Supreme Court of Kosovo
Ap.-Kž. No. 190/2009
27 January 2010
Prishtine/Pristina

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted in compliance with 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 ("Law on Jurisdiction"), composed of:

Guy Van Craen, EULEX Judge, as presiding and reporting judge,
Emilio Gatti, EULEX Judge, as member of the panel,
Fejzullah Hasani, Supreme Court Judge, as member of the panel,
Avdi Dinaj, Supreme Court Judge, as member of the panel and
Miftar Jasiqi, Supreme Court Judge, as member of the panel;

Assisted by EULEX Legal Officer Judit Eva Tatrai as recording officer, EULEX court recorder Eriona Brading and EULEX Interpreters, Nexhmi Rexhepi and Arben Pallaska;

In the presence of EULEX Prosecutor Johannes Pieter Van Vreeswijk, Defence Counsels M[redacted] S[redacted] and T[redacted] B[redacted] and Defendant Sh[redacted] M[redacted]

In the sessions held on 26 January 2010, following the deliberation of the panel concluded on 27 January 2010;

In the criminal case against:
S[redacted] M[redacted]:

Charged with the criminal offences of aggravated murder committed in complicity, contrary to Article 30 paragraph (2) items 2) and 6) of the Criminal Law of Kosovo (CLK) in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY); attempted murder committed in complicity, contrary to Article 30 paragraph (2) items 2) and 6) of the CLK in conjunction with Articles 19 and 22 of the CC SFRY; unlawful possession of weapons committed in complicity, contrary to Section 8.2 in conjunction with Section 8.6 of the UNMIK-Regulation No. 2001/7 in conjunction with Article 22 of the CC SFRY; unlawful possession of weapons, contrary to Section 8.2 in conjunction with Section 8.6 of the UNMIK-Regulation No. 2001/7; and unlawful possession of weapons, contrary to Article 328 paragraph (2) of the Criminal Code of Kosovo (CCK);

Deciding on the appeals of the defendant Sh[redacted] M[redacted], defence counsels M[redacted] S[redacted] and T[redacted] B[redacted] and the father of the defendant, G[redacted] M[redacted] filed against the verdict of the District Court of Prishtinë/Priština, P. No. 203/2005, dated 9 November 2007;

Having reviewed the court records, heard the arguments of the Public Prosecutor, the Defence Counsels and the Defendant, and having analysed the relevant laws;

Pursuant to Article 420 of the KCCP, the Supreme Court of Kosovo renders the following

JUDGMENT

The appeal filed by G[redacted] M[redacted] is **DISMISSED** as inadmissible.

The appeal of Sh[redacted] M[redacted] is **REJECTED** as unfounded.

The appeals of Defence Counsels T[redacted] B[redacted] and M[redacted] S[redacted] filed in favour of Sh[redacted] M[redacted] are **PARTIALLY GRANTED.**

The verdict of the District Court Prishtinë/Priština, P. No. 203/2005, dated 9 November 2007 is **MODIFIED**:

The qualifications of criminal offence committed against the International Police Officer P[redacted] K[redacted] E[redacted] (UNMIK CIVPOL), and local Police Officer A[redacted] R[redacted] (KPS) and of the criminal offence committed against the local Police Officer B[redacted] M[redacted] (KPS) and language assistant R[redacted] Z[redacted] (UNMIK) (charges a) and b) in the enacting clause of the verdict of the District Court of Prishtinë/Priština, P. No. 203/2005, dated 9 November 2007) are one count of Aggravated Murder and one count of Attempted Aggravated Murder as per Article 30 paragraph (2) item 6) of the Criminal Law of Kosovo (CLK), in relation with Article 19 and 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY).

The punishment imposed for the two counts of Aggravated Murder and Attempted Aggravated Murder is thirty (30) years of imprisonment. The aggregated punishment for all counts is thirty (30) years of imprisonment.

The twelve (12) years of imprisonment imposed on Sh[redacted] M[redacted] by the verdict of the District Court of Pejë/Peć, P. No. 126/2005, dated 3 August 2005, affirmed by the Supreme Court of Kosovo on 30 March 2006, is included in the aggregated punishment of thirty (30) years of imprisonment.

The Judgment of the District Court of Prishtinë/Priština, P. No. 203/2005, dated 9 November 2007 is **AFFIRMED** in the remaining parts.

The costs of the proceedings of second instance will be borne by the defendant.

Reasoning

A. Procedure

The Appeals filed against the judgment of the District Court of Pristina P. No. 203/2005 dated 9 November 2007:
- the timely filed appeal of the accused S[redacted] M[redacted] is admissible;
- the timely filed appeals of the defence counsels T[redacted] B[redacted] and M[redacted] S[redacted] on behalf of the accused are admissible;
- the appeal of G[redacted] M[redacted], father of the accused, is NOT admissible because he has not the right to appeal being not an authorised person (according Art. 399.1 of the applicable KCCP);

2) The session of the panel was held 26 January 2010 and the public pronouncement of the enacting clause of the Judgment was made on 1 February 2010.

B. Substantial violation of the provisions of the KCCP .

The first instance trial was held in the Courtroom at the facilities belonging to the Dubrava-prison. Although maybe not recommendable, the Courtroom and the Court-sessions legally assigned to host the trial in this case offered the legal conditions foreseen by the KCCP and the guarantees for a fair and public trial foreseen by the European Convention of Human Rights (ECHR, *e.g.* Art. 6, or Art. 14 of the Covenant on Civil and Political Rights):
- access for Public and Press (including family-members of victims and/or the accused) to the trial proceedings was guaranteed; it is noted that external monitors were present;
- the "change of venue" to this Courtroom was regularly and legally reasoned and announced in advance;
- the (eventual) contact between defence counsel and accused was guaranteed;
- the accused could effectively exercise his right to defence and was not hindered to do so, as it his shown by the minutes of the trial procedure.

The concrete circumstances (*e.g.* the personality of the accused, the amount of the participants, the particularity of the case with the most grave charges against the accused) made necessary that certain measures to assure the fair and good functioning of the trial and its proceedings, had to be taken by the competent authority (security and safety

measures regarding participants and public, e.g. through metal detectors, Police officers, security fence between accused and public, search procedures, etc.). These measures were not of that nature or of that effect that the full exercise of the right of the defence was hindered or limited (see the minutes of the main trial).

The Composition of the Trial Panel was legal and the disqualification request was legally ruled upon by the Deputy President of the District Court of Pristina in the absence (on leave) of the President of the District Court (decision dated 31 August 2006, P.No 155/2006, Judge Mejdi Dehari, rejecting the disqualification request based on Art. 43, para.1 of KCCP).

The second instance panel does not agree with the defence that the First Instance Court based its judgment on illegal evidence. The first instance court ruled during the criminal proceedings with a clear reasoning about the legality of the presented evidence (interception of telephone conversation as ordered and executed by the competent authorities and used as evidence by the panel). The first instance court took into account the strict rules governing this kind of intrusion in the privacy of citizens which are foreseen in Kosovo and applied the international law and international standards in this regard (*e.g.*, Art. 8.2 ECHR). The Supreme Court abides by the legally founded reasoning of the appealed judgment.

The defence does not give the correct interpretation of the applicable rules in particular with regard to the interception of the telephone conversation between "client-defence counsel". In this case the Sh[redacted] M[redacted] phoned a lawyer indeed but this lawyer was NOT his defence counsel, instead he was the one of a third person.

The first instance court decided legally and accurately during the trial proceedings that the recordings, legally obtained, were played during the public session. There is no grounded factual or legal reason which prevents the first instance court to proceed in this way, on the contrary taking into account, *inter alia*, the presence of the witness, the importance of this legal evidence, the publicity principle of the court proceeding they were disposed in accordance to the law.

Contrary to the opinion of the defence, it has to be underlined that the day of the completion of the trial, the first instance Court announced the judgment (enacting clause, pursuant to Art. 392.1, and Art. 392.2 of the KCCP). Although the written judgment was finalized months later after 9 November 2007, this belated serving to the parties of the written reasoned judgment does not constitute a substantial violation of the KCCP since there is not a nullity sanction foreseen in the KCCP for the belated drawing-up of the judgment, nor this belated delivery resulted in a violation of the right of the defence to know the decision adopted by the trial Panel on the guiltiness of the accused since the enacting clause was already announced on 9 November 2007. The accused, all parties, and the public knew from the last day of the trial, the court's decision on the guilt, the penalty imposed on the accused, and also received a synthetic reasoning of the court decision.

This particular time-indication (delivering of the written judgment according Art. 395.1 of the KCCP) is essentially foreseen as a management instrument to improve, a more efficient and/or rapid Justice.

The appellate court considers that, contrary to the defence counsels' conclusion, the enacting clause being immediately announced by the first instance Court, is clearly understandable and not in contradiction with the written judgment. No considerable discrepancy is to be considered, due to the fact that the reasoning analyses all charges, the presented evidence and their legal evaluation, and also the legal arguments presented by the parties. No contradiction is found between the Courts' exhaustive assessment of facts, and the statements of the witnesses or the other legal evidence are accurate and consistent. The first instance Court is clear on the assessment of the factual situation, the conduct of the accused in connection to the factual situation, the charges against the accused as indicated in the judgment which are consistent with the last amended indictment.

Answering to the defence counsels of the accused S[redacted] M[redacted], the Supreme Court Panel underlines that the lack of direct evidence does not imply *ipso facto* or automatically that the case has to be decided according to the principle "*in dubio pro reo*". The first instance Court is legally authorized to asses and decide whether there is enough secondary and supporting (factual) evidence, which taken separate or in a coordinated manner, proves beyond any reasonable doubt, that the accused is guilty. Furthermore, this Panel stresses that the first instance Court has the authority to asses freely, according to Art. 152 of the KCCP, all presented evidence, its relevance and probative value.

Although regrettable, the incident that a Police officer carried a duty weapon when heard as a witness is indeed not permitted by Art. 328.3 of the KCCP, but in this case this incident should not be considered as a substantial violation of the criminal procedure affecting the admissibility of his testimony. The fact that the witness carried his duty weapon as Police officer during his testimony, had no direct or indirect negative effect and hindered in no way the rights of the defence.

Conclusion: The appellate Panel did not found, according to the criteria set of under Art. 403 of the KCCP, neither any substantial violation of the KCCP nor any violation of the ECHR, which could legally justify the annulment of the judgment of the first instance Court.

C. Erroneous or incomplete determination of the factual situation

The first instance Court correctly determined the criminal facts which happened at the crime scene (UNMIK-Police car ambush). The parties neither challenge as such the established criminal conduct of the perpetrators nor the collected evidence at the crime

scene, but the defence counsels underline that there is no proof of the involvement of their client in these criminal acts.

The appeal Panel abides by the determination of facts and factual circumstances as established by the legal evidence presented during the hearings of the first instance procedure and clearly stated in the appealed judgment (chapter III of that Judgment). Therefore, the appeal Panel refers to the first instance judgment and considers it here as upheld in particular with regard to the description of: the crimes, the crime scene, the means used during the crimes, the methodology of the perpetrators, the runaway from the crime scene (through the hijacking of two cars), the lethal consequences for the victims and regarding one of the perpetrators, the search for weapons and the related findings, and finally the arrest of the accused.

The first instance Court determined the presence of the accused during the killing (ambush on the UNMIK-Police car). The First instance Court states:
"[...] the panel notes, however that there is no direct evidence that S[redacted] M[redacted] [...] belonged to the Group of assailants [...] none of the witnesses questioned during the main trial was able to identify any assailants [...]" and further "[...] other evidence, such as fingerprints, DNA, fibers is not available [...]" and "[...] notwithstanding the lack of witness and other evidence, the panel is convinced beyond reasonable doubt that Sh[redacted] M[redacted] was one of the perpetrators" (quote). The conviction of the first instance Court is based: on the content of the telephone calls intercepted from the mobile telephone belonging to the accused and used by him; on the accused voice recognition by G[redacted] K[redacted]; and on additional supporting and/or corroborating evidence. Also the professional walkie–talkie Motorola radio seized belonged to the accused as it was being officially assigned to him at the time he was a Police officer and was never returned. Finally, the weapons found during the criminal investigation were linked to the accused.

The first instance Court could correctly establish that the telephone calls as described in the judgment were made by the accused, with his mobile telephone, and with such a content which could only be known at that time by the accused. Therefore the first instance panel correctly referred mainly but not only to the voice recognition by witness G[redacted] K[redacted]. The latter was indeed able to recognize without any doubt the voice of the accused so the Panel assessed that an (eventual) further expertise was unnecessary. The appeal Panel refers to the reasoning of the first instance Panel with regard to the accurate witness statements of Mr. G[redacted] K[redacted] and considers it as upheld here.

Furthermore:
a) The appeal Panel notes, indeed, that there is enough objective supporting information that confirms the *thesis* that the voice heard during the intercepted telephone communication is the voice of the accused:
- the mobile phone with that specific telephone number belonged at the moment of the telephone calls to the accused;
- the mobile phone was found in his possession;
- the accused gave during the telephone calls precise information to the telephone-respondend about his close friend A[redacted] (shot during the ambush) and the (moral/family)

consequences of his death, the search in his fathers house, the escape from the crime scene, and other consistent information related to the crimes; this information was correct and confirmed during the trial;
- the telephone-respondent was in his "closed (female) relation" and specifics about their relation and feelings were revealed during the conversation;
- the time the telephone calls, which were made when he was on the run and hiding from Police (and others).

b) Notwithstanding the content of the telephone conversations, the time of those phone calls and the owner of the mobile phone and its number, the appeal Panel notes that the witness had the knowledge and the ability to recognize M[redacted] voice due to the fact that he knew personally the accused and that he had with the accused a relatively long professional relation being his team mate in the same Police station and in particular being his patrol mate. Not only they both had frequent conversation but for sure communicated frequently with each other through radio and telephone. So there can be no doubt about the witness ability to recognize the voice of his former (Police) colleague.

c) The accusation of the defence stating that the witness G[redacted] K[redacted] is part of a (Serbian) plot or revenge action against the accused, that this witness is not reliable at all being a "Serb collaborator or spy", is not founded neither by proof nor any supportive objective information.

The first instance Court correctly took into account, as supporting evidence of the presence at the crime scene of the accused, the fact that his walkie-talkie Motorola radio was found at the place where the Mercedes hijacked to runaway from the crime scene was left. There is enough evidence, which was not denied, that this specific walkie-talkie Motorola radio, was assigned to the accused when he was a Police officer. He as former Police officer knows how to use this radio and knows the Police-frequency. There is no doubt that this radio was not returned and stayed with the accused. When the radio was found it was still switched-on on the Police frequency and therefore used to intercept Police conversation during and after the ambush of the UNMIK-Police car. The fact that the first instance Court could not establish with enough evidence that the accused was involved in the specific crime of hijacking himself, or in the shooting at the Police-patrol chasing the hijacked Mercedes, is not to be considered as being in contradiction with the assessment that the accused was involved in the shooting at the UNMIK-Police car some minutes before. It is proven that at least 4 assailants fled the crime scene with two hijacked cars one of them a Mercedes and the other being an Opel in which the assailant and wounded A[redacted] S[redacted] was transported. It is for sure reasonable, taking into account the returning of shootings and the disturbing factor that A[redacted] was wounded, that S[redacted] M[redacted] gave his radio to one of the co-perpetrators during or after the shootings at the UNMIK-Police car. It is reasonable and logic to believe that the assailants did not foresee the returning shootings from UNMIK-Police officer and the fact that the late A[redacted] S[redacted] was wounded, and therefore left rapidly the crime scene in panic, hijacking the nearby Opel Vectra and Mercedes and leaving also the red Jeep Trooper including some weapons inside. The later scenario is not contradicting with the factual situation at the crime scene and the findings at the crime scene support this

scenario. The first instance Court could therefore correctly asses that the motorola radio, assigned during his Police-time, is supporting evidence for the UNMIK-Police car assault but not enough direct evidence of his participation in the hijacking (Mercedes event) and or assault against the intervening Police patrol.

The first instance Court correctly stated further on, that it is not even sure that the assailants came to the crime scene only by the red Jeep-Trooper and therefore it should not be excluded that also another car was used. The lack of sufficient specific evidence concerning the exact number of assailants and of the number of cars used led the first instance Court to the correct legal conclusion that S[redacted] M[redacted] can not be found guilty for the hijacking but that his Motorola radio is supporting evidence of his presence and involvement at the ambush of the UNMIK-Police car. The appeal panel does not agree with the defences argumentation which states that the Motorola radio was given/sold (previously to the crimes) to the late A[redacted] S[redacted] Not only, no reliable legal evidence was presented by the defence, but even reliable and/or objective information timely introduced, is lacking. The moment this defense line was introduced (taking into account the persons involved, the doubtful and at least not objectively supported reasoning) leads the appeal Panel to consider this defence line being nothing more than an unfounded story which in no way undermines the above mentioned Court reasoning, based on objective proof.

Finally, the weapons and ammunition found in the possession of the accused (during his arrest), found at the crime scene, found at his house (family) and legally confiscated, are not only correctly identified by the first instance Court as being additional evidence for the major crimes but are also direct evidence for the charges of illegal possession of weapons at different places and times (see indictment).

D. Violation of the Criminal Code.

1. The first instance Court established with the correct factual and legal reasoning the criminal liability of the accused within the scope of the indictment. The criminal conduct of the accused is legally qualified as to the applicable law taking into account the time the crimes were perpetrated.

2. The appeal Panel is of the opinion, although the facts and criminal conduct were correctly and legally qualified, that the different charges of murder and attempted murder should be considered as one criminal action and therefore should be punished with one penalty. Indeed the criminal action and criminal intention of the accused (reflected in both qualifications) is the same namely: the ambush and shooting at the UNMIK-Police car with the clear intention to kill the driver and all passengers; the kind of weapons and the lethal characteristics of the ammunition used; the amount of bullets fired; the way the ambush was organised and the way in which it was fired towards the car at close distance; all these elements do not leave any doubt about the intention to kill with premeditation all the people in the car. As stated by the first instance Court the reason for

this killing, the motive, is unknown. The motive is in any case not a substantial element for the crime while instead only the intention to kill is.

3. The first instance Court considered, as to the aggravating circumstance of committing a crime against an "official person", that also the on-duty UNMIK interpreter which was on-duty together with the police officer in the UNMIK-Police car was an "official person". The appeal Panel is of the opinion, based on a long standing jurisprudence, that the wording "official person" in the applicable law (also in the current Criminal Law) is to be extended to the person who officially wise and based on on-duty service is concretely and factually linked to the "official person". The reasoning behind this position, is that this person is exposed to the same danger as the "official person" (*e.g.* the driver of an official person). In this case the interpreter was assigned regularly on commanded official duty together with the police officers. Therefore the interpreter, although not a Police officer himself, enjoyed the same legal protection as the "official person".

4. The appeal Court is of the opinion that the aggravating circumstance (endangering the public, pursuant to Art. 30, para. 2, item 2 of the Criminal Law of Kosovo - CLK) can not be legally applied in this case and therefore the appeal Panel amends the qualifications of murder and attempted murder (counts 1 and 2) in this sense: leaving out the latter aggravating circumstance, only the aggravating circumstance of Art. 30, para. 2, item 6 of the CLK remains.

5. Answering the defence, the appeal Panel underlines that the different counts of the illegal possession of weapons should not be considered in this case as being one criminal act, and does not agree with the *thesis* that all the counts of illegal possession of weapons should as such be "absorbed" by the murder and attempted murder counts. Because each criminal act of illegal possession of weapons was terminated by the seizure of the weapons at different times and places, the so-called continuing criminal act, as claimed by the defence, was each time interrupted legally by those police actions of seizure. Furthermore the Court underlines not only the difference of facts and times but also the legal opinion that the illegal possession is clearly a totally different crime and has a different factual and moral substantial element than the crimes of murder and attempted murder.

6. The appeal Court agrees with the defence and the Prosecutor that the punishment the accused received previously by a final judgment should be combined with the punishment the accused will receive by this judgment. (In particular, the 12 years imprisonment imposed by the District Court of Peja, P. No. 126/2005, of 3 August 2005 and confirmed by the Supreme Court with the decision dated 30 March 2006).

7. The appeal Court refers to the reasoning of the first instance Court when explaining the applicable law and in particular the most favourable criminal law taking into account the date of the criminal facts. This reasoning is considered as upheld here. There can be no discussion about the fact that the most favourable law legally allows the first instance Court to impose 30 years of imprisonment by finding the accused guilty for the counts of

aggravated murder and attempted aggravated murder. The opinion of the defence counsel that the maximum punishment should be 20 years imprisonment is clearly a mistake. The maximum punishment which could be imposed in this case is 40 years imprisonment.

8. The appeal court agrees with the first instance Panel on the accurate penalties for the 3 single criminal acts of illegal possession of weapons, but imposes for the crimes of aggravated murder and attempted aggravated murder only ONE penalty of 30 years imprisonment.
Therefore the appeal panel imposes one aggregated penalty of 30 years of imprisonment. This penalty includes the above mentioned penalty of 12 years imprisonment decided by the final decision of the District Court of Peja.

9. It is clear to the appeal Panel that deciding so, taking into account the extremely violent and serious crimes, the personal engagement in these criminal acts, the dangerous personality of the accused, the enormous and life lasting trauma caused to the innocent people (families of the killed persons, the injured parties) by the accused, the accused gets now a more favourable punishment according to the law.

10. The appeal Panel does not take into consideration any mitigating circumstances due to the long lasting criminal investigation and criminal procedure. The appeal Panel underlines the very complex nature of the case because of the large number of suspects and accused in this case, of the different crimes considered during the criminal procedure, and of the amount of the investigative actions. The parties involved, including the prosecutor's office, defence counsels and judges, needed the appropriate time and management skills to analyze the 90 binders (with a total of thousands of pages) which constitute the court file. As a conclusion the appeal Panel is of the opinion that the rule stating that "everyone who is arrested shall be entitled to trial within a reasonable time" as prescribed by Art. 29.2 of the Constitution and Art. 6 of ECHR, has not been violated in this criminal proceeding.

E. Costs.

The costs of the proceedings will remain in charge of the appellant based on Article 121, paragraph 2 of the KCCP.

The decision on costs is based on Article 391, paragraph 1 items (6); Articles 99; 100, paragraph 2; 102 of the KCCP.

F. Detention

Pursuant to Article 391, paragraph 5 of the KCCP, the sentence includes the time the accused has already spent in pre-trial custody until his first instance imprisonment sentence and further of.

The detention on remand until the judgment becomes final, is confirmed due to the penalty imposed.

G. CONCLUSION.

The Supreme Court of Kosovo, as second instance Court, determines that the first instance Court has properly determined the material facts but also determines that the law should be applied differently in the sense as specified in the enacting clause and reasoned above. The Supreme Court of Kosovo, as appeal Panel, on the basis of the above reasoning, found that there was no founded justification to hold a hearing.

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Members of the panel:

Emilio Gatti
EULEX Judge

Fejzullah Hasani
Supreme Court Judge

Avdi Dinaj
Supreme Court Judge

Miftar Jasiqi
Supreme Court Judge

Presiding Judge:

Guy Van Craen
EULEX Judge

Recording officer:

Judit Eva Tatrai
EULEX Legal Officer

Legal Remedy:

An appeal against this judgment may be announced immediately after the announcement of the judgment or after the instruction on the right to appeal, but no later than eight (8) days after the date of the announcement of the judgment. A written appeal may be filed with the Supreme Court of Kosovo through the District Court of Prishtinë/Priština within fifteen (15) days following the receipt of the judgment [KCCP Articles 430, 398 and 400].