Supreme Court of Kosovo
AP – Kž. No. 365/2009
20 July 2010

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judges Maria Giuliana Civinini and Martti Harsia and Supreme Court Judges Emine Kaçiku and Emine Mustafa as members of the panel, assisted by Robert Abercrombie as recording clerk,

in the criminal case against the defendants

B. Z.

[redacted] father's name [redacted], mother's maiden name [redacted], born on [redacted],

held in pre-trial detention since 27 July 2008,

AND

A. Z.

[redacted], father's name [redacted], mother's maiden name [redacted],

held in pre-trial detention since 28 July 2008,

both charged with the criminal act of Murder committed in complicity for personal gain pursuant to Article 30 Paragraph 2 item 3 of the Criminal Law of Kosovo of 1977 (CLK) in conjunction with article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia,

deciding upon the appeal filed by Defence Counsel [redacted] on behalf of accused [redacted] dated 25 September 2009, and upon the appeal filed by Defence Counsel [redacted] on behalf of accused [redacted], dated 14

September 2009, against the Judgment P. No. 268/2008, rendered by the District Court of Pejë/Peć on 1 July 2009,

in a session, held on 20 July 2010, after a deliberation and voting renders this

JUDGMENT

The appeals filed by Defence Counsel [redacted] on behalf of accused [redacted] and Defence Counsel [redacted] on behalf of accused [redacted] against the Judgment P. No. 268/2008, rendered by the District Court of Pejë/Peć on 1 July 2009, are **rejected as unfounded**.

The Judgment of the Court of first instance is affirmed.

The accused shall bear the costs of the appeals proceedings.

Reasoning:

I. Procedural History

On an unknown day sometime at the end of June 1999 [redacted] a taxi driver from Pejë/Peć, went missing. He was later found dead, killed by a bullet which had been fired at him from behind at his neck.

On 29 July 2008 the criminal investigation against both defendants was initiated based upon a statement of witness [redacted] who went to the police in order to report the theft of his private vehicle, allegedly committed by his sons [redacted] and [redacted]. In this context he also indicated to the police that his sons [redacted] and [redacted] had robbed and killed a taxi driver one year after the war.

During the following investigation the suspicion soon focused on [redacted] and [redacted] who both with indictment PP. no. 259/2008, dated 17 October 2008 and filed by the District Public Prosecutor in Pejë/Peć, were eventually charged with the criminal act of Murder committed in complicity for personal gain pursuant to Article 30 Paragraph 2 item 3 of the Criminal Law of Kosovo of 1977 (CLK).

The indictment was confirmed by the District Court in Pejë/Peć with Ruling KAQ 316/2008, dated 20 November 2008.

On 8 April 2009, acting upon a request filed by the Deputy President of the District Court Pejë/Peć, Ukë Muçaj, the President of the Assembly of EULEX Judges after a hearing decided to assign the case to a panel composed of two EULEX Judges and one local Judge.

The main trial before this panel was held between 15 June and 1 July 2009. The panel on 1 July 2009 found both defendants guilty of the criminal offence of Murder committed in complicity for personal gain of [redacted] pursuant to Article 30 Paragraph 2 item 3 of the CLK in conjunction with article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY). [redacted] was sentenced to twenty (20) years, and [redacted] was sentenced to fifteen (15) years imprisonment. Both defendants were condemned to the payment of a sum of 10,000.00 (ten thousand/00) Euro to the injured party, [redacted] as initial compensation.

On 2 July 2009 Defence Counsel [redacted] on behalf of the defendant [redacted] and on 11 July 2009 Defence Counsel [redacted] on behalf of [redacted] announced appeals against the verdict.

The written verdict was served on the parties between 11 and 15 September 2009.

On 15 September 2009 Defence Counsel [redacted] on behalf of [redacted] and on 27 September 2009 Defence Counsel [redacted] as representative of [redacted] Zeka filed appeals against the verdict.

II. Issues raised in the appeals:

Defence Counsel [redacted] on behalf of the defendant [redacted] proposes to reverse the Judgment of the District Court of Pejë/Peć and to pronounce his client not guilty of the criminal act of Murder committed in complicity for personal gain and to acquit him or alternatively to modify the Judgment by pronouncing his client guilty of Aiding in committing the criminal offense of Murder for personal gain, pursuant to Article 30 Paragraph 2 item 3 CLK in conjunction with article 24 CCSFRY and reduce the punishment accordingly.

He appeals the first instance judgment "because of essential violations of provisions of criminal procedure and violation of Criminal Law, wrong verification of the factual state and the decision upon criminal sanctions". The Supreme Court of Kosovo, however, notes that Defence Counsel [redacted] does not submit any reasoning of his appeal apart from challenging the incriminating statements of witnesses [redacted] and [redacted] in the light of the defendant's statements.

To that regard the reasoning of the appeal filed by defence Counsel [redacted] can be

summarized as follows:

- The statement of witness [redacted] is not credible as she referred to a lack of memory on numerous occasions. In addition she has a motive to untruly incriminate accused [redacted] who terminated the relationship with her some time after the alleged crime occurred. [redacted] whenever she seemed to be involved in the event, played the role of the victim by putting herself as far away from the crime scene as possible. Only when there was a need to accuse defendant [redacted] she admitted having been close to the event.

- Witness [redacted] did not tell the truth but invented a story for the benefit of his younger son, [redacted], presuming that he could be saved from guilt and conviction.

- The statement of witness [redacted] is not credible, because this witness was not able to tell who was in the house "on the critical night" even though from people from the village he "had heard" about the tragic event. His statement was mostly like a recital learnt by heart.

- Witness [redacted] does not have a reliable memory at all what can be seen from the fact that in the main trial he did not remember his statement given before the Prosecutor although this statement was read to him.

- Witness [redacted] had heard "only on the news" about the killing of a taxi driver. He did either not tell the truth or in fact had forgotten many things from that time as forgetfulness is a normal psychological act and a human being after such a long period of time actually happens to forget several things.

- The evidence does not allow any conclusion as to the questions whose weapon was used, which type of weapon it was and who shot the taxi driver, causing the fatal injuries. In any case it emerges from the first instance judgment that accused [redacted] was not the one who had planned the commission of the crime, discussed the matter with [redacted] or [redacted] and hit the deceased as he did not have any motive for that.

Defence Counsel [redacted] on behalf of accused [redacted] proposes to alter the first instance judgment and to acquit the accused [redacted], or to annul the first instance judgment and return the case back for retrial, or to alter it concerning the decision upon the punishment.

In detail Defence Counsel [redacted] contends:

- The facts were not correctly established. The statement given by accused [redacted] that he walked away and left [redacted] and [redacted] dealing with the taxi driver is more credible than other versions. The vehicle was never used by accused [redacted], the gun was not his, and the uniform [redacted] was wearing was not his uniform

either. Witnes[redacted] is not credible as she was afraid ending up in the role as a defendant and consequently put the blame on [redacted].
In addition even if accused [redacted] had been in agreement with accused [redacted] regarding the planned crime he would benefit from the concept of voluntary abandonment of the commission of a crime pursuant to the (more favorable) Article 22 Paragraph 1 of the Criminal Code of Kosovo (CCK).

- The wrong establishment of facts results in the violation of the criminal law to the detriment of accused Arben Zeka.

- In any case the punishment imposed onto accused A. Z. [redacted] is to harsh and reflects rather elements of revenge.

The Office of the State Prosecutor of Kosovo (OSPK) with opinion, dated 26 October 2009, submits that the appeals should be rejected as unfounded. The court of first instance established the guilt of the accused with convincing reasons. When determining the punishment the first instance court assessed completely and comprehensively all circumstances as foreseen by Article 64 of the Provisional Criminal Code of Kosovo (PCCK). Both appeals fail to emphasize any other mitigating circumstances which would allow imposing a more lenient sentence. The pronounced sentences are not only in harmony with the intensity of the social danger and the level of criminal liability, but also serve the purpose of general prevention.

III. Findings of the Supreme Court

1.

The appeals of the Defence Counsels are timely filed and admissible.

The Judgment, dated 1 July 2009, was served on Defence [redacted]j on 11 September 2009, on defence Counsel [redacted]n an unknown date[1], and on both accused on 15 September 2009. The appeal of Defence Counsel [redacted] was filed with the District Court on 15 September, whereas the appeal of Defence Counsel [redacted] was posted on 27 September. Since pursuant to Article 127 Paragraph 4 of the KCCP the prescribed period of time for pursuing a legal remedy shall commence on the date when the document is served on the defendant, both appeals are timely filed in accordance with Article 398 Paragraph 1 of the KCCP which stipulates that an appeal may be filed within fifteen (15) days of the day the copy of the judgment has been served.

[1] A date cannot be found on the delivery slip

2.

The appeals are not grounded.

Both Defence Counsels challenge only the correct determination of facts. The arguments submitted by the Defence Counsels in support of their opinions are not convincing. On the contrary the Supreme Court of Kosovo finds that the facts were accurately and correctly established by the Court of first instance.

T.H.

Both appeals are mainly challenging the testimony of witness [redacted] who was together with the accused when the crime occurred. It is not arguable that this witness due to her presence at the crime scene is in a difficult position as she might be seen and perhaps treated as possible co-perpetrator. This alone, however, is not a valid reason to disregard her personal credibility in general. It rather requires a particularly careful assessment of her statements, always bearing in mind that she might have a motive to untruly incriminate the accused in order to exonerate herself.

T.H.

The Court of first instance fully adhered to these requirements and evaluated the testimony of witness [redacted] with particular care. In doing so the Court of first instance pointed out that witness [redacted] admitted that at the time of the commission of the crime she was aware of the intention of the accused to deprive the victim of his life. This was rightfully regarded by the Court of first instance as an important reason to assign personal credibility to her as she did not attempt to eliminate her own possible criminal liability. Hence the argument of the defence in the appeals that witness [redacted] "played the role of the victim, putting herself as far away from the crime scene as possible" does not stand as it not even matches reality.

The same applies to the alleged "lack of memory (of witness [redacted]) at numerous occasions". First of all it must not be ignored that witness [redacted] testified in a main trial which was held approximately ten (10) years after an event she had witnessed at the age of just fifteen (15) years. This by itself is a plausible explanation for a partial lack of memory and hence not sufficient as reason to disregard her credibility in total. Secondly, it is noteworthy that the memory of witness [redacted], when confronted with her previous statements and other evidence, improved to an extent that she was able to give a narration of the criminal event which was much more detailed than the descriptions of the accused and did not show major contradictions. Thirdly, this narration is regarding a number of details fully in compliance with other evidence, as exhaustively and correctly described in the first instance judgment. In this context it is also important that her testimony is to a large extent even consistent with the statements of the accused who both confessed having been at the crime scene, however each of them - based upon stories which are lacking plausibility and hence are anything but convincing - blaming the other one for committing the crime.

Against this background it can also be excluded that witness [redacted] had a motive to untruly incriminate accused [redacted] because he had terminated the relationship with her some time after the event. The Court of first instance did not fail to carefully assess also this issue and with exhaustive reasoning excluded such a motive for untrue incrimination, in doing so also pointing out that witness [redacted] did not incriminate only [redacted], but also [redacted] what renders the allegation raised by the defence even implausible.

As a result there is no reasonable doubt that the crime happened as established by the Court of first instance based upon the testimony of witness [redacted].

The further arguments in the appeals refer to witnesses from hearsay only who could not contribute any own observations regarding the commission of the crime. Besides, the Supreme Court of Kosovo holds that the arguments raised in the appeals against the credibility of these witnesses and the evaluation of their testimony are based upon mere speculations and allegations and are hence without any substance. The Court of first instance thoroughly and exhaustively evaluated the testimonies of these witnesses and in doing so fully convincingly and comprehensible explained that the facts were established beyond reasonable doubt.

The Supreme Court of Kosovo underlines that the inability of the Court of first instance to establish the owner of the weapon, which was used to shoot the victim, does not render the determination of facts faulty or incomplete. Neither does it matter that it could not be established which type of weapon was used and by which of the accused. It was correctly established beyond reasonable doubt that the victim was shot dead with a pistol. The details regarding this weapon – brand, make, ownership - are not elements of the criminal act of aggravated murder pursuant to Article 30 Paragraph 2 of the CLK. Hence it cannot be objected that the evidentiary situation did not allow establishing the details regarding the pistol. The same applies to the question which of the accused held the pistol in his hand when the lethal shot was fired. The legal construction of co-perpetration pursuant to Article 22 of the CCSFRY does not require the objective elements of a crime being committed by each of the defendants individually. It rather requires the intent of each of the defendants to commit the criminal offence and, based upon this intent, the acceptance of the acts of the other co-perpetrators as own actions. Consequently it does from the legal point of view not matter whether the pistol was held and fired by accused [redacted] or accused [redacted]. Based upon this there is also no room for the legal qualification that one of the accused acted just as an assistant of the other one.

Regarding the determination of the punishment the Supreme Court holds that the Court of first instance correctly determined the imprisonment sentences of the accused.

Applicable law is in general the law which was in force at the time the crime occurred. However, since the Provisional Criminal Code of Kosovo (PCCK) entered into force after the commission of the crime the court has in accordance with Article 2 of the PCCK to apply the most favorable law. The assessment which law is more favorable cannot be done *in abstracto* based upon the charges in the indictment. The Supreme Court explained already in previous decisions[2] that there are several specific rules that attach to the principle of the more favorable law. Primarily, however,

> "it must be stressed that the comparison of the 'severity' between the new and the old law is not done in regard to those laws (or specific provisions) taken *in abstracto*, but always in regard to the outcome of the application of these laws to the concrete case. The practical consequence is that the act under judicial consideration must be evaluated under the old law and under the new law, and then the results compared. If the result for the accused is the same under the old law and the new law (...), PCCK require(s) that the old law apply"[3].

In the case in question applicable law at the time the crime was committed – some time at end of June 1999 – was Article 30 Paragraph 2 of the CLK which provides as punishment imprisonment of at least ten (10) years or death penalty. Capital punishment was abolished by UNMIK-Regulation 2000/59, Section 1.5. Hence maximum possible punishment was imprisonment of fifteen (15) years pursuant to Article 38 Paragraph 1 of the CCSFRY or twenty (20) years pursuant to Article 38 Paragraph 2 of the CCSFRY. The question whether Article 38 Paragraph 2 of the CCSFRY was applicable in Kosovo does not need to be answered at this stage, because the respective provision of Article 147 of the PCCK/CCK provides as punishment imprisonment of at least ten (10) years or of long-term imprisonment up to forty (40) years and hence is in any case not more favorable for the accused.

Thus, applicable law in the case in question is the CLK and in particular Article 30 Paragraph 2 CLK, as correctly applied by the first instance Court.

Although the Court of first instance based upon the application of this law correctly assumed the power to impose imprisonment of up to twenty (20) years onto the accused, the legal reasoning requires a more detailed explanation.

The minimum possible term of imprisonment of ten (10) years emerges from Article 30 Paragraph 2 of the CLK and is out of question. The determination of the maximum possible punishment, however, requires a more in-depth analysis of the legal provisions. Article 38 Paragraph 1 of the CCSFRY as a general rule limits the maximum possible punishment of imprisonment to fifteen (15) years. Deviating from this rule Paragraph 2 of the same Article allows a term of imprisonment of

[2] AP - Kž. No. 382/2003; AP – Kž. No. 368/2009
[3] See also Supreme Court of Kosovo, AP KZ 490/2003

twenty (20) years for criminal acts eligible for death penalty. This Paragraph of Article 38 of the CCSFRY, however, is not directly applicable in the case in question. Although UNMIK-Regulation 1999/1 determined as the law applicable in the territory of Kosovo "the law which was in force prior to 24 March 1999", UNMIK-Regulation 1999/24 determined the applicable law as "the law in force in Kosovo on 22 March 1989". Since Paragraph 2 of Article 38 of the CCSFRY was implemented by the Law on Amendments of the CCSFRY from 26 July 1993[4], it entered into effect after 22 March 1989 and was not applicable pursuant to UNMIK-Regulation 1999/24, what based upon the principle of the more favorable law has to be respected with regard to the accused. The later amendment of the law through section 1.6 of UNMIK-Regulation 2000/59 - possible term of imprisonment up to a maximum of forty (40) years for criminal offences punishable by the death penalty – cannot be applied in the case in question as it would result in the application of amended law to the detriment of the accused.

However, in the case in question Section 1.2 of UNMIK-Regulation 1999/24 allows the extraordinary application of Article 38 Paragraph 2 of the CCSFRY. This Section reads as follows:

> *If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.*

Based upon this exceptional rule Article 38 Paragraph 2 of the CCSFRY can be applied for criminal offences committed in the territory of Kosovo after 22 March 1989. It is obvious that UNMIK-Regulation 1999/24, when abolishing capital punishment, did not cover the matter of a replacement by a term of imprisonment exceeding the maximum term of fifteen (15) years. In the light of UNMIK-Regulation 2000/59 it cannot be argued that such replacement was not deemed necessary because UNMIK-Regulation 2000/59 pronounced again the abolishment of capital punishment (Section 1.5), this time replacing capital punishment by possible imprisonment up to forty (40) years. Even more important, according to Section 3 of UNMIK-Regulation 2000/59 this change should be deemed to have entered into force as of 10 June 1999. Although this immediately raises legal questions regarding the retroactive effect of law it shows the clear idea of the lawmaking authorities in the territory of Kosovo that a substitute for the abolished capital punishment should have been pronounced in UNMIK-Regulation 1999/24 already. Since

[4] See Ljubisa Lazarevic, Commentary of the Criminal Code of FRY, 1995, 5th edition, Article 38 Paragraph 2 section 2

Paragraph 2 of Article 38 of the CCSFRY is neither discriminatory nor in violation with the principles mentioned in Section 1.3 of UNMIK-Regulation 1999/24, its application is as an exception allowed.

Consequently the range of punishment for the accused was ten (10) to fifteen (15) years imprisonment or a fixed term of twenty (20) years imprisonment. The punishments imposed by the Court of first instance are within this range of power.

The individual terms of imprisonment imposed onto the accused are also appropriate. The Court of first instance determined the concrete punishment by taking thoroughly into consideration mitigating as well as aggravating circumstances. The argument of Defence Counsel [redacted] that his client [redacted] had been a KLA-fighter for two years what might potentially have dictated the commission of the crime is without merits. Defence Counsel A[redacted]iled to submit any specific reasons or circumstances which would allow such conclusion.

Based upon the above the appeals are rejected as unfounded and the judgment of the Court of first instance is fully affirmed.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
AP – Kž. No. 365/2009

Presiding Judge

Norbert Koster

Panel Member

Maria Giuliana Civinini

Panel Member

Martti Harsia

Panel Member

Emine Kaçiku

Panel Member

Emine Mustafa