SUPREME COURT of KOSOVO

Supreme Court of Kosovo
API.-KZI. No. 09/2009
Prishtinë/Priština
28 December 2010

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 28 December 2010 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Martti Harsia and Kosovo National Judges Emine Mustafa, Nesrin Lushta and Salih Toplica as panel members

And with Nexhmije Mezini as Court Recorder,

In the presence of the

International Public Prosecutor Jakob Willaredt, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsels Av E R for the defendant **O Z**

In the criminal case number API-KZI 09/2009 against the defendant:

O Z, father's name S, mother's maidens name A H, born on in the village of , municipality of Rahovec/Orahovac in Kosovo, Kosovo Albanian, last residence in Freedom , businessman by occupation, high school education, married, children, currently in detention on remand in Dubrava Detention Centre

Convicted in the 1st Instance by Verdict of the District Court of Prizren in the case no. P. Nr. 155/2007 dated 17 April 2008 and registered with the Registry of the District Court of Prizren on the same day, **the defendant was found guilty of the following criminal offenses:**

[i] Because on 10 October 2005 at about 16:20 hrs in the market of Xerxe/Zerze village, Prizren municipality, **O Z** acting in concert as a co-perpetrator with **Sh Sh** for the purpose of deliberately depriving another person of his life, namely H. Rr , intentionally shot at and killed H Rr while other persons were

presentand in a manner that demonstrated a ruthless disregard for life and in a violent manner;

of committing the criminal offence of **Aggravated Murder** in violation of the Article 147 item 5 of the Provisional Criminal Code of Kosovo (PCCK), committed in Co-Perpetration, under Article 23 of the PCCK, in that he, with another, killed H Rr on 10 October 2005 in Xerxe/Zerze village, Prizren Municipality;

[ii] Because on 10 October 2005 at about 16:20 hrs in the market of Xerxe/Zerze village, Prizren municipality, O Z acting in concert as a co-perpetrator with **Sh Sh** for the purpose of deliberately attempting to deprive another person of his life, namely N Rr , intentionally shot at and wounded N Rr ., while other persons were presentand in a manner that demonstrated a ruthless disregard for life and in a violent manner;

of committing the criminal offence of **Attempted Murder** in violation of the Article 147 item 11 and Article 20 of the PCCK, committed in Co-Perpetration, under Article 23 of the PCCK, in that he, with another attempted to kill N Rr on 10 October 2005, in Xerxe/Zerze village;

[iii] Because on 10 October 2005 at about 16:20 hrs in the market of Xerxe/Zerze village, Prizren municipality, O Z acting in concert as a co-perpetrator with **Sh Sh** for the purpose of deliberately depriving another person of his life, namely H Rr ; and while deliberately attempting to deprive another person of his life, namely N Ri , intentionally shot at H Rr and N Rr , while in possession of and using a weapon for which he had no authorization to possess or use;

of committing the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of the Article 328 paragraph 1 of the PCCK, in that he was in possession of and used a weapon in the homicide and homicide attempt of the Rrustemi brothers on 10 October 2005, in Xerxe/Zerze village;

[iv] Because on 19 April 2007 when he was apprehended by the police, he was in a possession of a weapon for which he had no authorization to possess or use;

of committing the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of the Article 328 paragraph 2 of the PCCK in that a weapon was found on his possession when he was apprehended by the police on 19 April 2007.

And was convicted as follows:

The accused was sentenced for the criminal act of **Aggravated Murder** committed in Co-Perpetration to a term of twenty-five (25) years [Article 147 paragraph 5 and Article 23 of the the PCCK]; for the criminal act of **Attempted Murder** committed in Co-Perpetration to a term of imprisonment of tweny-five (25) years [Article 147 paragraph

11; Articles 20 and 23 of the the PCCK]; for **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 1 of the PCCK] to a term of six (6) years and for **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 2 of the PCCK] to a term of three (3) years.
An aggregate punishment of 25 years was built by the 1st Instance Court in accordance with Article 71 paragraph 1 of the PCCK with credit for the time served in detention on remand since 19 April 2007;

Convicted in the 2nd Instance by modifying verdict of the Supreme Court of Kosovo (Ap-Kz No. 481/2008, dated 21 July 2009) on appeal of the Defence against the Judgment of the District Court of Prizren (P. no. 155/2007) dated 17 April 2008, as follows:

[i] The appeal filed in the interest of **O Z** on 04 August 2008 was partially GRANTED 1) as to the legal qualifications of count 1 and 2, which are unified and qualified being **Aggravated Murder** in violation of Article 147 item 11 of the PCCK, committed in Co-Perpetration under Article 23 of the PCCK, in that he, with another, killed Hasan Rrustemi on 10 October 2005 in Xerxe/Zerze village, Prizren Municipality; and 2) as to the legal qualification of count 3, being **Unauthorized Ownership, Control, Possession or Use of Weapons in violation of** Article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005, in Xerxe/Zerze village, Prizren Municipality; wereas
[ii] the appeal filed in the interest of **O Z** on 04 August 2008 was REJECTED in the remaining parts.

The Defense Counsels of the accused timely filed appeals against the Verdict of the Supreme Court of Kosovo dated 21 July 2009 (Ap.-Kz.No.481/2009); the appeal of Av E R was filed on 03 September 2009 and the appeal of Av F C was filed on 08 August 2009 whereas the one of Av T G was filed on 08 September 2009. It was asserted by all three Defence Counsels that the Verdict contains violation of the criminal code and that the punishment imposed upon the accused was to be challenged. In addition, Defence Counsels Av E R and Av F C alledge essential violations of the criminal procedure as well as erroneous and incomplete establishment of the factual state. Av E R has proposed to modify the appealed Judgment and to acquit the defendant from the criminal charge of **Aggravated Murder** committed in Co-Perpetration or, subsidiarily impose a more lenient punishment for all criminal offences or annul the Judgment and send it bach for re-trial, whereas Av F C requests to annul the Judgment P No. 155/2007 of the District Court of Prizren, dated 17 April 2008 as the 1st Instance Court and Judgment Ap.-Kz.No. 481/2008 of the Supreme Court of Kosovo as the 2nd Instance Court, dated 21 July 2009 and to return the matter for re-trial to the 1st Instance Court; finally Av T G has proposed to modify the Supreme Court Judgment dated 21 July 2009 to take the case back to the Supreme Court for re-trial and re-decision or – subsidiary – modify the legal qualification of the criminal offence and to impose a more lenient punishment or to impose one of applicable measures for perpetrators with mental disabilities or diminished mental abilities foreseen by UNMIK Regulation Nr. 2004/34.

The OSPK, with a response dated 22 January 2009 and registered with the Registry of the Supreme Court of Kosovo dated 25 January 2009 fully objected to all the appeals as ungrounded and therefore proposed dismissing them and to confirm the contested Judgment related to **O. Z .**

Based on the written Verdict of the District Court of Prizren in the case number P. Nr. 155/2007 dated 17 April 2008 (filed with the Registry of that Court on the same day), and the Verdict of the Supreme Court of Kosovo (Ap-Kz No. 481/2008, dated 21 July 2009), the submitted written appeals of the Defense Counsels, the relevant file records and documents and the oral submissions of the parties during the hearing session on 28 December 2010, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on the same day, hereby issues the following:

RULING

The appeals filed by Defence Counsels E . R on 3 September 2009, F C on 8 August 2009 and T G on 8 September 2009 on behalf of the defendant O . Z are PARTIALLY GRANTED. The Judgment of the Court of Second Instance, Supreme Court of Kosovo, AP.-KŽ. No. 481/2008, dated 21 July 2009, is ANNULED. The case is returned to the Court of Second Instance for re-trial.

As for the remaining part the appeals are REJECTED.

REASONING

Procedural History

1. In the afternoon of 10 October 2005 at about 16:20 hrs in the green market of Xerxe/Zerze village, Municipality of Prizren, two perpetrators acting in concert as co-perpetrators approached the K-Albanian citizens H Rr and his brother N Rr who both of them were in the process of entering their car in order to leave the market, which they had attended for shopping purposes at that time. Both perpetrators pointed their handguns at H Rr , shot at and killed him. One of the two perpetrators, after having shot at H Rr , pointed his handgun towards N. Rr as well, who in the course of events eventually got wounded and was hospitalized afterwards.

2. Witnesses identified the defendant O Z as one of the shooters, and who immediately after was observed entering a bordaux colored Opel Vectra at the drivers side, which was parked in a way that it blocked the vehicle of the victims, thus hindering them to leave the place. The respective Opel Vectra then left the village of Xerxe/Zerze towards Gjakova/Djakovica.

3. On 12 October 2005 the Public Prosecutor of the Prizren District filed a Ruling on Initiation of Investigation against O Z and the alleged second perpetrator Sh Sh An order for their arrest was issued by the Pre-Trial Judge of the District Court of Prizren on the same day. On 19 April 2007 O Z was apprehended by police and found in possession of a revolver of the type "Amadeo Rossi S.A. 0.38 Special", which he had no authorization for.He was detained from then on continuously.

4. As the second alleged perpetrator, Sh Sh was arrested on 23 Mai 2007 without incident by UNMIK police and detained on motion of the District Public Prosecutor based on a ruling of the District Court of Prizren on the same day (Hep. No. 52/07).

5. Dated 16 July 2007 the District Public Prosecutor in Prizren drew up an indictment against the defendants O Z and Sh Sh (PP 230/2005), which was filed with the District Court of Prizren on 17 July 2007. Both defendants were indicted for the criminal offenses of **Aggravated Murder** committed in Co-Perpetration [Article 147 paragraph 5 and Article 23 of the the PCCK]; **Attempted Murder** committed in Co-Perpetration [Article 147 paragraph 11; Articles 20 and 23 of the the PCCK]; **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 1 of the PCCK] and the defendant **Osman Zyberaj** alone as well for **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 2 of the PCCK]

6. The indictment was consolidated by Confirmation decision of the First Instance Court (KA 112/2007) on 30 August 2007.

7. The public Main Trial hearing against O Z and Sh Sh which consisted in altogether nine (9) sessions between 31 January and 17 April 2008 was partly held in the premises of the District Court of Prizren and – considering the health conditions of the defendant O Z - in some other parts in the court room of the Dubrava Prison facility. The verdict of guilty for **Aggravated Murder** in violation of Article 147 paragraphs 4, 5 and 8 of the PCCK and **Attempted Murder** in violation of Article 147 paragraph 11 and Artilce 20 of the PCCK, both committed in Co-Perpetration according to Article 23 of the PCCK, and for **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 1 of the PCCK against both defendants as well against the defendant Osman Zyberaj alone for **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 2 of the PCCK was pronounced on 17 April 2008 imposing an aggregate 25 (twenty-five) years prison sentence against each of the defendants.

8. During the main trial, the First Instance Court examined the accused, **O Z** and **Sh Sh**. Then, the following witnesses were questioned: V B and S B., who were attending the green market in Xerxe/Zerze, when the criminal acts in question were committed, KPS Officer L V . and former KPS Officer F D who investigated the crime scene and attended investigations and autopsy concerning the digging out and burning of the corpse of the victim H Rr in Rahovac/Orahovac a few days later, the victim N Rr International Police Officers Robert Castellow who was appointed to monitor and advise in the case of the killing of H Rr and E G who was involved in the arrest of the defendant **O Z** on 19 April 2007, KPS Officer I K, who was involved as ballistic expert into the investigations concerning the weapon found on **O Z** and the shell casings and bullit heads found in the crime scene, Lajm journalist Q K, who attended the crime scene immediately after the shooting and who – based on information given to him through a telephone call – published a newspaper article on 14 October 2005, thus telling the names of both victims and that the defendants **O Z** and **Sh Sh** would be the perpetrators, Autopsy Pathologist Dr. A S who conducted the autopsy of H Rr Orthopedic Surgeon and Traumatologist Dr. S D who treated N Rr KPS Officers I H S G Xh M F B and R G I B who all have been involved in the investigation of the crime; Sh K, who as a worker in a car wash in Xerxe/Zerze and Xh Th who works as a sales person close to the market in Xerxe/Zerze and who both had seen **Sh Sh** near rto the market at the day of the shooting, as well as B Z the wife of defendant **O Z**

9. In addition, the Presiding Judge continuously consulted with relevant medical staff in order to make sure that the defendant **O Z**, who suffers several physical and psycological deseases, would be physically and mentally able to follow the trial and participate in a way that inables him to understand the proceedings, consult with his Defence Counsel and respond to the Court. In particular, the cardiologist Dr. J M was consulted as well as internist Dr, G R and D M and B Moreover, the defendant **O Z** was permanently under observation of a paramedic who provided him with needed medication and made sure that the defendant was hospitalized, whenever this deemed necessary.

10. Based on this evidence, the 1st Instance Court established the factual situation, which led to the convictions as lined out before. Based on its findings, on 17 April 2008, the District Court announced the Verdict and found the accused guilty of the criminal offences listed above from items [i] through [iv]. Consequently, the Court imposed on the accused the punishments as also specified above.

11.The Judgment was timely appealed by both Defence Counsels of the defendant **O Z**, Av E R and Av R G on 04 August 2008.

On 29 October 2008, Defence Counsel Av E R forwarded to the Court a letter of the defendant **O Z** and asked to have it attached to the appeal.

Also the Defence Counsel of the defendant **Sh** **Sh** ., Av R. H , timely appealed the District Court Judgment on 11 August 2008.

12. Dated 01 December 2008 the OPSK gave an opinion according to Article 409 paragraph 2 of the PCPCK, thus proposing to reject all appeals as being ungrounded and without merits. The Public Prosecutor did not appeal.

13. On 21 July 2009, after the handover of the case files to EULEX in January 2009, the Supreme Court of Kosovo held an appeal session pursuant to Article 410 of the KCCP, within which the request of the defendant **O** **Z** dated 25 October 2008 as attached to the appeal of his Defence Counsels was read and the submissions of the Defence Counsels of the defendant **O** **Z** , Av R G Av E R and Av F C were heard as well as the sumissions of the defendant **O** **Z** and the opinion of the OSPK.
Moreover, also the submissions of the co-defendant **Sh** **Sh** and his Defence Counsels Av R H and H S were heard.

14. Dated 21 July 2009 the appeals panel of the Supreme Court of Kosovo pronounced its Judgment (Az.-Kz. 481/2008), thus partially granting the appeal of the defendant **O** **Z** as to the legal qualification under counts 1 and 2 of the 1st Instance Judgment, which was qualified as one Aggravated Murder in violation of Article 147 item 11 of the PCCK, and as to the legal qualification under count 3 of the 1st Instance Judgment, thus stating that the defendant **O** **Z** had committed the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons in violation of** Article 328 paragraph 2 of the PCCK only. For the remaining parts the appeals were rejected and the 1st Instance Judgment was confirmed.

15. The defendant **Sh** **Sh** was acquitted from all charges due to lack of evidence.

16. The three Defence Counsels of **O** **Z** , Av E R , Av F C. and Av T G timely appealed the Judgment of the appeals panel of the Supreme Court of Kosovo as issued in the 2nd Instance dated 21 July 2009 (Ap.-Kz.No.481/2009). The appeal of Av E R was filed on 03 September 2009 and the appeal of Av F C was filed on 08 August 2009 whereas the one of Av T G was filed on 08 September 2009. It was asserted by all three Defence Counsels that the Verdict contains violation of the criminal code and that the punishment imposed upon the accused was to be challenged. In addition, Defence Counsels Av F R and Av F C allege essential violations of the criminal procedure as well as erroneous and incomplete establishment of the factual state. Av E R has proposed to modify the appealed Judgment and to acquit the defendant from the criminal charge of **Aggravated Murder** committed in Co-Perpetration or, subsidiarily impose a more lenient punishment for all criminal offences or annul the Judgment and send it back for re-trial, whereas Av F C requests to annul the Judgment P No. 155/2007 of the District Court of Prizren, dated 17 August 2008 as the 1st Instance Court and Judgment Ap.-Kz. No. 481/2008 of the Supreme Court of Kosovo as the 2nd Instance

Court, dated 21 July 2009 and to return the matter for re-trial to the 1st Instance Court; finally Av T G has proposed to modify the Supreme Court Judgment dated 21 July 2009 to take the case back to the Supreme Court for re-trial and re-decision or – subsidiarily – modify the legal qualification of the criminal offence and to impose a more lenient punishment or to impose one of applicable measures for perpetrators with mental disabilities or diminished mental abilities foreseen by UNMIK Regulation Nr. 2004/34.

17 **The OSPK**, with a response dated 22 January 2009 and registered with the Registry of the Supreme Court of Kosovo dated 25 January 2009 fully objected to all the appeals as ungrounded and therefore proposed to dismiss them and confirm the contested Judgment related to O Z

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

I. THE ENACTING CLAUSE OF THE 2ND INSTANCE JUDGMENT

Ad 1: Comprehensibility and consistency of the enacting clause:

18. The Defense Counsel Av E R in his appeal has pointed out his opinion that the enacting clause of the 2nd Instance Judgment lacks necessary information, in particular regarding factual description of the criminal offences and the circumstances on which the application of the respective provisions of the material law depend, as well as regarding the intention of the alleged perpetrator to commit the crimes. Thus, **the Supreme Court had violated Articles 403 paragraph 1, item 11; 391 of the KCCP.**

This panel of the Supreme Court is of the opinion that the enacting clause of the 2nd 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 2nd 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 2nd Instance Judgment as to the point under discussion indeed reads as follows:

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo ... in the criminal proceedings against:

O Z *son of S and A H , born on in village, Rahovac/Orahovac Municipality, Kosovo Albanian, , st., married with children, businessman by occupation, high school education, currently in detention in Dubrava Prison and*

Sh Sh *., the son of Sh and N H , born on in , Gjakova/Djakovica Municipality, Kosovo Albanian, married with children, resident in village, merchant, average economic status, finished high school, currently in detention in Dubrava Detention Centre.*

Deciding upon the appeals on the District Court of Prizren Judgment P. no. 155/2007, dated 17 April 2008, convicting the two defendants of having committed the criminal offences of 1) aggravated murder in co-perpetration in violation of Article 147 paragraph 5 and Article 23 PCCK, attempted murder in co-perpetration in violation of Article 147 paragraph 11 and Articles 20 and 23 PCCK, 3) unauthorized ownership, control, possession or use of weapons in violation of Article 328 paragraph 1 PCCK in Xerxe/Zerze village, Prizren Municipality on 10 October 2005 and O Z only of having committed the criminal offence of 4) unauthorized ownership, control, possession or use of weapons in violation of the Article 328 paragraph 2 PCCK upon his arrest on 19 April 2007, appeals which were filed by the defense counsels on behalf of O Z on 04.08.2008 and on behalf of Sh Sh on 11.08.2008.

.... In the session held on 21 July 2009 and after deliberation and voting held on 21 July 2009,

Acting pursuant to Article 420 of the Criminal Procedure Code of Kosovo (KCCP) renders this

VERDICT

The appeal filed in the interest of O Z on 04 August 2008 is partially GRANTED 1) as to the legal qualification of Count 1 and Count 2, which are unified and qualified being Aggravated Murder in violation of Article 147 item 11 of the PCCK, committed in Co-Perpetration under Article 23 of the PCCK, in that he with another killed H Rr and attempted to kill N ı Rr on 10 October 2005 in Xerxe/Zerze village, Prizren Municipality and 2) as to the legal qualification of Count 3, being Unauthorized Ownership, Control, Possession and Use of Weapons in violation of the Article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005 in Xerxe/Zerze village, Prizren Municipality.
The appeal filed in the interest of O ı Z on 04 August 2008 is REJECTED in the remaining part.

The appeal filed in the interest of Sh Sh on 11 August 2008 is GRANTED and the defendant is ACQUITTED from all charges.

....

The Judgment of the District Court of Prizren, dated 17 April 2008, P No 155/2007 is affirmed in the remaining parts.

...

Bearing in mind that the appealed Judgment of the 2nd Instance Court just punctually refers to the concerns as raised by the Defence against the 1st Instance Judgment and thus is in line with the provision of Article 415 paragraph 1 of the KCCP stipulating that *the court of second instance shall examine the part of the judgment, which is challenged by the appeal*, it is noteworthy that indeed the enacting clause of the 2nd Instance Judgment is not as clear and precise as it could be. Nevertheless, it without any doubts fulfills all requirements of Article 396 paragraph 3 of the KCCP, as there are in particular the personal data of the accused in accordance with Article 233 of the KCCP and the decision by which he is pronounced guilty of the act of which he was accused.

The enacting clause of the 2nd Instance Judgment particularly is not as precise and detailed as it could be expected, when it comes to 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, as it is required by Article 391 paragraph 1 of the KCCP.

Notwithstanding, the enacting clause of the 2nd Instance Judgment qualifies the respective deeds as "*Aggravated Murder in violation of Article 147 item 11 of the PCCK, committed in Co-Perpetration under Article 23 of the PCCK, in that he* [the defendant **O Z** *with another killed H Rr and attempted to kill N Rr on 10 October 2005 in Xerxe/Zerze village, Prizren Municipality and 2) as to the legal qualification of Count 3, being Unauthorized Ownership, Control, Possession and Use of Weapons in violation of the Article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005 in Xerxe/Zerze village, Prizren Municipality*".

Moreover, full reference is made to the appealed 1st Instance *Judgment of the District Court of Prizren, dated 17 April 2008, P No 155/2007*, which was affirmed in the remaining parts.

Therefore, this panel of the Supreme Court notes that the enacting clause of the appealed 2nd Instance Judgment, although it could have been shaped much clearer, is at least clear enough to stand challenges on its understandability, comprehensibility and consistency.

Ad 2: Contradictions within the enacting clause and between the latter and the reasoning of the Judgment:

19. Moreover, Defence Counsels Av E R and Av F C. have stressed that as of their legal opinion the enacting clause and the reasoning of the 2nd Instance Judgment would be contradictory to each other, since – although the co-defendant **Sh Sh** had been acquitted of all charges, which clearly can be read from the enacting clause – the defendant **O Z** had been sentenced as co-perpetrator and continuously would be addressed a "co-perpetrator" throughout the whole reasoning of the Judgment. Therefore, **the Supreme Court had violated Article 403 paragraph 1, item 12 of the KCCP.**

This panel of the Supreme Court finds that there is clearly no indication for a violation of Article 403 paragraph 1, item 12 of the KCCP, since no contradiction of the enacting clause as such or between the latter and the reasoning of the Judgment can be established, when it comes to the legal qualification of the criminal acts as committed by **O Z** in Co-Perpetration. Notwithstanding the fact the at the other defendant, **Sh Sh** was acquitted by the 2nd Instance panel due to lack of evidence (which is not to be discussed in the context at hand) it was never challenged that – when **O Z** was involved in the shooting on 10 October 2010 in the market in Xerxe/Zerze village, Prizren Municipality, - there was a second person present, thus acting in concert with him. This in particular was stated by the witness N Rr from the beginning, even on the occasion of his very first interrogation by UNMIK police on 21 October 2005, when he pointed out that he had recognized only the defendant **O Z** as a shooter, but did not know about the identity of the second shooter. The witness referred to the presence and activities of two shooters continuously also after this on all occasions, whenever he was interrogated. Moreover, also the witness KPS Sgt. I B on the

day of the commission of the shootings, 10 October 2005, has made a protocol on the interrogation of a witness, who did not want to disclose his/her identity and therefore is unknown to the Courts. However, also this witness had stated that two shooters were involved into the commission of the crimes at hand. Witness I B . has confirmed his statement in the course of his interrogation in front of the 1st Instance Court on 11 April 2008. Since the 2nd Instance panel in its Judgment has affirmed the 1st Instance Verdict to this content, within which particularly the witness N . Rr has stated that **O Z** had pointed a gun onto the victim H. Rr . and afterwards had pointed it onto the witness himself and moreover the witness was considered reliable in this regards, the legal qualification of the 2nd Instance panel of the Supreme Court regarding the shooting-related deeds of **O Z** as being committed in Co-Perpetration deems correct.

II. CONTRADICTIONS AND SHORTCOMINGS OF THE REASONING AS SUCH

20. Defense Counsel Av E . R . moreover has stressed that the reasoning of the 2nd Instance Judgment as such would be contradictory in itself, since it addresses the defendant **O Z** continuously as "co-perpetrator", while it gives reasoning for the acquittal of the other defendant, **Sh . Sh** ., who was indicted as co-perpetrator. Also, there would be shortcomings regarding decisive facts, particularly when it comes to the question of an intention as required by Article 147 item 11 of the Criminal Code of Kosovo (CCK). Also the motive as being based on a blood feud related family rivalry had not been properly considered by the Supreme Court. Therefore, **Article 403 paragraph 1, item 12 of the KCCP would be violated by the Supreme Court.**

This panel of the Supreme Court does not see any violation of the law, in particular of Article 403 paragraph 1, item 12 of the KCCP. Insofar, reference is made to what was already stated above under point A.I. of this Judgment.

As to the legal qualification regarding Aggravated Murder pursuant Article 147 item 11 of the CCK, reference will be made under point C.II. of this Judgment, since the issue is considered to be linked more with subjects of proper application of the criminal law.

III. IMPROPER CONSIDERATION AND EVALUATION OF EVIDENCE

Ad 1: Evaluation of the witness statements of Nazim Rrustemi:

21. Defense Counsel Av E R moreover is of the opinion that the challenged 2nd Instance Judgment had not properly evaluated the statements of witness N Rr , the wounded brother of the late victim H Rr , since he was considered as being convincing with regards to the defendant **O Z** , whilst the Court did not follow him with respect to the role of defendant **Sh Sh**

This panel of the Supreme Court of Kosovo arrives to the opinion that no improper evaluation of evidence, in particular regarding the differentiations in terms of liability of the witness N Rr , was made, neither by the 1st Instance Court nor particularly by the 2nd Instance panel of the Supreme Court.

The examination of the file allows finding out that the 1st Instance Court, as it is pointed out in the Judgment dated 17 April 2008 (P. No. 155/2007), carefully has analyzed the statements of the witness and weighed them regarding all aspects one by one *(p. 7 through 9 of the English version and thereafter)*.

However, the 2nd Instance panel came to a different result regarding the defendant Sh Sh and has elaborated its opinion on the credibility of the witness N Rr in the following way:

[A]... *"possible mistake in the proceedings made by the first judge in relation to the recognition of Sh does not mean that the other statements of the witness related to the fact and to the other defendant are not credible. The reasoning of the challenged verdict makes it clear that N Rr knew O Z since they were of the same village. ... That O Z was one of the aggressors was stated by N since the very first moment of the Police investigation (see witness L V without any previous and external influence and constantly repeated until the main trial" (p.13 of the English version).*

With regards to the other defendant, Sh Sh the 2nd Instance Court has come to the point that the defendant needs to be acquitted. Regarding the witness N Rr , the 2nd Instance Judgment clearly points out:

"N Rr stated immediately after the incident to a Police Officer (witness L V) to have recognized one of the shooters as O Z . The same statement was made by Rr to the Police in his first interview dated 11 October 2005 at the hospital."

Then, the Judgment continues analyzing the different statements given by N Rr on 11 October 2005, 27 October 2005 08 July 2007 and finally during the Main Trial in 2008. The 2nd Instance panel in this context has made clear that obviously the witness N Rr first has recognized Sh Sh is the second shooter, when he was interviewed by Police on 08 July 2007, but not earlier. The 2nd Instance Judgment insofar refers to these aspects as well as to the fact that during the Main Trial session the witness in a non-public session had the choice between nine (9) persons in order to identify the defendant Sh Sh who was sitting with his Defence Counsel at the defendant's bank. Therefore, the 2nd Instance panel concludes that "... *this allows a reasonable doubt on this identification" (p.24 of the English version).*

This panel of the Supreme Court fully affirms this reasoning as being clear and sufficient in terms of the evaluation of evidence regarding the statements of witness N Rr

Ad 2: Rejection of reconstruction request and handling of the results of the ballistic expertise by the 2nd Instance panel:

22. Moreover, Defence Counsel Av E R has stressed - and this argument is joined by Av F C as well – that the 2nd Instance Court had rejected the reconstruction request of the Defence regarding the crime scene, although this was clearly justified by Article 254 of the CCK. The 2nd Instance panel also had tried to find an explanation for the results of the ballistic expertise, thus alleging two types of weapons being used, one that rejects ammunition during the shooting process and another one that doesn't. However, this could not be based on whatsoever facts and expertise.

As far as the Defence has stressed that the reconstruction of the crime scene was rejected by the 1st Instance Court and its Judgment insofar nevertheless was confirmed by the 2nd Instance Judgment, although the request had been justified according to Article 254 of the KCCP, this panel refers to the reasoning as given by the first Judge, pointing out that the reconstruction of the crime scene never before was required by the Defence, in particular not during the investigation and Pre-Trial phase, as it is foreseen by the law as a rule. It looks like the 2nd Instance panel did not see any needs for a reconstruction, but has based its decision on other corroborative evidence as provided according to the case file. This clearly can be understood from the very detailed and extensive elaborations the 2nd Instance Court has undertaken concerning the issue *(p.14 through 16 of the English version)*.

However, it is noteworthy that the Defence has not elaborated on the question, to which results different from what was established so far by the Court a reconstruction of the crime scene would lead.

Although it is worth mentioning that the speculations of the 2nd Instance panel on the use of two different weapons, which one of them might have rejected the cartridges and the other one didn't, seem to lack any weapon related experience and therefore might be misleading, it cannot be seen and also was not pointed out by the Defence Counsels in the course of their respective appeals, how this aspect would affect the findings of the Court.

Ad 3: Improper evaluation of evidence

23. Last but not least, there would be no individual and joint evaluation of the evidence taken in the 2nd Instance Judgment, as otherwise required by Article 387 paragraph 2 and 396 paragraph 7 of the KCCP.

Having checked through the relevant documents of the case file carefully, this Court realizes that the same argument already was raised in the course of appeals against the 1st Instance Judgment. Therefore, the 2nd Instance Court particularly has pointed out on its opinion that the respective aspects of the appeal would not be grounded, but that the

challenged 1st Instance Verdict would *"assess the collected evidence both separately (p.6-17) and as a whole (p.18-27)" (p.13 of the English version).*

This Court fully shares the opinion of the 2nd Instance Court (although it is very short), since the analysis of the 1st Instance Judgment as been carried out on this background clearly confirms the respective establishments of the 2nd Instance Court. It is noteworthy in this context that of course – since the 2nd Instance Court has chosen not to take any evidence again - the re-evaluation of evidence had to be based on the findings of the 1st Instance.

IV. THE "ADMISSION" OF O Z

24. The Defence Counsels of the defendant, Av E R and Av F C have stressed in their appeals that the statement of O Z dated 25 October 2008 and attached to the appeal on request of Av E R on 29 October 2008 does not fulfill the requirements for a guilty plea as set up by the law. In particular the 2nd Instance Court had considered the respective statement of the defendant an admission of the shootings without giving him the opportunity to admit the crimes in the course of the appellate procedure. Instead of opening a separate hearing in order to enable the defendant providing for his defense, the hearing of the defendant related to his appeal was conducted just in the course of a regular appeals session. Thus, by not granting the conditions of fair trial to the defendant as required by Article 6 of the European Convention of Human Rights (ECHR), **the 2nd Instance Appeals panel had violated Article 403 paragraph 1, item 9 of the KCCP**. The defendant particularly had been deprived of the possibility to describe what has happened and what the background of all the events had been and to present numerous witnesses stating in his favor.

The Supreme Court of Kosovo finds that the concerns raised by the Defence in this regard are factually grounded, as a guilty plea according to the relevant provisions of the KCCP requires the defendant to be properly warned and heard about his version of what has happened and whether or not he pleads guilty separately on each point and that this needs to be done in the course of a hearing. This was not the case at hand.

The 2nd Instance Court in its Judgment states as follows:

"During the main trial the defendant had never pleaded guilty. On 29 October 2008 the defense counsel of O Z forwarded to this Court as an attachment to his appeal a letter of the defendant dated 25 October 2008. In this letter the defendant ..... adds to 'accept to have murdered H Rr (chief of the Serb Intelligence Service) and to have wounded his brother'.

... During the session before this Court Z stated: 'it is true that on 10 October 2005 a murder took place and that it was committed by me. Apart from presenting it in writing, I wanted to do it orally too'. Z did not give any detail about the facts.

This Court is of the opinion that the written petition and the oral statement of O Z represent a sort of guilty plea and not a new piece of evidence, which can be taken only in a hearing and not during a session (412.1). The defendant simply accepted to have committed the murder of H Rr and the attempted murder of his brother N without entering into details on the facts or stating his defence. Moreover the statements of O. Z don't change the factual situation as determined by the 1st judge" (p.4 of the English version).

Indeed, as the 2nd Instance Court correctly refers to, Article 411 paragraph 2 of the KCCP provides that *"the court of second instance shall decide in a session of the panel whether to conduct a hearing"*. In addition, Article 412 paragraph 1 of the KCCP stipulates as follows:

"A hearing before the court of second instance shall be conducted only when it is necessary to take new evidence or to repeat evidence already taken due to an erroneous or incomplete determination of the factual situation, and when there are valid grounds for not returning the case to the court of first instance for re-trial".

The Supreme Court of Kosovo insofar finds that of course – contrary to the understanding of the 2nd Instance panel – a guilty plea needs to be considered as evidence in the sense of the law. This illuminates particularly from the fact that according to Article 315 paragraphs 3 and 4 of the KCCP in relation to the Confirmation Hearing (as repeated by Article 359 paragraphs 2 through 5 of the KCCP for the Main Trial session) the judge may proceed with his/her decision in case s/he is satisfied with the guilty plea, but otherwise needs to conduct the whole evidence procedure before.

This understanding of the Supreme Court is also supported by the commentaries on the old Yugoslav Law on Criminal Procedure (LCP), in particular on Articles 223 and 323 of the LCP, which both stipulate on a confession of the accused, either during the investigation phase (Article 223 of the LCP) or during the Main Trial (Article 323 of the LCP). Whilst in both cases already the law says that besides a confession of the accused the body conducting proceedings, in the Main Trial the court has *"the duty to gather/present other evidence as well"*, the commentary clearly points out as follows:

This provision [of Article 223 of the LCP] *establishes that the confession of the accused is indeed evidence in the criminal proceedings. (Branko Petric; Commentary on the Law on Criminal Procedure 1988; 3rd Edition Official Gazette of the SFRY, Belgrade, Article 223, no. 1.).*

In the context of Article 323 of the LCP, the commentaries point out that *"the confession of the defendant, which used to be considered as top evidence, ... is now reduced to the level of any other evidence in the criminal proceedings. This means that the confession of the defendant is subject to free critical assessment regarding its internal essence and contents as well as regarding its complex connection with all other heard evidence and established facts, just as any other evidence". (Branko Petric, Commentary on the Law*

on Criminal Procedure 1988, 3rd Edition Official Gazette of the SFRY, Belgrade, Article 323, no. (1)).

Moreover, Article 315 of the KCCP – which Article 359 of the KCCP refers to for the Main Trial – provides for a valid guilty plea that:

- the defendant understands his rights he has been warned about;
- the defendant understands the indictment;
- the defendant understands the nature and consequences of the plea;
- the plea is voluntarily made after sufficient consultation with the defense counsel;
- the plea is supported by the facts of the case;
- no circumstance exists barring prosecution.

In this respect, the defendant needs to plead guilty or not guilty on each of the charges, one by one. When all these requirements are met, the judge may invite the views of the public prosecutor, defense counsel and injured parties.

The intended procedure additionally may be illuminated by some commentaries of the LCP as well, which of course did not know the instrument of guilty plea up the extent at hand, but was quite well elaborated with regards to a confession by the accused.

For the Main Trial, Article 317 paragraph 1 of the LCP particularly refers to *"the provisions that apply to examining the accused in the preliminary examination"* and thus to Article 218 of the LCP, which describes in detail, how the accused needs to be treated in the fore field and during the interrogation. The commentary insofar in particular points out as follows:

"The confession, in order to treat it as such, must include, completely, the confession to all the acts and facts (that is, omissions), which are the essential elements of the criminal act that the accused is charged with. If the accused confesses only to one ... or some actions or omissions that is facts, and if he does not confess to one of them or some ... then there is no confession to the criminal act, if the denial refers to any essential element of the criminal act." (Branko Petric, Commentary on the Law on Criminal Proceedure 1988, 3rd Edition Official Gazette of the SFRY, Belgrade, Article 218, no. III. 8)).

Considering the ranking and importance of a guilty plea for the continuation of ongoing procedures, this might not be interpreted differently in the context of the now applicable KCCP. In this context it is noteworthy that according to the 2nd Instance Judgment *Zyberaj stated ... but did not give any detail about the facts (p.4 of the English version).*

Unfortunately, the details of the conduct of the respective session of the 2nd Instance Court dated 21 July 2009 (Ap.-Kz. No. 481/2008) can not be re-constructed due to the fact that the minutes of the session are not contained in the case file anymore and that they also can not be found in the prosecutorial hand file. They are lost.

That is, why this Court can only speculate on the question, whether or not the Judge had invited the views of the public prosecutor, defense counsel and injured parties, as required by Article 315 and 359 of the KCCP with regards to a guilty plea. Moreover, not having the minutes available it can not be re-constructed how much weight the 2nd Instance panel had given to the "admission" of the defendant., thus pointing out in the reasoning of the Judgment, that *"the statements of O Z don't change the factual situation as determined by the 1st judge" (p.4 of the English version).*

In case the 2nd Instance panel had weighed the statement of the defendant only little, thus just recognizing it but basing the Judgment otherwise on the evidence taken during the 1st Instance Main Trial, it could be concluded that the very brief consideration of the "admission" and statement of **O Z** by the 2nd Instance panel did not harm the results and conclusions of the panel at all, even not in case the parties had not been invited to give their opinions on the value of the respective statement. However, this can not be read from the minutes anymore.

Considering the fact that the current panel is the very last regular instance to decide on the issue and that according to Art. 430 par.2 of the KCCP this panel shall not conduct any hearing, the decision on sending back the case to the 2nd Instance deemed to be the most proper way of handling the problems at hand.

B. Erroneous and incomplete determination of the factual situation

25. Defense Counsel Av F C has stressed that the rejection of a reconstruction request of the Defence for the crime scene by the 2nd Instance Court had had as a result that the determination of the factual situation was incomplete and erroneous. Moreover, as also stressed by Defence Counsel Av E R , this – together with the fact that defendant **O Z** was not given the chance to present numerous witnesses in his favor and to describe the situation like it was from his viewpoint – the Supreme Court had not properly elaborated on the question, whether the defendant was acting in a situation of necessary defense. Thus, **the Supreme Court had violated Article 402 paragraph 1, item 3, Article 405 of the KCCP.**

This panel of the Supreme Court has arrived to the opinion that a reconstruction of the crime scene not necessarily would have lead to a different result concerning the findings of the 2nd Instance Court on the guilt of O Z . In addition it is noteworthy in this context that also the Defence Counsel himself has not elaborated more on this point. Therefore, full reference is made to what was said already above under point A. IV., Ad 2. of this Judgment. In addition, for the court in order to consider legal provision in favor of the defendant, such as Necessary Defense, the defendant has at least to provide a consistent and plausible narration that allows the court to assess if any such favorable legal provisions could apply. In the current proceedings the defense has never provided a description of events that could lead to such a conclusion.

C. Substantial violation of the Criminal Law

I THE "ADMISSION" LETTER OF O Z

26. Defence Counsel Av T G has pointed out his opinion that the "admission" letter of the defendant **O Z** , dated 25 October 2008, would raise serious doubts regarding its reliability, since according to the date of the cover letter of the Defence Counsel, which is 29 October 2008, the letter had been registered before it was written. Moreover, under graphologic aspects it might be doubtful that **O Z** had written the letter at all, since the handwriting would look like the one of a female. Last but not least and only in case the letter indeed was written by the defendant himself, the Supreme Court had not considered the fact that the defendant suffers depression and psychological disorder, which easily could cause as a result that the defendant admits, what in reality he never had done. Insofar, UNMIK Regulation 2004/34, Section 3 dated 28 August 2008 had to be considered and had been violated by the Supreme Court.

27. Considering the "admission" letter of **O Z** dated 25 October 2008 as attached to the appeal on request of his Defence Counsel E R , this panel of the Supreme Court finds that after what was said before (point A. IV. of this Judgment) the question, whether or not the letter shows the handwriting of O Z may remain open for the time being despite from the fact that the amount of handwritten words may not be sufficient for a graphologic expertise and notwithstanding the information given by the Defence Counsel Av E R in his cover letter dated 29 October 2010, that in the context of a visit of the Defence Counsel in Dubrava Prison on 28 October 2010 *"... the accused O Z expressed his whish to have the following delivered to the District Court in Prizren, properly signed by him ..."* and that *"... this letter is designated for the Supreme Court of Kosovo and routed via the District Court in Prizren accompanied by the request to have it attached to the appeal against the Verdict C. no. 155/2007 dated 17.04.2007 to be examined together with the appeal submitted by counsel"*. Moreover, the Defence Counsel in this context expressed his hope *"... that the letter of O Z for the Supreme Court will be properly forwarded and attached to the appeal ..."*.

28. It indeed was established that the letter of the defendant **O Z** was registered with the District Court in Prizren on 28 October 2008, whilst the cover letter of his Defence Counsel dated 29 October 2008. However, this might be explained by a typing-/writing mistake of the court clerk in Prizren, since it was not challenged during the 2nd Instance sessions, where the defendant even has repeated the contents of the letter.

29. As to the question on psychiatric problems of **O Z** , which could easily cause a subjective situation within which the defendant admits acts, he never has committed himself; reference is made to what was said before (point A. IV. of this Judgment).

II. THE LEGAL QUALIFICATION OF THE SHOOTING RESULTS BY THE SUPREME COURT

30. Defence Counsel Av E R has expressed his opinion that the qualification of only one criminal offence of **Aggravated Murder in violation** of Article 147 paragraph 1, item 11 of the CCK would not be given. In particular, the 2nd Instance Court, while changing the legal qualification of counts 1 and 2 of the indictment as ruled out in the 1st Instance Judgment, did not elaborate on the legal condition of the intention to kill, as required by Article 147 item 11 of the CCK. Instead and contrary to what the 2nd Instance Court had found, there would be two criminal offences in question, one Murder and one Attempted Murder, out of which at least the latter one would not be punishable at all, since it would not be a crime. Therefore, **the Supreme Court had violated Article 404 paragraph 1 of the KCCP.**

A careful analysis of the 2nd Instance Judgment illuminates that the 2nd Instance Court was driven by the concern that *"the conviction for two different counts violates the criminal law to detriment of the accused because according to the provision of Article 147 item 11 of the CCK these two facts can not be kept separate but must be considered as unique criminal offence" (p.6 of the English version of the 2nd Instance Judgment).*

However, further analysis of the case file and the 2nd Instance Judgment leads this Court to the opinion that indeed no elaborations were conducted on the question of an intension of the perpetrator(s) as qualified form of *mens rea/dolus directus*, and as required by Article 147 item 11 of the CCK. The 2nd Instance Court has quite detailed and convincing pointed out why the alleged Aggravated Murder and the alleged Attempted Murder (counts 1 and 2) need to be considered as one Aggravated Murder under Article 147 item 11 of the CCK only and that any other understanding would be to the detriment of the defendant. However, as a question resulting from the denial of an intention as requested by the law, the need for elaboration would come up, whether or not there is a punishable attempted murder in the case at hand.

A look into corresponding commented provisions from the old criminal laws applicable in Kosovo, particularly Article 47 of the Criminal Code of Serbia (CCS), which the latter all commentaries of the Kosovo law refer to (and also Article 30 paragraph 2, sub-paragraph 2 of the Criminal Code of the Autonomous Province of Kosovo (CC SAPK) as in this regard being the closest provision to what is applicable now), shows that they insofar stipulate as follows:

Article 47 of the CCS (in its older version):

(3) The punishment from paragraph 2 of this Article shall be pronounced upon a person who with premeditation commits several murders ... regardless of whether they are being tried for all these murders by application of provisions on concurrence, or they have been previously convicted of a certain murder.

Article 47 of the CCS (in its newer version):

The term of imprisonment of at least ten years ... shall be pronounced against: ...

6) Whoever takes life of a few persons with premeditated intent, and it does not represent a murder of moment...;

According to the wording of the respective laws as well as to the available commentaries (which of course are not at all binding, but may give some hints), all these provisions, like the applicable Article 147 item 11 of the CCK refer to premeditated intentional murders. It is also clear that in all cases not only one person can be affected by the respective criminal act.

From the commentaries on the older version of Article 47 paragraph 3 of the CCS as quoted before, it can be understood that traditionally two opinions have been discussed on how to interpret the law, out of which one of them understands the provision as *"a special qualified form of murder, the so-called multiple homicide"*. Commentaries – as far as the case at hand is concerned – point out that this has far-reaching consequences, in particular with regards to the existence of a (punishable) attempt, which is considered to be given, *"when the perpetrator with premeditation takes the life of one person and attempts to take the life of another person"* ....
"According to the other opinion, the provision of parapgraph 3 ... prescribes the punishment for several premeditated murders committed in concurrence or for only one premeditated murder".
However, also was the intent of having the dilemma resolved on occasion of a conference of the representatives of criminal divisions of the republic supreme courts and the judges of the Criminal Divison of the Supreme Court of Yugoslavia, held on 26 and 27 December 1968 in Belgrade, where it was concluded that the respective paragraph 3 *"represents a provision providing for sentence, and not a provision which foresees a qualified form of murder from paragraph 1 of the same Article"*.
(Srzentic, Nikola; Stajic, Dr. Aleksandar; Kraus, Dr. Bozidar, Lazarevic, Dr. Ljubisa; Djordjevic, Dr. Miroslav; Commentary on the Criminal Laws of Serbia, SAP Kosovo and SAP Vojvodina; 1981 in: "Savremena Administracija"; Belgrade; (Article 47 of the CCS; item 11)).

Also the commentaries on the newer version of Article 47 of the CCS as quoted before underline that *"this provision applies not only to committed murder but also to an attempted murder"*. However, this commentary continues later saying that *"this criminal act exists only when at least two or more persons have been deprived of life. If only one person has been deprived of life and there has been an attempt to deprive of life another person, that shall not amount to the attempted murder from item 6) if the perpetrator premeditated the murder of several persons; if opposite is the case, that shall be considered a real concurrence between a committed and an attempted murder"*.

(Srzentic, Nikola; Ljubisa Lazarevic; Commentary ot the Criminal Code of Serbia 1995; 5th Edition in: "Savremena Administracija"; Belgrade; (Article 47 of the CCS; item 9)).

On the background of the interpretation of the appealed 2nd Instance Judgment as well as from the above commentaries, in particular the latter one, this panel of the Supreme Court understands that the question whether or not the respective criminal acts as related to the shooting of H and N Rr can be qualified as one Aggravated Murder pursuant to Article 147 item 11 of the CCK is still open due to the fact that the Court has not yet elaborated on the subjective side of the crimes and in particular the requested intention of the perpetrator. In case the intention for the commission of one Aggravated Murder pursuant to Article 147 item 11 of the KCCP can not be established, it would be needed to discuss again whether the then two separate acts can be legally qualified as one murder and one attempted murder, or if the interpretation of the law as it was pointed out by the commentaries quoted before is still valid under the applicable law to the result that there is no punishable attempt due to the fact that only one person was killed.

III. THE CRIMINAL LIABLITY OF O Z AT THE TIME OF THE COMMISSION OF THE CRIMES

31. Finally, Defence Counsels Av F C and T G both have stressed that the criminal liability of the defendant at the time when the criminal offences had been committed, never was challenged by the Courts and that in this way UNMIK Regulation 2004/34 was disregarded.

The Supreme Court of Kosovo finds that the appeal in this regard is grounded. Although the question of criminal liability of the defendant **O Z** never was raised by the Defence before, neither in the 1st nor in the 2nd Instance, and most likely therefore was not analyzed or considered at all so far, the issue falls under the scope of appellate review and thus needs to be examined by the court of second instance even *ex officio*, pursuant to Article 415 paragraph 1, item 2 as read with Article 404 item 2 of the KCCP.

Reference is made to Article 12 of the CCK, which stipulates as follows:

(1) A person who committed a criminal offence is considered mentally incompetent if, at the time of the commission of a criminal offence, he or she suffered from a permanent or temporary mental illness, mental disorder or disturbance in mental development that affected his or her mental functioning so that such person was not able to understand or control his or her actions or omissions or to understand that he or she was committing a criminal offence.

(2) A person who committed a criminal offence is considered to have diminished mental capacity if, at the time of the commission of a criminal offence, his or her to understand or control his or her actions or omissions was substantially diminished because of the conditions referred to in paragraph 1 of the present article. Such person is criminally liable but the court shall take into consideration

these conditions when deciding on the duration and the type of sanction or measure of mandatory treatment it imposes.

In the case at hand, it can be understood not only from the medical statements continuously given to the Court concerning the health conditions of **O Z** during the diverse sessions of the Main Trial, but particularly from the written psychiatric expertises submitted to the Court even before the Main Trial started, that the defendant **O Z** was affected by a number of different diseases, as well physical as psychiatric ones. In particular, the psychiatrist Dr. N P has stated in his "Psychiatric Report for the Court" dated 16 February 2008 that the defendant **O Z** suffers a *"schizoid-typical personality disorder F 21"*, .which allegedly has its roots already in middle of the last year of his secondary school, and which – after his brother was killed in the war – was aggravated even more by this fact.The respective diagnosis moreover defined *"hypnologic and hippomaniac hallucinations"* and stated that *"his thoughts are interfered by metaphysic imaginations and* [that] *he often uses pseudo logical and pseudo physical phrases* [would be] *eccentric* [and would show] *paranoid ideas of victimization and of guiltiness"*. Moreover, the undated expertise of the Psychiatric Clinic of the University Clinic Centre of Kosovo as set up in cooperation of psychiatrists Dr. J M and Dr. N M . as well as neurologist Prof.Dr. S B , which is based on psychiatric examination of the defendant on 07 March 2008 states that from 2000 his mental state had changed, that he suffers *"hypnagogic and hypnopomic hallucinations"* and showed *"pseudo dement behavior"*. As a diagnosis it was defined that the defendant suffers *"Post Traumatic Stress Dissorder (PTSD)"* and shows *"severe anxiety and depression"*.

All this together and other expertise and documentation in the case file should have led the 2nd Instance Court to the *ex officio* examination of the criminal liability of the defendant at the time when the crimes were committed.

D. Decision on the punishment

32. All three Defence Counsels of the defendant **O Z** have stressed that the imposed punishment is inappropriate and needs to be seriously lowered. In particular, a sentence of six (6) years for illegal possession of weapons, as imposed by the 1st Instance Court and confirmed by the 2nd Instance panel, would be ridiculously high and never ever before had been imposed by any Kosovo court. Moreover, the aggregate punishment of altogether twenty-five (25) years would mean lifelong imprisonment to the defendant, considering his age of already 47 years. It would be noteworthy that the Supreme Court in its challenged Judgment Ap.Kz.No.481/2008, dated 21 July 2009 had reasoned that the punishment imposed is close to the minimum of long-term imprisonment, which would be twenty-one (21) years, but instead the minimum punishment as foreseen by Article 147 paragraph 1, item 11 of the CCK would be of at least ten (10) years only.

The decision on the punishment deems fair, properly conducted and not unusual as far as it can be based on the findings of the 2nd Instance Court. Insofar, this panel of the

Supreme Court shares the assessment made by the 2nd Instance panel, which has confirmed the assessment of the 1st Instance Court. However, no further elaborations can be made at the current stage of proceedings, since imposing a punishment will have to consider a number of new aspects to be analyzed by the re-trial judge, as there is particularly the criminal liability of the defendant **O Z** and the question of legal qualification of the two shooting-related criminal acts concerning the victims H Rr and N Rr as pointed out before.

E. Conclusion of the Supreme Court of Kosovo

33. For the abovementioned reasons, the Supreme Court concludes that the appeals of the Defence of defendant **O Z** are partially founded.

This in particular refers to a possible admission of the murder of H Rr and the attempted murder of N Rr by the defendant **O Z**, in terms of which the provided legal procedure was not carried out in accordance with the KCCP by the 2nd Instance panel (read point A.IV. of this Judgment).

Moreover, the 2nd Instance Court has failed to examine for the question, whether or not the defendant **O Z** was criminally reliable at the time when the respective criminal acts of shooting at H and N Rr have been committed. Therefore, Article 415 paragraph 1, item 2 as read with Article 404 item 2 of the KCCP have been violated, since the examination in particular by the panel of second instance needs to be carried out *ex officio*, whenever this is indicated in which way ever in the respective case (read point C.III. of this Judgment). For these abovementioned reasons, the Judgment of the 2nd Instance panel of the Supreme Court needs to be annulled and the case will be sent back to the Court of 2nd Instance for re-consideration and re-trial.

Last but not least, the Supreme Court of Kosovo has found that the legal qualification of the killing of H Rr and shooting at and wounding of N Rr needs to consider the question of premeditation and intention of the perpetrator, which was not elaborated on by the 2nd Instance Court.

Finally, the reconsideration of the issues addressed above may lead to the necessity to re-evaluate on the imposed punishment as well.

Consequently and since according to Article 430 paragraph 2, sentence 2 of the KCCP the Supreme Court as a 3rd Instance Court may not conduct any hearing and thus is prevented by the law to directly take evidence, the Supreme Court has decided in accordance with Article 430 paragraph 2 as read with Articles 420 paragraph 1, item 2, 424 of the KCCP.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Supreme Court of Kosovo
API.-KZI. No. 09/2009
Prishtinë/Priština
28 December 2010

Panel Member

Emine Mustafa
Supreme Court Judge

Panel Member

Martti Harsia
EULEX Judge

Panel Member

Nesrin Lushta
Supreme Court Judge

Panel Member

Salih Toplica
Supreme Court Judge

Presiding Judge

Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk

Holger Engelmann
EULEX Legal Officer