

**SUPREME COURT OF KOSOVO**

**Ap-Kz- 89/2011**

**Date: 18 May 2012**

**IN THE NAME OF THE PEOPLE**

**THE SUPREME COURT OF KOSOVO**, in the panel composed by judge Francesco Florit as Presiding, Judges Martti Harsia, Salih Toplica, Nazmije Ibrahimimi and Marije Ademi as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk, in the criminal case P.nr 01/2010 of the District Court of Mitrovice/Mitrovica against the defendant:

A [REDACTED] P [REDACTED], [REDACTED]  
[REDACTED]  
[REDACTED], in the detention on remand from 16 December 2008 until 8 September 2010, charged according to Indictment PP nr 128/08 filed on 15 July 2009 by Public Prosecutor, as partially adopted by injured party A [REDACTED] F [REDACTED] as subsidiary prosecutor upon the withdrawal of the charge of Murder by the public prosecutor, with the criminal offences of Murder in violation of Article 146 and Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 par 2 of Criminal Code of Kosovo (*thereafter "CCK"*),

Found guilty by Judgment of the District Court of Mitrovice/Mitrovica P nr 01/2010, dated 14 October 2010 of Murder committed by exceeding the limits of the necessary defense as defined in Article 146 in conjunction to Article 8 par 4, and criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons as defined in Article 328 par 2 of the CCK and sentenced to 2 years of imprisonment.

Acting upon the Appeals filed by Av F [REDACTED] B [REDACTED], the representative of injured parties, and by the defense counsel Av M [REDACTED] H [REDACTED] on behalf of the defendant, against the Judgment of the District Court of Mitrovice/Mitrovica P nr 01/2010, dated 14 October 2010; considering the Reply to appeal filed by the defense counsel Av. M [REDACTED] H [REDACTED] and the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) on the appeals filed on 23 March 2011,

After holding a public session on 18 May 2012, in the presence of the parties and following a session on deliberation and voting held on same day, pursuant to Articles 420, 424 and 426 of the Kosovo Criminal Code of Procedure (*hereafter "KCCP"*) issues the following:

**JUDGMENT**

The appeal of the representative of injured parties and of the defendant A [REDACTED] P [REDACTED] against the Judgment of the District Court of Mitrovice/Mitrovica P nr 01/2010, dated 14 October 2010, are hereby rejected as ungrounded and the challenged Judgment of the District Court of Mitrovice/Mitrovica P nr 01/2010, dated 14 October 2010, is affirmed.

The costs of the criminal proceedings in second instance shall be paid from the budgetary resources pursuant to Articles 99, 100 and 103 of the KCCP.

## REASONING

### I. Procedural background

On 16 December 2008 at around 14.00hrs in Rahove-village, Municipality of Mitrovica/Mitrovica in the place called "Quka e Lisices" after an altercation the defendant A [REDACTED] P [REDACTED] shot at R [REDACTED] F [REDACTED] with his automatic rifle; the wounds caused by the bullets were lethal for the victim.

On 19 December 2008 the District Public Prosecutor initiated the investigations against the defendant A [REDACTED] P [REDACTED] and on 15 July 2009 the Public Prosecutor filed the indictment PP nr 128/08 with the District Court of Mitrovica/Mitrovica against the defendant A [REDACTED] P [REDACTED] for the commission of the criminal offence of Murder in violation of Article 146 and for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons as defined in Article 328 par 2 of the CCK.

On 12 January 2010, the District Court of Mitrovica/Mitrovica confirmed the indictment. Following the decision dated 2 August 2010 of the President of the Assembly of EULEX Judges for assignation of the case to the EULEX, the trial proceedings started on 12 October 2010 before the District Court of Mitrovica/Mitrovica.

On 14 October 2010, the District Court of Mitrovica/Mitrovica by Judgment P nr 01/2010 found the defendant A [REDACTED] P [REDACTED] guilty of the criminal offence of Murder committed by exceeding the limits of the necessary defense in violation of Article 146 in conjunction to Article 8 par 4 and criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons as defined in Article 328 par 2 of the CCK. The punishment for exceeding the limits of the necessary defense has been waived due to the strong trauma or fear inflicted to the defendant by the attack of the now deceased; for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons as defined in Article 328 par 2 of the CCK, the court imposed onto the accused a punishment of two years of imprisonment.

The Judgment rendered in the court of first instance has been challenged by the injured party respectively the subsidiary prosecutor through the legal representative Av. F [REDACTED] B [REDACTED] and the defendant A [REDACTED] P [REDACTED] through his defense counsel Av. M [REDACTED] H [REDACTED].

The Office of State Prosecutor (OSPK) has submitted an opinion PPA 89/11 whereby asks the court to reject both appeals, as ungrounded and affirm the appealed Judgment of the District Court of Mitrovica/Mitrovica P nr 01/2010, dated 14 October 2010.

### II. Appeal of the representative of the injured parties.

In the appeal, the injured party denounces (i) the violation of substantial provisions of the criminal procedure, (ii) erroneous and incomplete determination of the factual situation, and (iii) the violation of the criminal law regarding the decision on the criminal sanction.

In his appeal, the injured party emphasized the violation of substantial provisions of the criminal procedure foreseen in the Article 403, Paragraph 1, Item 8 and 12 of the CPCK, because the enacting clause of the judgment is incomprehensible, contradictory in its content and with the reasoning of the judgment; additionally, it is alleged, reasons for decisive facts are not given in the judgment whereas the presented reasons are unclear; further, according to the appeal, for decisive facts there are considerable contradictions between what is presented in the reasoning of the judgment and the content of files or minutes of the main trial. More, the enacting clause of the judgment does not provide description of the trajectory for the entering and exiting passage of the bullets and the cause of the four inflicted wounds. Further, there is no specific argument to justify why the action of the accused was qualified as necessary defence. The injured party maintains that the presented factual description in the enacting clause of the appealed judgment is in contradiction not only with the factual description of the prosecutor's indictment and of the subsidiary indictment (as the injured party did not alter it) but also with the content of the evidence administered during the main trial.

The appellant further argues that his right to an effective defense has been infringed. The defense counsel states that the court must ensure that a party is given the possibility to appoint a defense counsel that can represent the client with skill and expertise that satisfies the objective standard of reasonably effective assistance of a defense counsel. It is submitted that the fact that A [REDACTED] F [REDACTED] is a cleric could not be sufficient ground to refuse him the opportunity to appoint a professional defence counsel in order to guarantee the effective legal assistance required in a criminal procedure. Therefore, the argument goes, the first instance court should have postponed the main trial and given the injured party eight days to assign a lawyer.

Further in the appeal, it is argued that the court mistakenly held that the place of incident "the so-called fields of Lisice" belong to Rahove village taking into account that the cadastral books confirm that the fields of Lisice belong to Lisice village and not Rahove village.

Finally, the appeal of the injured party also alleges of some other violations of the criminal procedure that are related to alleged improper qualification of the criminal act, intent and motives of the defendant and the failure of the court to conduct the DNA expertise that would have verified if the blood from the accused could be identified on the blade of the bill hook.

### **III. Appeal of the defense counsel Av M [REDACTED] H [REDACTED], filed on behalf of the defendant**

The lawyer of the defendant, Av. M [REDACTED] H [REDACTED] laments the violation of the provisions of the criminal code related to the decision on sentencing. It is argued that the defendant did not exceed the limits of the necessary defense but acted merely in necessary defense when committing the murder in order to avert an unlawful, real and imminent attack caused by the now deceased.

Further, the defense counsel maintains that the length of the criminal sanction imposed onto the accused for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons as defined in Article 328 par 2 of the CCK has been very harsh.

#### **IV. Supreme Court findings**

After reviewing all files of this case, after studying the appealed judgment pursuant to the provision of Article 415 of the CPCK and after assessment of the mentioned arguments in the appeals, the Court finds the following:

- a. The appeals are admissible as they are filed with the competent court pursuant to Article 398 par 1 and within the deadline pursuant to Article 407 of the KCCP.
- b. The Supreme Court of Kosovo decided after a session on deliberation and voting following a hearing held on 18 May 2012 as prescribed by Article 413, 411 and 420 of the KCCP.
- c. The appeals of the representative of the injured parties and of the defendant A [REDACTED] P [REDACTED] are ungrounded.

The judgment of the first instance does not contain the essential violations of the legal provisions of the criminal procedure foreseen by provision of Article 403, Paragraph 1, Item 8 and 12 of the KCCP, listed in the appeal.

Indeed the court of first instance, in the reasoning of the challenged judgment, presented the facts which were correctly established and gave clear and convincing reasons for the establishment of the facts of the case. Therefore, there are no contradictions in the enacting clause of the judgment, nor any contradiction between enacting clause and the reasoning. On this point, the Supreme Court stresses that, when the appeal denounces the alleged contradiction of the judgement or of its enacting clause, it is not sufficient to repeat in a formulaic and mechanic way the text of number 12 of paragraph 1 of article 403 KCCP. The defence counsel should not simply indicate that there is a contradiction, for example between the enacting clause and the judgment or between the reasoning and the facts as established in the course of the trial, but he/she should also make the effort to explain what the alleged contradiction consists of or why between facts and their description in the decision there is not congruence. The simple statement that there is contradiction does not constitute a sufficient ground of appeal and does not help the Court to understand the argument of the defence lawyer.

The enacting clause makes an adequate reference to all decisive facts, namely the number of shots, the description of a weapon used by the defendant and the manner in which the crime was committed. In the statement of grounds, the court presented the grounds for each individual point of the judgment. The Supreme Court of Kosovo is satisfied that the first instance court clearly and exhaustively stated the facts it considered proven or not proven, as well the grounds for this, and specifically indicated the evidence relied upon by the court when rendering the judgment. The allegation concerning the lack of description of the trajectory of the entrance and exit of the bullets is, in the view of the Supreme Court of Kosovo, a partial reading of the enacting clause. Indeed, the enacting clause and reasoning are organic and indivisible parts of a judgment. The enacting clause has to contain a sufficient number of details, in order to allow the proper defense of the accused. Any addition that is superfluous to this aim must be avoided, because it would risk to cause confusion, instead of clarity. In light of this, the description of the trajectory of the bullet is

obviously not necessary in the enacting clause. The argument of the Av.F. B. is therefore nothing more than a pretext, and a speculation, because the description of the trajectory is in no way necessary to ensure the defense of the accused and it is surprising that such an argument comes from the Representative of the Subsidiary Prosecutor.

As such the judgment must be read in its entire context. The reasoning part of the judgment contains all the details and sufficiently provides explanation of the factual situation based on the evidences which were properly obtained, administered and evaluated by the court. Therefore allegation of the defense counsel about the inconsistency of the judgment is ungrounded.

As regards the alleged infringement of the right to an effective legal assistance for the injured party, the Supreme Court of Kosovo notes that the court had no obligation to appoint *ex officio* a defense counsel for the injured party nor had a duty to postpone the hearing in order to allow the injured party to appoint one.

The specific circumstances required for an appointment of defense counsel for injured party (art.82 KCCP) are obviously not present in the case at hand: the injured party is not particularly vulnerable nor in substantial need of assistance of an authorized representative. Quite on the contrary, the injured party is an educated and cultured individual.

There is no evidence to indicate that the injured party has been in any way restricted from engaging a defense counsel of his choice if he wished to do so, at any stage of the trial. But the injured party cannot expect that the trial is postponed in order to give him the possibility to appoint one.

Therefore, no infringement of the defense rights guaranteed to the injured party under the applicable law could be detected in this case.

Concerning the place of the incident, the allegation of the defense counsel is immaterial. The Supreme Court of Kosovo finds that for the purpose of this case, the municipality to which the "field of Lisice" belongs to, is of no relevance. Indeed, there is no doubt and/or any uncertainties as to where the criminal offence has taken place. As a matter of fact, the first instance court has correctly mentioned the presence of different names for the same area, leaving no doubt that it was aware of possible different names of the place. Additionally, the case file contains photographs showing clearly the crime scene; original numbers placed over each piece of evidence found at the crime scene, make the understanding of the picture extremely easy. Therefore, the Supreme Court of Kosovo finds the argument not worthwhile and without merit. The allegation that the crime happened somewhere else and that the body of the victim was then transported to the crime scene is a mere conjecture.

Both parties (defendant and injured party) in their respective appeal say that the qualification of the criminal act is wrongful. The injured party claims that the homicide should have been qualified as murder whereas the defendant states that it was an act of necessary defense. For the reasons indicated below, the Supreme Court of Kosovo considers that first instance court has correctly qualified the act as Murder committed exceeding the limits of the necessary defense in violation of Article 146 in conjunction to Article 8 par 4 of CCK.

At the end of the main trial the Panel concluded that, after a verbal dispute, the now deceased hit the accused from behind with a bill hook inflicting on the defendant an open wound at the left jaw and that when the victim raised his hands to hit again, the defendant started shooting at R [REDACTED] F [REDACTED] in order to prevent the latter from completing his aggression. This reconstruction of the facts is based on the account of the events that the same defendant has given, since no other person was present when the action took place.

The first instance Court concluded that the version of the accused was the most plausible and that it was corroborated by objective evidence. Indeed, the expert witness Dr. E [REDACTED] A [REDACTED] indicated that he had provided medical treatment to the accused on 16 December 2006 and confirmed that the wound on the defendant was caused by a sharp object on the left hand side of the jaw. The conclusion of the trial panel was that the sharp object used in the action and which caused the wound on the defendant was the bill hook found partially under the body of R [REDACTED] F [REDACTED] still held by his right hand, as photographed at the crime scene.

This conclusion is not only logic and plausible (no other sharp tool was found at the crime scene; the presence of the fresh wound is confirmed by the medical doctor who sutured the wound) but is also corroborated by another factual element which can be noticed from the autopsy report and that is convincingly explained in the decision of first instance (page 12, lines 7 and following).

As shown in the pictures of the dead body of R [REDACTED] F [REDACTED], the holes of entry and of exit of the bullets on the upper arm of the victim indicate that the trajectory of the shot was from the back of the arm towards the forepart and from up to down.

With the shooter placed in front of the victim (the entry holes of the shots on the legs indicate so), the only explanation of the direction of the trajectory of the bullets which hit the arm is to consider that both arms were raised above the shoulders and that the forearms were even higher, above the head, aimed to hold the billhook high just a fraction of second before the second hit was going to be delivered by R [REDACTED] F [REDACTED].

Following this description of the events, it is easy to understand that, as commented also by Av. F [REDACTED] B [REDACTED] in the course of the hearing, the entire action was not instantaneous, but it took some seconds to develop. How many? Nobody knows, of course, but a sufficient amount for A [REDACTED] P [REDACTED] to turn to the aggressor, after the first hit, ask him with surprise why he was hitting him, then prepare the weapon and aim to the target. The precision with which the targets were hit (the arm, from where the immediate threat was coming, being the immediate target; the legs were probably hit in succession) indicates at the same time that A [REDACTED] P [REDACTED] wanted simply to defend himself (otherwise, he would have aimed to the central part of the body) and not to kill. His reaction, therefore, was simply the response to an impending threat, rather than the intention to vindicate the tort he had just suffered.

The defendant was acting in defense, but exceeding the limits of the necessary defense which would have been sufficient to guarantee to him an escape from the aggressor. If the defendant had limited the shots to the initial two, this would have been sufficient to stop the attack and to allow him to leave the place safe. By shooting four times, the defendant went beyond the justified threshold of his reaction and exceed the necessary defense.

Based on the above, the Supreme Court of Kosovo is satisfied with the qualification given by the first instance Court and finds therefore, that the District Court of Mitrovica did not make an error of law. Specifically, the application of the last paragraph of article 8 of the CCK to the action of A● P● appears to be correct. The excess in the self defence has been committed by the defendant exclusively for the resolution showed by the victim itself, to bring to conclusion the aggression he had already initiated delivering the first hit with the billhook. Convinced of his physical superiority and of his ability to hit A● P● before A● P● could hit him, the victim did not arrest his action even when he saw A● P● pull out the weapon from his shoulder, remove the safety catch and load the weapon, preparing to shoot. The determination of the victim has therefore generated in the accused the fear which justifies the waiver of the punishment.

Finally, the first Court has justified why it has come to the conclusion that a DNA analysis to determine whose blood was on the blade of the billhook was superfluous. Given the amount of blood spilt at the crime scene by both individuals present, the risk of contamination of the evidence was simply too high to make the execution of a DNA analysis meaningful.

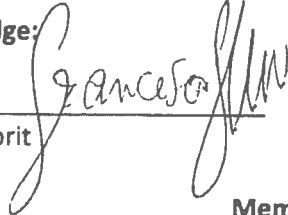
Concerning the motive/s of defendant which the defence alleges to have not been correctly established, this panel notes that the motive/s of a crime is/are not part of the crime itself as it is defined in the law. The Supreme Court of Kosovo however adopts the finding of the first instance court that a dispute on grazing cattle in the area preceded and eventually caused the incident. This fact is corroborated by the testimony of the witness I● I● who confirmed that he was told by the accused and two other persons not to graze cattle in that area and to tell this also to R● F● Nevertheless there is no legal obligation whatsoever for the court to establish the motives that drove defendant in committing a criminal offence. Therefore the Supreme Court of Kosovo finds this argument without a merit.

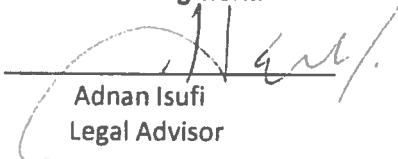
As regards the length of punishment, the Supreme Court of Kosovo has a different view from that of the defense counsel of the defendant. The criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons is a particularly serious offence punishable up to ten years of imprisonment. The defense counsel's argument that for Unauthorized Ownership, Control, Possession or Use of Weapons, the court usually imposed conditional sentence, is ungrounded. Especially in criminal cases, circumstances are hardly ever the same in every case and the courts must provide relevant and sufficient reasons in every case when imposing the punishment taking in account the defendant's individual circumstances. Taking into account the specific circumstances related to the case, the manner in which the crime was committed – *modus operandi* as well as the intensity of the social risk of the criminal offence, this court concludes that the imposed punishment is fair and lawful, i.e. in compliance with the purpose of punishment, as foreseen by the law. Therefore the Supreme Court finds that the court of first instance has fully and correctly examined all relevant circumstances and has provided sufficient reasons when imposing the type and length of the punishment.

## **VI. Conclusion of the Supreme Court of Kosovo**

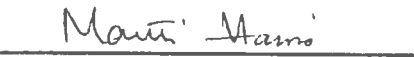
For the reasons above, pursuant to Article 420 (4) of KCCP the Supreme Court of Kosovo decided as in the enacting clause.

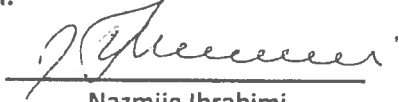
**SUPREME COURT OF KOSOVO**  
**Ap-Kz 89/11, 18 May 2012**


**Presiding judge:**  
  
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Francesco Florit  
EULEX Judge

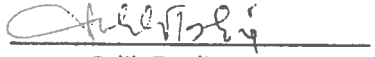
**Recording clerk:**  
  
\_\_\_\_\_  
Adnan Isufi  
Legal Advisor

**Members of the panel:**

  
\_\_\_\_\_  
Martti Harsia,  
EULEX Judge

  
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Nazmije Ibrahim  
Supreme Court Judge

  
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Marije Ademi  
Supreme Court Judge

  
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Salih Toplica  
Supreme Court Judge