

SUPREME COURT OF KOSOVO
PKL.-KZZ. No. 76/2012
Prishtinë/Priština
17 October 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of
EULEX Judge Tore Thomassen as Presiding Judge,
EULEX Judge Gerrit-Marc Sprenger,
Supreme Court Judge Emine Mustafa,
Supreme Court Judge Nesrin Lushta and
Supreme Court Judge Salih Toplica as members of the panel,

In the criminal case against the defendant:

L.B.

[REDACTED]

in detention on remand since 7 April 2010,

Convicted in the first instance by Judgment P. No. 164/2010 of the District Court of Prizren, dated 8 February 2011, for having committed the following criminal offences:

Aggravated Murder in co-perpetration, in violation of Article 147 paragraph 7 in conjunction with Article 23 of the Criminal Code of Kosovo (henceforth: CCK); and

Unauthorized Ownership, Control, Possession and Use of Weapons as per Article 328 paragraph 2 of the CCK

And therefore having been sentenced to an aggregate punishment of fifteen (15) years of imprisonment;

With the Supreme Court of Kosovo with Judgment AP.-KŽ. 173/2011, dated 14 December 2011, affirming the conviction and the sentence while modifying the enacting clause;

Deciding upon the Request for Protection of Legality filed on 11 April 2012 by Defence Counsel [REDACTED] on behalf of the defendant against the Judgment of the Supreme Court of Kosovo AP.-KŽ. 173/2011, dated 14 December 2011, while having considered the Reply of the Office of the Chief State Prosecutor of the Republic of Kosovo (OSPK) filed on 25 May 2012, after having deliberated on 17 October 2012,

E.R.

Hereby renders the following:

JUDGMENT

The Request for Protection of Legality filed on 11 April 2012 by the defendant is **REJECTED AS UNFOUNDED**.



REASONING

I. Procedural History

On 6 September 2010 the District Prosecutor in Prizren filed the Indictment PP. No. 92/2010 against the defendant [REDACTED] (L.B)

The Indictment was confirmed by Ruling KA. No. 140/2010 of the District Court Prizren on 6 October 2010.

On 15 October 2010 the injured party filed a request with the Assembly of EULEX Judges to take over the criminal proceedings.

On 04 November 2010, the President of the Assembly of EULEX Judges based on Article 3.3 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges (henceforth: LoJ) decided to take over the case and assigned it to EULEX Judges at the District Court of Prizren.

The main trial against the defendant and the Juvenile E. B. was held in January and February 2011.

The District Prosecutor amended the Indictment in his closing speech.

On 8 February 2011 the Judgment P. No. 164/2010 was announced convicting the defendant and sentencing him as mentioned above.

The prosecution, the defendant, as well as the representative of the injured party appealed the aforementioned Judgement.

On 14 December 2011 with Judgment AP.-KŽ. No. 173/2011 the Supreme Court of Kosovo modified the enacting clause of the first instance Judgment while affirming the conviction and the sentence against the defendant [REDACTED] (L.B)

On 11 April 2012 the Defence Counsel [REDACTED] (E.R) filed a Request for Protection of Legality on behalf of the defendant against the Judgment of the Supreme Court.

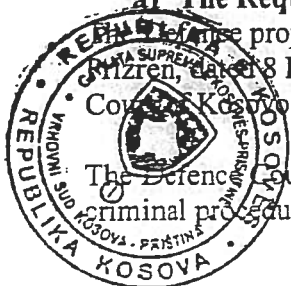
On 25 May 2012 the OSPK filed a Reply to the defendant's Request.

II. Submissions of the Parties

a) The Request on behalf of the defendant

The Defence Counsel proposes to annul the Judgment P. No. 164/2010 of the District Court of Prizren, dated 8 February 2011, and the Judgment AP.-KŽ. No. 173/2011 of the Supreme Court of Kosovo, dated 14 December 2011, and remit the case for retrial.

The Defence Counsel bases his Request on substantial violations of the provisions of Criminal procedure pursuant to Article 403 paragraph 1 items 10) and 12) of the Kosovo



Code of Criminal Procedure (henceforth: KCCP) and violation of the criminal law pursuant to Article 404 item 1 of the KCCP.

In particular the Request claims that Judgment exceeds the criminal charges, the enacting clause is in contradiction with the reasoning and the reasoning does not contain the decisive facts.

The Defence Counsel submits that while the Indictment identifies the Juvenile E. B. as the one who shot the victim from close distance with the pistol "Zastava", calibre 6.35 mm with serial number ET-8111258 and with one bullet hit him in rear part of the head, the District Court in its Judgment charges both co-defendants with having used the pistol. With that the District Court changed the objective identity of the Indictment and therefore exceeded the scope of it. The court when charging the defendant [REDACTED] with the use of the pistol while the Indictment did not do that exceeded the scope of the Indictment. Between the indictment and the judgment identity should exist with regard to the essential facts, in respect to objective identity (the event) and the subjective identity (the person). Only the prosecution is permitted to modify the description of these essential facts.

L.B

The Supreme Court has reiterated this violation of the court of first instance. Instead of granting the appeal, modifying the contested judgment and issuing a new one, the Supreme Court has rendered the same judgment again.

The challenged Judgment fails to explain the nature and essence of the alleged "prior agreement", based upon which the two defendants acted in co-perpetration. It does not describe how the plan was made, what was discussed, where did the co-perpetrators meet, and what was the purpose of the murder. The explanation provided – that the agreement to commit the murder was made by one phone call – is not logic or credible.

The Judgment also fails to explain the exact contributions of the defendant to be made according to the alleged joint plan, what actions he exactly undertook in execution of that joint plan and that the result was a consequence of the cooperation of the co-perpetrators.

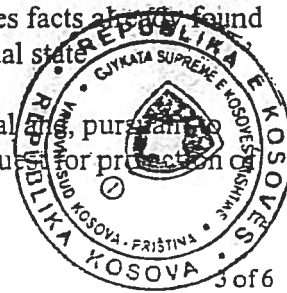
Also missing is the explanation of the subjective element of the criminal offence. The Judgment does not explain that the defendant had the intent to commit the criminal act and that he was aware of the consequences.

b) The OSPK Reply

The OSPK considers the Request for Protection of Legality filed by the Defence as unfounded and proposes to reject it. There are no substantial violations of the provisions of criminal procedure or violations of the criminal law.

The factual descriptions in the Judgments' enacting clauses are clear, without contradictions, comprehensible and contain all essential elements of the criminal offence. The modification made by the second instance Judgment only clarifies facts already found in the Judgment of the first instance court and does not alter the factual state

The facts in the enacting clauses of the challenged Judgments are final pursuant to Article 451 paragraph 2 of the KCCP, cannot be contested with a request for protection of legality anymore.



The claim that the Judgments exceed the scope of the Indictment is without merits. The Judgment has altered neither objective nor the subjective identity of the Indictment. The conviction is based within the framework determined by the indictment in regard to the critical event and the accused persons.

III. Findings of the Supreme Court of Kosovo

The Panel finds that the Request for Protection of Legality is timely filed, admissible but unfounded.

Pursuant to Article 455 paragraph 1 of the KCCP, the Supreme Court of Kosovo confined itself to examining those violations of law that the requesting party alleged.

The Court finds the claim that the contested final Judgment exceeds the scope of the Indictment without merits. The Judgment of the second instance stays within the objective and subjective factual frame set by the Indictment. It does not modify the description of any essential facts in relation to the defendant [REDACTED]. While the Indictment names the Juvenile E. B. as shooter, the Judgments leave this question open and give both co-defendants the benefit of the doubt, ergo naming none of them explicitly as shooter. In the final form of the Judgment it is said:

"One of the defendants, but with prior agreement of both, intentionally used a 'Zastava' pistol ... and shot the victim, [REDACTED] at the back part of the head from close range, thus causing him a lethal wound."

The Defence Counsel is mistaken when alleging that the final Judgment convicts his client for the use of the pistol. The formulation, as amended in the enacting clause of the Judgment of the Supreme Court, is very clear in that it does not give individual responsibility for the actual use of the pistol to any one of the co-defendants. It only says that the result happened as a result of their joint action.

If indeed the Judgment would have changed facts described in the Indictment that only related to the Juvenile E. B., this could not constitute a grievance for the defendant [REDACTED] or any violation at all. The facts described in the Indictment are binding only in relation to the adult defendant. Only in relation to him the factual frame for the charges is set by the Indictment, while the facts related to the charges against the Juvenile are determined by the Proposal for Imposing a Sentence against a Juvenile¹ - a separate and different document.

In the concrete case, the defendant is not charged in the Indictment with having used the pistol in person (but the Juvenile E.B. was named) and he is not found guilty in the final Judgment for that particular act. Neither the Indictment nor the final Judgment does give the defendant [REDACTED] the criminal liability for having fired the lethal shot in person. The Panel refers to paragraph 44 of the Supreme Court Judgment where the court



Proposal M. No. 09/2010, filed on 6 September 2010 by the District Prosecution Office in Prizren

(B.V) (L.B) (L.B)
"At no point in the reasoning does the Judgment state that [redacted] used the gun. ...there is no need to prove whether it was [redacted] or (the Juvenile) E.B. that fired the gun, as long as killing [redacted] was the joint aim and both of them substantially contributed to the commission of the criminal offence... ."

The final Judgment clearly corresponds with the Indictment that he deliberately contributed by his actions in cooperation with the Juvenile B. D. to the death of the victim and hence is guilty of having committed the criminal offence of Aggravated Murder in co-perpetration, in violation of Article 147 paragraph 7 in conjunction with Article 23 of the CCK.

The Judgment remains within the factual description of the event – the deprivation of life of the victim by both defendants working in cooperation and based upon a prior agreement. The actual result – the death of the victim - has occurred as a causal consequence of their individual contributions. The Judgment makes no determination, which one of the two defendants fired the lethal shot, but only that it was either one of them. The victim was deprived of his life as the intended result of the cooperation of both defendants based on a joint plan.

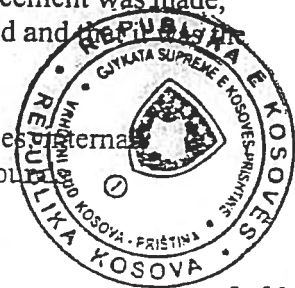
The Panel rejects the defendant's claim as unfounded that the final Judgment fails to explain the nature and essence of the alleged "prior agreement", based upon which the two defendants acted in co-perpetration. Both Judgments in depth and detail have consistently reasoned and described the joint prior agreement. Reference is made to paragraph 50 of the Judgment of the Supreme Court of Kosovo where the court describes the exchange of text messages one day before the murder between [redacted] and the witness [redacted] in relation to the defendant's plan to meet with his co-perpetrator on the next day.

(G.B) (L.B) (L.B)
Further on, the testimony of the witness [redacted], according to which [redacted] told him on the 16 May 2009 shortly after the shooting that "We have committed a murder." is credible and indicates the joint planning and responsibility for the criminal act. The witness also pointed out that at that time they did not accuse each other.

(G.B)
Additional weighty indicators for an advanced agreement and a joint commission of the criminal offence are the handing over of the pistol from the Juvenile E.B. to the defendant, as testified by the witness [redacted], the warning issued to the witness by both - the defendant and the Juvenile (Paragraph 52 of the Supreme Court Judgment) as well as the re-meeting of the defendant and the Juvenile E.B. shortly after they had return home after the murder (Paragraph 53 of the Supreme Court Judgment).

The Supreme Court does not follow the defendant's objection that an agreement to commit a murder could not be made via one phone call. The contested Judgment does not claim that the prior agreement was made by only one phone call. All previously mentioned factual circumstances prove that there was a prior agreement to jointly commit the murder. It is not required to determine exactly when and where the prior agreement was made, provided that the Judgment can prove that such an agreement existed and on that basis for the following joint commission of the criminal offence.

The Defence has not substantiated other alleged incomprehensibilities or inconsistencies of the enacting clause or inconsistencies with the group



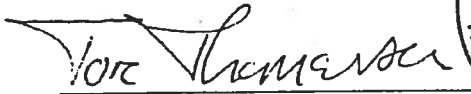
The Panel is satisfied that the challenged Judgment in its final form does not contain violations of the criminal law.

The Defence submits that the challenged Judgments do not elaborate on the individual substantial contribution to the criminal offence provided by the defendant [REDACTED] (L.B) as required by Article 23 of the CCK. The Panel rejects this submission as unfounded. In the enacting clause of the final Judgment as well as in the reasoning it is sufficiently explained that the defendant with his presence during the preparation of the murder, during the shooting of the victim and the following removal of the wallet provided backup and in that way substantially contributed to the commission of the criminal offence, in the meaning of Article 23 of the CCK.

In regard to alleged lack of reasoning on the subjective element of intent in the impugned Judgment – as claimed by the defendant's Request – the Panel is satisfied that the *mens rea* of the defendant was sufficiently reasoned. The Court refers to paragraphs 41 to 43 and paragraph 45 of the Judgment of the second instance, where all subjective elements required by the law were discussed and found present. The court of second instance, mostly in referring to the reasoning of the first instance Judgement, has elaborated on the way the intend of the defendant was evaluated by the District Court, the form of intend, the intend covering his individual contribution to the criminal offence and the premeditation in regard to the actual result of killing the victim, [REDACTED] (B.V)

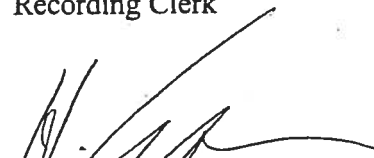
Based on the mentioned grounds and pursuant to Article 456 of the KCCP, the Supreme Court of Kosovo decided as in the enacting clause.

Presiding Judge:


Tore Thomassen
EULEX Judge



Recording Clerk


Holger Engelmann
EULEX Legal Officer

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