuant to Article 390 Paragraph 1 item 2 of the KCCP (for S U) and convicted in first instance by the same Judgment for the offence of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 Paragraph 2 of the CCK and sentenced to one (1) year of imprisonment (for J V),[1]

Acting upon the Appeals filed on 20 February 2012 by Defence Counsel Haxhi Cekaj on behalf of Defendant J V , on 24 February by Lawyer Nushe Kuka-Mekaj, Representative of the Injured Party H A , on 27 February by the EULEX District Public Prosecutor, all against the Judgment P no. 259/2011 of Pejë/Peć District Court dated 30 November 2011, and considering the Reply to the Appeals filed on 5 March by Defence Counsel Gëzim Kollqaku on behalf of Defendant S U and the Opinion and Motion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 24 May,

After having held a public session on 24 July 2012 in the presence of Defendant S U and his Defence Counsel Gezim Kollcaku,

---

[1] The summary Indictment against J V in relation to the offence of Participation in a Brawl was rejected pursuant to Article 389 Paragraph 1 item 1 of the KCCP.

Pursuant to Articles 420 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

1. The Appeal of the Injured Party H. A against the Judgment P no. 259/2011 of Pejë/Peć District Court dated 30 November 2011 is **DISMISSED** as impermissible pursuant to Articles 420 Paragraph 1 item 1 and 422 of the KCCP.
2. All further Appeals are **REJECTED** as ungrounded pursuant to Article 420 Paragraph 1 item 2 and 423 of the KCCP.
3. The Judgment P no. 259/2011 of Pejë/Peć District Court dated 30 November 2011 is **AFFIRMED** in its entirety.

REASONING

I. Procedural background

On 20 November 2010, at around 02.00 am in the Cafeteria Damjana located in the village of Jabllanicë e Leshanit, Pejë/Peć Municipality, a brawl involving several individuals, including S U , J V and A H resulted in the injury of S U and the death of A H following a fatal gunshot.

On 31 May 2011, the District Public Prosecutor filed the indictment PP no. 479/10 dated 23 May 2011 charging S U with Murder contrary to Article 146 of CCK, and J V with Unauthorized ownership, control, possession or use of weapons contrary to Article 328 Paragraph 2 of the CCK. A summary indictment was additionally filed against A U and Sl U for the criminal offence of Participation in a Brawl contrary to Article 155 Paragraph 1 read with Article 23 of CCK.
On 27 June 2011, the Indictment was confirmed by Ruling KAQ no. 206/11.

The main trial was held throughout the month of November 2011. On 3 November 2011, the Public Prosecutor withdrew the charge of Participation in a Brawl against J V

On 30 November 2011, the District Court of Pejë/Peć issued the Judgment P no. 259/2011 by which S U was acquitted of Murder pursuant to Article 390 Paragraph 1 item 2 of the KCCP, since there are circumstances of necessary defence under Article 8 of the CCK. J V was found guilty of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 Paragraph 2 of the CCK and sentenced to 1 (one) year of imprisonment. The summary indictment against Jusuf Vishaj in relation to the offence of Participation in a Brawl was rejected pursuant to Article 389 Paragraph 1 item 1 of the KCCP, as the Prosecutor withdrew the charge during the main trial.[2]

[2] The third Defendant was acquitted pursuant to Article 390 Paragraph 1 item 3 of the KCCP, and the fourth Defendant was found guilty of Participation in a Brawl contrary Article 155 Paragraph 1 of the CCK and sentenced to 4 (four) months of imprisonment. In addition, the District Court ordered the confiscation

II. Submissions of the parties

A. Appeal of the District Public Prosecutor

The Public Prosecutor files an appeal on the grounds of an erroneous determination of the factual situation and of the decision on punitive sanctions under Articles 405 and 406 of the KCCP. He requests the Supreme Court of Kosovo to annul the contested verdict in relation to the acquittal of S U and to the punishment imposed on J V and send back the case for retrial or to amend the verdict.
The Prosecutor claims that the First Instance Panel incorrectly determined the facts in respect to the charges against D L The Panel failed to properly consider the autopsy report which proves that multiple serious wounds were inflicted to A H on his skull, caused by a sharp object, strongly indicating that the Defendant attacked the victim with an axe prior to the shooting. Therefore, A H was acting in self-defense.
The Prosecutor also avers that the First Instance Court disregarded other evidence, e.g. statements of witness E G Sh U , M P contradicting the findings that the victim's conduct was aggressive and the attack on S U was imminent.
The Panel, furthermore, rejected the Motion to hear a medical expert and a ballistics expert to clarify the following circumstances: time of infliction and consequences of the injuries on the victim's physical condition, distance from which the lethal shot was fired, absence of gun powder traces on A H s hands.
The First Instance Court did not determine if S L was previously convicted.

The Public Prosecutor alleges that the District Court Panel omitted to take into account the previous conviction of J V to six years and six months of imprisonment for Smuggling of migrants contrary to Article 138 Paragraph 1, in conjunction with Establishing slavery, slavery like conditions and forced labour under Article 137 of the CCK.

B. Appeal on behalf of Defendant J V

The Defence alleges a substantial violation of the provisions of criminal procedure under Article 403 Paragraph 1 item 3 of the KCCP and opposes the decision on criminal sanctions under Article 406 of the KCCP. Defence Counsel suggests amending the challenged Judgment to impose a more lenient punishment onto J V or to annul it and send back the case for retrial.
He claims that an essential violation of the criminal procedure was committed by the First Instance Court because J V was not present during the two first sessions of the main trial. In addition, it is submitted that the District Court Panel omitted to consider several mitigating circumstances when calculating the punishment: the Defendant admitted his guilt and expressed remorse; he has never been in conflict with the law prior to this proceeding; he is the father of one child and the only bread-winner for his entire family.

---

and destruction of the pistol of type TT, caliber 7.62 mm, with serial number 26276 and the payment of the costs of the criminal proceeding amounting amount of 100 (one hundred) Euros by Defendants S[illegible] U and J V [illegible]aj pursuant to Article 99 Paragraph 2 item 6 of KCCP

C. Appeal on behalf of the Injured Party Hasime Alaj

The Representative of the Injured Party alleges an erroneous determination of the factual situation under Article 405 of the KCCP and proposes to the Supreme Court to annul the contested Judgment and send back the case for retrial. He claims that the First instance Court failed to consider several elements: the victim was found dead sitting on the table; some witness statements' lack of clarity; paraffin was found with the Accused. The Injured Party, moreover, contends the District Court Panel's rejection to call a medical expert in court.

D. Reply to the Appeal filed on behalf of Defendant S U

The Defence suggests to the Supreme Court of Kosovo to confirm the First Instance Judgment. He puts forward that S U acted in necessary defence, as it is ascertained by the statements of the Accused and the witnesses, as well as the documentary evidence.

E. Opinion and Motion of the OSPK

The State Prosecutor proposes to the Supreme Court to reject all the appeals and to confirm the contested Judgment.[3]

Regarding Defendant S U the State Prosecutor believes that the complete factual situation in regard to what happened after A H rose from his table is not known as the evidence available is very limited and partly contradictory. The First Instance Court has not established the circumstances of infliction of the victim's injuries that were mentioned in the autopsy report and might have been done with an axe. It is however not clear who was holding the axe at the critical time.

In the OSPK's opinion, calling a medical expert and a firearms expert could not provide additional evidence to result in another outcome of the proceeding. The fact that gun residue was not found on either A H 's nor S U hands does not conclusively prove that none of them fired the gun.

The State Prosecutor, furthermore, agrees with the District Court Panel's rejection to hear Prosecutor Sinanaj, who conducted the interview of Witness M P

As to Defendant J V the State Prosecutor recalls the circumstances of the two first days of the main trial when the Defendant was absent. The OSPK submits that the possibility to remove an Accused from the courtroom during the trial in case of disturbance under Article 336 Paragraph 2 indicates that the mandatory presence of the Defendant during the trial is not without exceptions. The purpose of Article 403 Paragraph 1 item 3 of the KCCP is to ensure a fair trial. In the case at hand, no evidence in relation to the indictment against J V was administered during the two first days of trial. His absence has not impaired his ability to defend himself or his right to a fair trial. The State Prosecutor thus submits that this does not constitute a substantial violation of the provisions of criminal procedure.

---

[3] The State Prosecutor received the English versions of several documents from the District Court of Pejë-Pec and suggests amending the case file to insert these materials.

Finally, the State Prosecutor finds that the sentence imposed onto the Defendant is not excessive, and reflects the level of culpability established by the Court.

III. Findings of the Supreme Court of Kosovo

A. Competence of the Supreme court of Kosovo and admissibility of the Appeals

The Supreme Court of Kosovo is competent to decide on the Appeals pursuant to Articles 26 Paragraph 1 and 398 and following of the KCCP.
The Supreme Court Panel has been constituted in accordance with Article 3 Paragraph 7 of the Law No. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

The verdict P no. 259/11 was pronounced on 30 November 2011.
The Appeal of Defence Counsel Haxhi Cekaj on behalf of Defendant J V was filed on 20 February 2012. Lawyer Nushe Kuha-Mekaj, Representative of the Injured Party, lodged an appeal on 24 February 2012. The Appeal filed by the Public Prosecutor was filed on 27 February. A Reply to the Appeals was filed by Defence Counsel Gëzim Kollqaku on behalf of S U on 5 March 2012. At last, the Opinion and Motion of the OSPK was received on 24 May 2012.
Lawyer Haxhi Cekaj received the challenged Judgment on 10 February. It is noted that Defendant J V has not signed the delivery slip. The Public Prosecutor, Lawyer Nushe Kuha-Mekaj and Injured Party H A received the Judgment on 10 February. Defence Counsel Gëzim Kollqaku and S U were served with the appeals respectively on 29 February and 2 March.
It is noted that the Representative of the Injured Party filed an appeal on the basis of an erroneous determination of the factual state, that is not permitted under Article 399 Paragraph 3 of the KCCP. Indeed this provision restricts the scope of the appeal of the Injured Party to the punitive sanctions and to the costs of criminal proceedings. The Appeal of the Injured Party H A is consequently dismissed as impermissible pursuant to Articles 420 Paragraph 1 item 1 and 422 of the KCCP.
The Supreme Court panel holds that the Appeals by Defence Counsel Haxhi Cekaj and the Public Prosecutor as well as the Reply to the Appeal are admissible, pursuant to Article 398 Paragraph 1 and 408 of the KCCP.

B. Merits of the Appeals

The Supreme Court of Kosovo finds the Appeals ungrounded and, thus, rejects them in their entirety.

1. Appeal of the District Public Prosecutor in respect to Defendant S U

That the First Instance Court erroneously determined the factual state under Article 405 of the KCCP

After assessing the elements of the case file, the Supreme Court Panel finds that the Prosecutor's contention does not stand and, as such, concurs with the State Prosecutor and the Defence's submissions. The Supreme Court takes the view that the District Court Panel proceeded to all the necessary steps to establish the truth and determined the facts in the instance in an accurate manner. Any further explorations would not have assisted in refuting the assertion that S U acted in self-defence, following an unprovoked threat to his life that justified the shooting of the victim.

The undersigned Panel recalls the circumstances of the event: it occurred during a brawl; it involved several persons and creates immense confusion in the cafeteria; some individuals got injured, the Defendant S U was seriously wounded and A H was shot dead; some of the participants in the brawl are family connected. In the Supreme Court's view, the account of the facts presented by the Defendant is to a certain extent corroborated by the oral and documentary evidence. The late A H and S U were facing one another very closely, and the victim fired two shots at Defendant U hurting him seriously. He then fired back at H

The Supreme Court of Kosovo finds that, as stressed by the State Prosecutor, the evidence presented in the case cannot allow a full determination of the factual state, in particular relating to the circumstance of the injuries of the victim, the time of their commission and the identity of the perpetrator.
Contrary to the opinion of the Public Prosecutor, it cannot be verified that Sylejman Uka has provoked the victim by prior hits on the victim's skull. The autopsy report[4] indeed mentions that traces of "incision-laceration-ripping wounds" and "under-skin haemorrhage or blueness (hematoma)", caused by a mechanic action of hard sharp object (cutting) were found on the victim's skull. First of all, great accuracy in the results of another medical expertise cannot be expected as the forensic experts who performed the autopsy could not establish if the incisions on the skull were pre- or post-mortem, and if they were provoked by a hit with an axe. Secondly, if such contention could be ascertained, evidence is lacking on whether S U was the one who hit A H in the head by the axe. The Supreme Court concedes that the First instance Court could have elaborated on this circumstance in its written reasoning. However, justification can be found in the trial records.[5] That rests that the circumstances of the hitting of A H remained unclarified. The Autopsy report, nonetheless, clearly states that the shots inflicted to the victim, and not the injuries found on the skull, were the cause of the death.[6]

As to the alleged provocation of the late victim, it was confirmed that S U was holding an axe during the brawl, which he used to hit J V with the handle. He

[4] Autopsy report from Department of Forensic medicine, reference no. MA 10-308, issued on 20 November 2010, page 3
[5] District Court of Pejë/Peć, minutes of main trial, 30 November 2011, page 10
[6] Autopsy report from Department of Forensic medicine, reference no. MA 10-308, issued on 20 November 2010, page 6: cause of death: perforating wound in the region of stomach caused by a dynamic action of a bullet fired form the fire weapon

admitted this fact in court. He also hit M G on her back with the axe.[7] It could not be established that he directed the axe against A H

The submission of the Public Prosecutor regarding the rejection to hear the Kosovo Prosecutor Sinanaj (in relation to the questioning of the witnesses E G and M P) is without merit. The Supreme Court considers that the District Court Panel carefully assessed the witnesses' testimonies and their credibility, bearing in mind the personality of the witnesses, their role in the brawl and its circumstances. Moreover, hearing Prosecutor Sinanaj in court could not shed light on the circumstances of the events. E. G has confirmed his previous statements according to which the late victim suddenly stood up drawing his pistol approaching his table. He denied that Defendant U had something in his hands and threatened A H It is also noted that he drank more than 10 bottles of beer. The First Instance Court rightfully refused to call the Kosovo Prosecutor in court to elaborate on the witness' previous statement. The same conclusions are reached for witness P He confirmed that the victim stood up and pulled his gun which initially was directed to the ground.

The District Court similarly rejected to hear a ballistic expert. A ballistic expertise was performed during the investigation.[8] The findings corroborate the sequence of facts described by the First Instance Court. The use of the pistol HELWAN calibre 9 19 mm serial number 1057899 with four bullets was ascertained. The undersigned Panel cannot deny that positive results of gunshot residues (GSR) analysis would have clarified the circumstances of the case. It is noted that the forensics experts proceeded to an extract of samples of gunpowder traces on the victim and the Accused's hands. The report mentioned that the samples were taken from S U at the hospital and that an extraction of GSR was also performed on the victim.[9] The expertise, however, concluded to the absence of GSR on the left and right hands of A H and S U [10] The absence of residues can easily be explained by the fact that they might have been removed when the victim and the Defendant were being cleaned in the hospital and the morgue.[11] The First Instance Court provided grounded reasoning to reject the Motion of the Public Prosecutor and of the Injured Party that the Supreme Court hereby endorses.

---

[7] District Court of Pejë/Peć, Judgment P no. 259/2011, 30 November 2011, page 14

[8] Expertise report from the forensic Laboratory Directorate, reference no. 2010-2375, PP no. 479/2010, concluded on 01.02.2011; Expertise report from the forensic Laboratory Directorate, fire expertise unit, reference no. 2010-2375, PP no. 479/2010, concluded on 20.12.2010

[9] Crime scene inspection Report from the Kosovo police, investigation file no.: 2010-DA-2560 – FRP-10-184, dated 20 November 2010

[10] See Forensic Science Centre of the Republic of Croatia, traceology department reference no. 511-01-115/1-2491/11.SK, dated 16 May 2011

[11] See *inter alia* Activity after shooting and its effect on the retention of primer residue, 26th Annual Program Amer. Acad. For. Sci. (1974), Dallas, U.S.A. Kilty JW.: Persons who test-fired guns had their hands examined for antimony and barium at various timed intervals after shooting. The shooters' activity was unrestricted after firing, except that hand washing was forbidden. This study led to the conclusion that 2 hours after firing, substantial amounts of antimony and barium were removed. Importantly, the same worker (46) reported no evidence of gunshot residue deposition remaining on the hands of a shooter after the hands were washed with soap and water and then dried with paper towels.

In the light of the aforementioned, the First Instance Court rightfully applied the principle *in dubio pro reo* enshrined in Article 3 Paragraph 2 of the KCCP.[12] In sum, the facts were adequately determined by the District Court Panel to conclude that the reaction of S U was proportionate to the danger posed by the unlawful, real and imminent attack of the late A H and that the Defendant acted in necessary defence as foreseen under Article 8 of the CCK. Consequently, the acquittal of the Defendant is justified since there are circumstances that exclude his criminal liability pursuant to Article 390 Paragraph 2 of the KCCP.

That the First Instance Court failed to correctly determine the punishment under Article 406 of the KCCP

It is noted that the First Instance Court rejected the Prosecution's motion to postpone the main trial while awaiting documentation related to the previous convictions of S U from the German authorities. The excerpt of the Central Registry issued by the Federal Office for Justice in Bonn dated 17 November 2011 (enclosing the information on the conviction of S U for Attempted Murder) was submitted by the Public Prosecutor, together with the Appeal. The events in the instance occurred in November 2010 and the Indictment PP no. 479/10 was filed in May 2011. S U was known as suspect since the day of the incident. The Supreme Court of Kosovo concedes that the request for international legal assistance might take some time. It, nevertheless, finds that the First Instance Court correctly decided to complete the trial proceeding without waiting for the outcome of the request of previous convictions.[13] The Supreme Court holds that the notion of fair trial 'within reasonable time' is of fundamental nature, as guaranteed by the KCCP, the Constitution of the Republic of Kosovo and the European Convention of Human Rights (ECHR).[14] The First Instance Court proceeded in the case at hand to a fair balance of the interests of the parties to the proceeding.
Finally, the previous criminal conviction of the Accused could have had an impact on the imposition of the punishment under Article 64 Paragraph 1 of the CCK, if S U were to be convicted, which was not the case.

2. Appeal of the Public Prosecutor and the Defendant in respect to Defendant Jusuf Vishaj

That the First Instance Court committed a substantial violation of Article 403 Paragraph 1 item 3 of the KCCP

The Supreme Court Panel notes that the main trial started on 1 November 2011 in the absence of J V The trial continued on 2 November without the Defendant, who was also absent during the closing speech on 30 November.[15] J V. finally

[12] District Court of Pejë/Peć, Judgment P no. 259/2011, 30 November 2011, page 19
[13] Ibid, page 20; see also minutes of main trial, 30 November 2011, page 10
[14] European Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950
[15] District Court of Pejë/Peć, Judgment P no. 259/2011, 30 November 2011, page 5; see also minutes of main trial, 3 November 2012, pages 2-3

appeared in court on 3 November 2011 and the trial was re-opened with the consent of all the parties. On that date, the Defendant and his Defence counsel agreed to continue the trial sessions. In addition, the Public Prosecutor read the Indictment and the minutes dated 1 and 2 November 2011 were considered as read out. The Trial Panel expressed its intention to sever the case against J V which eventually was not done. None of the witnesses gave statements regarding the charges against J V during his absence and that his lawyer was present during these sessions.

The presence of the Accused during the trial is of mandatory nature under the Kosovo procedural rules.[16] The KCCP, however, foresees moderations to this principle: announcement of the judgement in the absence of a party under Article 392 Paragraph 3, removal of the Accused from the courtroom in case of disturbance under Article 336 Paragraph 2. The procedure *in absentia* was known under the old law.[17] Worth mentioning is that a trial held in the absence of the Accused with the strict procedural safeguards is possible in some European legal systems.[18]

The European Court of Human rights (ECtHR) held that the right to a fair trial enshrined in Article 6 Paragraphs 1 and 3 c), d) and e) of the ECHR implicitly contains the right to participate effectively to a hearing.[19] A trial *in absentia* has to ensure the guarantees of fair trial under the ECHR, which shall be respected at all stages of the proceeding.[20] The

---

[16] See *inter alia* Chapter XXX (Measures to ensure the presence of the Defendant, to prevent re-offending and to ensure successful conduct of the criminal proceedings), Article 321 Paragraph 1, Article 330 Paragraph 1, Article 403 Paragraph 1 item 3 of the KCCP

[17] Article 300 Paragraph 3 of the Law on Criminal Procedure of Yugoslavia: (1) [...] (2) An accused may be tried in absentia only if he is at large or is otherwise inaccessible to government agencies, and if there are particularly important reasons for trying him although he is not present. (3) The decision to try the accused in absentia shall be made by the panel on the motion of the prosecutor. An appeal shall not stay execution of the decision.

[18] See Belgian Code of criminal instruction, Article 149 and following; United Kingdom case law, House of Lords 20 February 2002, R. v. Jones (Anthony) [2003] 1 A.C. 1; French Code of criminal procedure, Chapter VIII default proceedings in felony cases, Article 379-2; *inter alia* Council of the European Union Framework Decision 11309/08 dated 2 July 2008 with a view to adopting a Council Framework Decision on the enforcement of decisions rendered in absentia and amending Framework Decision 2002/584/JHA on the European arrest warrant [...] (http://register.consilium.europa.eu/pdf/en/08/st11/st11309.en08.pdf)

[19] See ECtHR, Colozza v. Italy, Application no. 9024/80, Judgment of Chamber, 12 February 1985, para 27: "27. Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present."; see also ECtHR, Poitrimol v France, Application no. 14032/88, Judgment of Chamber, 23 November 1993, para 31

[20] See ECtHR, Poitrimol v. France, Application no. 14032/88, judgment 23 November 1993, para 34: "... A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial (see the Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, p. 45, para. 99, and, mutatis mutandis, the Goddi judgment previously cited, Series A no. 76, p. 12, para. 30, and the F.C.B. judgment previously cited, Series A no. 208-B, p. 21, para. 33) [...]."; *inter alia* United Nations Human Rights Committee, Mbenge v. Democratic Republic of Congo, Communication No. 16/1977, 25 march 1983, para 14.1: "Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in

European Court set up some minimum procedural standards to be followed: the national authorities have to demonstrate due diligence in trying to locate the Accused and inform the individual of the charges and the details of the case. The accused should be entitled to a fresh determination of the merits of the case, subsequent to a trial *in absentia*.[21] In the ECtHR's view, the Accused may waive his right to be present at the hearing. Such waiver has to be done in an unequivocal manner and surrounded by procedural safeguards. The compliance of such procedure with the guarantees of a fair trial depends of the circumstances of the case and is examined on a case-by-case basis.

The Supreme Court takes the opinion that the defence's rights were respected in the case of J. V. The District Court issued a summons to the Defendant. The latter was being represented at all time by his Defence counsel. The charges regarding him were not discussed and no evidence submitted in his absence. At last, the Defendant and his Defence Counsel expressly agreed not to recommence the trial from the start. It is also noted that J V and his lawyer participated actively to the subsequent trial sessions. The Defendant was not present in court on the day of the announcement of the verdict, the 30 November, despite the fact that he has been duly summoned by the Presiding Judge.[22] On that day, his lawyer mentioned that he could not reach his client. The Defence Counsel submitted a very concise closing speech without raising any contention in this respect.[23] This cannot be considered that J V has waived his right to be present in court in an unequivocal and determined manner. However, the Code authorizes that a judgment be announced in the absence of the Accused under Article 392, which occurred in the instance.[24] As stressed by the First Instance Court, the Defendant pleaded guilty to the charge.

At the appeal stage, the Supreme Court Registry duly sent a notification to J V to ensure his appearance in court.[25] The Registry also attempted to contact him, his partner and his Defence counsel by phone, to obtain additional information on his whereabouts, without success. Moreover, J V filed an appeal and therefore should have made himself available to the court as to enable his appearance in the second instance proceeding. The Supreme court of Kosovo takes the views that all efforts have been made by the authorities for the Defendant to be present in court during the first and second proceedings. An indefinite postponement of the proceeding due to the

---

advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice."

[21] See ECtHR, Krombach v France (2001) Application no. 29731/96, judgment 13/05/2001, para. 87. "In the Court's view, the procedure for a retrial after the contempt has been purged only affects the effective exercise of the defence rights if the accused is arrested, for in such cases the authorities have a positive obligation to afford the accused the opportunity to have a complete rehearing of the case in his or her presence. [...]";

[22] Minutes of main trial, 15 November 2011, page 36

[23] Minutes of main trial, 30 November 2011, pages 17-18

[24] Article 392 Paragraph 3 of the KCCP: The judgment shall be announced even in the absence of a party, a legal representative, authorized representative or defence counsel. If the accused is not present, the trial panel may decide that the presiding judge reports the judgment to him or her orally or that the judgment be served on him or her in writing.

[25] See Envelope containing notification to the Defendant, dated 19 July 2012. It is written the Defendant is outside the country and the family cannot receive any document on his behalf

impossibility to contact the Defendant may affect the rights of the co-Defendants and impede the completion of the case in a reasonable time. Consequently, in this Panel's opinion, the procedure *in absentia* was done in the interests of the administration of justice, respecting the minimum guarantees of fair trial the Defendant is entitled to.
The ground of appeal is therefore rejected as unfounded.

That the First Instance Court committed a violation under Article 406 of the KCCP in determining the punishment of the Defendant

The Defendant was sentenced to one (1) year of imprisonment. The First Instance Panel considered the facts that J. .. V. .. brought his gun loaded to a restaurant and that most of the time he had his weapon on him as aggravating circumstance, and that he admitted carrying a weapon as mitigating circumstance.[26] The District Court held that "in Kosovo it is important to give strong signals that unauthorized ownership of weapons will be punished severely." As mentioned in the Prosecutor's appeal, it omitted to take into consideration the past conviction of the Defendant to six years and six months of imprisonment for the offence of Smuggling of migrants read with Establishing slavery, slavery like conditions and forced labour.
The Supreme Court can only concur with these first instance findings. Controversy may arise as to include the previous criminal conviction of an Accused as an element of the "the past conduct of the perpetrator", circumstance to consider when determining the punishment, pursuant to Article 64 of the CCK. The Supreme Court Panel holds that the previous criminal conviction of an Accused is a factor to be taken into account during the calculation of the punishment. This view complies with the purposes of punishment mentioned in Article 34 of the CCK to prevent from repeating a criminal offence and to deter other persons from committing criminal offences. Also, Article 354 of the KCCP clearly entitles the Trial Panel to consider the information related to the prior conviction of the Defendant after the presentation of evidence is completed.

However, such omission does not affect the determination of the punishment, as the Public Prosecutor contends. An evaluation of all the circumstances of the case, including the personal characteristics of J. V. , was done at the first instance level to reach a decision on the sanction, in accordance with Article 34 and following of the CCK. Moreover a one (1)-year imprisonment is an appropriate sentence for the commission of such criminal offence. The Supreme Court need not to reiterate its acknowledgement of the vital deterrence of unauthorized possession and/or use of weapons in Kosovo.

Consequently, it was decided as in the enacting clause.

Presiding Judge

EULEX Judge Horst Proetel

Panel member

Supreme Court Judge Nesrin Lushta

Panel member

[26] District Court of Peja/Peć, Judgment P no. 259/2011, 30 November 2011, page 21

Supreme Court Judge Marije Ademi

Panel member

EULEX Judge Martti Harsia

EULEX Judge Anne Kerber

Recording Clerk

Legal officer Chiara Rojek

SUPREME COURT OF KOSOVO
Ap-Kz no. 129/2012
24 July 2012
Prishtinë/Priština