SUPREME COURT of KOSOVO

21 July 2009
Prishtine/Pristina
Ap.-Kz No. 481/2008

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of International Judge Emilio Gatti as Presiding Judge, International Judges Maria Giuliana Civinini and Guy Van Craen and Kosovo National Judges Salih Mekaj and Avdi Dinaj as panel members,

in the criminal proceedings against:

[redacted], the son of [redacted] and [redacted] born on [redacted] in [redacted] village, [redacted] Municipality, Kosovo Albanian, resident i[redacted], married with [redacted] businessman by occupation, high school education, currently in detention in Dubrava Prison; and

S[redacted] SH[redacted], the son of [redacted] born [redacted] in [redacted] Municipality, Kosovo Albanian, married with [redacted], resident i[redacted], merchant, average economic status, finished high school, currently in detention in Dubrava Detention centre.

Deciding upon the appeals on the District Court of Prizren Judgment P. no. 155/2007, dated 17 April 2008, convicting the two defendants of having committed the criminal offences of 1).aggravated murder in co-perpetration in violation of article 147 paragraph 5 and article 23 PCCK, 2) attempted murder in co-perpetration in violation of article 147 paragraph 11 and articles 20 and 23 PCCK, 3) unauthorized ownership, control possession or use of weapons in violation of the article 328 paragraph 1 PCCK in [redacted] village, Prizren Municipality on 10 October 2005 and O[redacted] only of having committed the criminal offence of 4) unauthorized ownership, control possession or use of weapons in violation of the article 328 paragraph 2 PCCK upon his arrest on 19 April 2007, appeals which were filed by the defense counsels on behalf of O[redacted] on 04.08. 2008 and on behalf of Sh[redacted] Sh[redacted] 11.08.2008.

After having read the request of O[redacted] dated 25.10.2008 attached to the appeal of his defense counsels, having heard the submissions of the defense counsels Mr. R[redacted] G[redacted] Mr. E[redacted] and Mr. F[redacted] Mr. [redacted] and Mr. H[redacted] the submissions of Mr. O[redacted] and Mr. Sh[redacted] SH[redacted] and opinion and motion of the OSPK Prosecutor Ms. Anette MILK in the session held on 21 July 2009 and

after a deliberation and voting held on 21 July 2009,

acting pursuant to Article 420 of the Criminal procedure Code of Kosovo (KCCP) renders this

VERDICT

The appeal filed in the interest of Os[redacted]Z[redacted]on 4 August 2008 is partially GRANTED 1) as to the legal qualification of Count 1 and Count 2, which are unified and qualified being Aggravated Murder in violation of article 147 item 11 of the PCCK, committed in Co-Perpetration under article 23 of the PCCK, in that he with another killed H[redacted]R[redacted]and attempted to kill N[redacted]R[redacted]10 October 2005 i[redacted] village, Prizren Municipality and 2) as to the legal qualification of Count 3, being Unauthorized Ownership, Control, Possession or Use of Weapons in violation of the article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005 in Xerxe/Zrze village, Prizren Municipality.
The appeal filed in the interest of O[redacted]on 4 August 2008 is REJECTED in the remaining parts.

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

Pursuant to article 391.5 PCPCK, the time spent in detention on remand by O[redacted]Z[redacted]is included in the amount of punishment.

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

The costs of the second instance proceeding will remain in charge of O[redacted]Z[redacted]

With a separate ruling is decided about the detention on remand for each defendant, according to article 426 and 393 KCCP.

REASONING

Procedural History

1. Against O[redacted] Z[redacted] and Sh[redacted] Sh[redacted] International Public Prosecutor filed an indictment on 17 July 2007 charging the two defendants with the criminal offences of 1) aggravated murder in co-perpetration in violation of article 147 paragraphs 4, 5 and 8 and article 23 PCCK, 2) attempted murder in co-perpetration in violation of article 147 paragraph 11 and articles 20 and 23 PCCK, 3) unauthorized ownership, control possession or use of weapons in violation of the article 328 paragraphs 1 and 2 PCCK in [redacted] village, Prizren Municipality on 10 October 2005 and Os[redacted] Z[redacted] only of having committed the criminal offence of 4) unauthorized ownership, control possession or use of weapons in violation of the article 328 paragraphs 1 and 2 PCCK upon his arrest on 19 April 2007.

The allegations against both defendants were related to the aggravated murder on H[redacted] R[redacted] to the attempted aggravated murder on N[redacted] R[redacted] and to the unauthorized ownership, control, possession or use of weapons in [redacted] on 10 October 2005 and against O[redacted] Z[redacted] only to the unauthorized ownership, control, possession or use of weapons on 19 April 2007.

The confirmation judge confirmed the indictment totally on 30 August 2007.

2. The public main trial against O[redacted] Z[redacted] and Sh[redacted] Sh[redacted] was held in District Court of Prizren and/or in the Dubrava Detention facility and lasted from 31 January 2008 to 17 April 2008.

At the hearing of 17 April 2008 the judgment was announced.
The two defendants O[redacted] and Sh[redacted] Sh[redacted] were found guilty of all criminal offences they were charged with and sentenced each with an aggregated punishment of twenty-five (25) years of imprisonment.

3. O[redacted] Z[redacted] had been arrested on 19 April 2007 and Sh[redacted] Sh[redacted] on 23 May 2007 and kept since then in detention on remand.

4. The defense counsels of the two defendants filed appeal against the verdict as follows.
The appeal of Mr. R[redacted] G[redacted] and Mr. E[redacted] R[redacted] from Prizren as defense counsels of defendant O[redacted] Z[redacted] was filed on 04.08.2008.
On 29.10.2008 defense counsel E[redacted] forwarded to the Court a letter of O[redacted] Z[redacted], that had to be attached to the appeal.
The appeal of Mr. R[redacted] H[redacted] from Prizren as defense counsel of defendant Sh[redacted] Sh[redacted] was filed on 11.08.2008

5. After the hand over of the case to EULEX Judges in January 2009, the Supreme Court of Kosovo scheduled the appeal session on 21 July 2009 where, after the report of the reporting judge, the defendants and their defense counsels explained their appeals and the International Prosecutor replied as stated in the minutes of the record.

6. The deliberation was taken by the Court on 21 July 2009.

Ex Officio Court Findings

I

Four issues must be considered preliminarily.

7. The appeal on behalf of O[redacted] Z[redacted] was filed on 4 August 2008.
As it will be seen better further on, the appeal claimed the innocence of the defendant from the counts 1, 2 and 3.
During the main trial the defendant had never pleaded guilty.
On 29 October 2008 the defense counsel of O[redacted] Z[redacted] forwarded to this Court as an attachment to his appeal a letter of the defendant dated 25 October 2008.
In this letter the defendant, after having asked for a re-trial, adds to "accept to have murdered H[redacted] R[redacted] (chief of the Serb Intelligence Service) and to have wounded his brother".
During the session before this Court Z[redacted] stated: "it is true that on 10 October 2005 a murder took place and that it was committed by me. Apart from presenting it in writing I wanted to do it orally too".
Z[redacted] did not give any detail about the facts.

This Court is of the opinion that the written petition and the oral statement of O[redacted] Z[redacted] represent a sort of guilty plea and not a new piece of evidence which can be taken only in a hearing and not during a session (art. 412.1 PCPCK).
The defendant simply accepted to have committed the murder of H[redacted] R[redacted] and the attempted murder of his brother N[redacted] without entering in details on the facts or stating his defense.
Moreover the statements of O[redacted] Z[redacted] don't change the factual situation as determined by the first judge.

8 A second issue was raised by the defense counsel of Sh[redacted] Sh[redacted] only during the session before this Court and is related to the possible disqualification of the Public Prosecutor of the main trial, Mr. Robert Dean, due to his contemporary activity as Chief of Department of Justice (DoJ) of UNMIK and of prosecutor.
The defense counsel bases his request on Section 4.2 of UNMIK Regulation 2001/2 according to which: "an international judge or international prosecutor shall not hold any other public or administrative office incompatible with his or her functions, or engage in

any occupation of a professional nature, whether remunerative or not, or otherwise engage in any activity that is incompatible with his or her functions".
The defense counsel claims, according to article 40 paragraph 3 in relation to article 45 paragraph 1 PCPCK, that the autonomy and independence of the prosecutor Mr. Dean may have been made doubtful because of the administrative activity of Mr. Dean as Chief of DoJ.

This Court rejects this claim because on one side there is no doubt that Mr. Robert Dean was the "authorized prosecutor" able to file the indictment against the two defendants (see articles 6 and 304 PCPCK).
On the other side the request for disqualification was raised by the defense counsel after the expiring of the time limit provided by article 41 paragraph 2 PCPCK, that is the commencement of the main trial.
The activity of Mr. Dean as Chief of DoJ of UNMIK was publicly well known before the commencement of the main trial and this time limit had to be respected by a person who wanted to present this kind of claim.

9. Three other points must be examined ex officio according to article 415 paragraph 1 item 4 PCPCK because they are related to the violation of the criminal law made by the First Instance Court to detriment of the accused.
The first two points are related to the aggravating circumstances envisaged by article 147 items 5 and 11 of PCCK, the third one is related to the legal qualification of the fact with which Count 3 deals.

10. As seen above the first judge convicted both Os[redacted]Z[redacted] and Sh[redacted] Sh[redacted] for the criminal offence of aggravated murder according to article 147 item 5 PCCK, being the murder of H[redacted]P[redacted] committed in a way that demonstrates " a ruthless disregard for life and in a violent manner".
Both appeals claim that the challenged verdict did not give any reason nor corroborate with any fact why the charged acts were committed with cruelty and violence.

The first judge examines (pages 22 – 23 and 26) the aggravating circumstance foreseen by article 147 no. 5 PCCK, concluding that the conduct of the defendant constituted a "violent assault upon the fabric of ethnic relations in Kosovo with the intent to intimidate others, much like terrorism and its use of violence for intimidation".
The shooting of two people in broad daylight in a very public setting in the manner of a merciless assassination is "clearly a ruthless disregard for the lives of the victims and the harm done to others, including the community as a whole".

This Court does not share the opinion of the first judge.
The aggravating circumstances indicated by article 147 item 5 PCCK are strictly related to the act of the murder and to its modalities.
The reasons, the purposes, the results of the murder have nothing to do with this aggravating circumstance if they are not accompanied by specific ruthless and violent modalities.

It must be remembered that every homicide encompasses a minimum of violence and ruthlessness.
For this reason the charged aggravating circumstance can be integrated only if the degree of ruthlessness and violence gets over this "minimum" and reaches an appreciable intensity.
Ruthlessness is the characteristics of an act committed without any mercy or pity for the victim.
It is the case where the perpetrator not only kills the victim but intentionally inflicts to him an unnecessary pain or sufferance.
In this case the brutality and the cruelty used by the perpetrator trespass the murder in itself and show an higher degree of criminal liability of him.
Only in this case there is a justification for an aggravating circumstance, which differs this crime from that of murder not aggravated as envisaged by article 146 PCCK.
Analogue consideration must be done for the violence foreseen by article 147 item 5: this violence must exceed the minimum necessary for the not aggravated murder and indicate a higher degree of criminal liability.
In this case the perpetrators acted within few seconds, using lethal weapons as revolver or automatic pistols, three shots went through the chest of H[redacted]R[redacted]ne pierced his heart, he was killed immediately (see the autopsy report), there was no time to rage against the victim.
The same is also valid for the second victim, N[redacted] R[redacted] who was injured in the same few seconds and could survive because the perpetrators escaped.
In this case there is no ground for the aggravating circumstance envisaged by article 147 item 5, because ruthless and violence used did not trespass the need of the murder.
This aggravating circumstance must therefore be excluded.

11. As to the aggravating circumstance foreseen by article 147 item 11 PCCK it can be noticed as follows.
The first judge convicted the two defendants for two different counts: one of aggravated murder (count 1) and one of aggravated attempted murder (count 2) and considered only the second one as aggravated according to article 147 item 11.
The conviction for two different counts violates the criminal law to detriment of the accused because according to the provision of article 147 item 11 these two facts can not be kept separate but must be considered as a unique criminal offence.
Since the commission (or the attempt to commit, according to article 20 PCCK) of more than one intentional murder is expressly the object of this aggravating circumstance, when the judge is in presence of two murders, he must apply this circumstance and can convict only for one criminal offence and not for two.
The aggravating circumstance can be applied in this case even though only one person was actually killed because in relation to the second victim finds application the provision of article 20 PCCK on the attempt to commit a crime.
The application of this aggravating circumstance makes it therefore necessary to unify the two crimes of murder and attempted murder in one unique count, whose factual description remains the same as stated in the verdict of first-instance and whose legal qualification is Aggravated Murder in violation of article 147 item 11 of the PCCK, committed in Co-Perpetration under article 23 of the PCCK, in that the defendant with

another killed H[redacted] R[redacted] and attempted to kill N[redacted] R[redacted] on 10 October 2005 [redacted] village, Prizren Municipality.

12. As to the Count 3 it must be noticed that erroneously and to detriment of the accused the first judge has qualified it as a violation of article 328 paragraph 1 PCCK, whereas the correct legal qualification of it is according to article 328 paragraph 2 PCCK.
The reason is that in this case the use of the weapon in a threatening, intimidating or otherwise unauthorized manner was already included in the crime of aggravated murder.
What remains is ownership, controls and possession of a weapon without a valid Weapon Authorization Card according to article 328 paragraph 2 PCCK.
The factual description of Count 3 remains the same as stated in the verdict of first instance, whereas its legal qualification becomes Unauthorized Ownership, Control, Possession or Use of Weapons in violation of the article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005 in [redacted] village, Prizren Municipality.

13. In their appeals the parties raised other issues which can be examined also ex officio, and particularly the violation of the provisions of the criminal proceedings envisaged by art. 403 paragraph 1 item 12 and the violation of the criminal law.
These points will be dealt with in details in the next parts of this judgment.

As to the other points, which this Court is obliged to examine ex officio, no violations of the criminal procedure and of the criminal law were found both in the first instance proceedings and in the challenged verdict.

Issues raised by the Appellants

II

14. The appeal of R[redacted] G[redacted] and E[redacted] R[redacted] from Prizren as defense counsels of defendant O[redacted] Z[redacted] was filed on 04.08.2008.

The judgment of first instance is challenged due to:

- essential violation of the provisions of the criminal procedure code – article 402, paragraph 1, item 1 in conjunction with article 403 paragraph 1, item 12 of PCPCK;
- erroneous and incomplete establishment of the factual state – article 402, paragraph 1, item 3 in conjunction with article 405 of PCPCK:
- violation of criminal law – article 402, paragraph 1, item 2 in conjunction with article 404, item 1 of PCPCK and
- decision regarding criminal sanctions – article 402, paragraph 1, item 4 in conjunction with article 406, paragraph 1 of PCPCK.

The Defense Counsel proposes:

- to alter the appealed verdict issued by District Court of Prizren in order to release the accused O[redacted] Z[redacted] from the charges for the criminal offences under item 1, 2, and 3 of the enacting clause,
- for the criminal offence under 4 of enacting clause of the appealed verdict pronounce a lenient sentence or
- quash the verdict and return the case for re-trial or
- pronounce a more lenient sentence.

The grounds of the appeal filed on behalf of the defendant are as follows.

Essential violations of criminal proceedings.

15. Alleged inability of the defendant to follow the trial and to understand the charge due to physical and psychological illness.
The appeal claims that during the main trial the defendant was continuously followed by the doctor who undertook medical interventions and administered various medications.
Thus the defendant was not able to follow the trial and to understand the charges brought against him.
Again according to the appeal, currently the accused feels better and affirms to be able to face justice.

This point of the appeal is not grounded.
The defense himself remembers the continuous control and supervision exercised by medical personnel appointed by the first Court and the continuous care and medications dedicated to the health conditions of the defendant.
The appeal does not provide this Court with medical expertise about the inability of the defendant during the main trial nor about his ability at present.

The First Instance Court (pages 17 – 18) recalls the objections raised by defendant and defense counsel on the physical and mental competence of Z[redacted] the clinical information obtained by the Court and the medical supervision and care exercised during the sessions in order to minimize health risks caused by his attendance in the trial.
The first Court was constantly informed that Z[redacted] was "mentally competent and was oriented in all aspects" and that, despite a serious cardiac condition, "with proper care" he would be able to attend the trial and to assist counsel in his defense.
The first judge recalls the care undertaken: a bed available in the courtroom for the defendant, a constant medical supervision, rest periods during the hearings.
The first Court remembers also that, despite the weakness shown at the hearings, "during the breaks or at other times outside the courtroom, he appeared animated, alert and easily conversed with family, friends and counsel".

This Court observes that in the case file are to be found many documents on both physical and mental condition of the defendant, sign of the attention that the first judge gave to this issue constantly during the whole main trial.
Z[redacted] attendance at the hearings was followed by medical personnel.
The first hearings were delayed or cancelled due to his claims of an unstable health condition.
Upon a request of the defense counsel, in order to facilitate the care of the health needs of the defendant and his participation at the hearings without the stress of the travel the Court let him firstly be transferred from Dubrava to the Prizren Detention Centre.
Later on, upon motion of DoJ the SRSG authorized the change of the venue of the main trial and some hearings were held in Dubrava Detention Centre where the defendant had the services of his treating medical staff on an ongoing basis.
The continuous monitoring offered by the medical structures of the prisons where Z[redacted] was kept was accompanied by a specific physical and mental expertise asked by the District Court on 26 February 2008 in order to determine his competence to stand trial.
Both physical (see the report of dr. P[redacted] A[redacted] dated 4 March 2008) and psychiatric reports concluded for the capability of the defendant to stand trial.
The psychiatric expertise, signed by two psychiatrists and one neurologist found out that the defendant was suffering from chronic hypertension, anxiety attacks and depression as part of Post Traumatic Stress Disorder.
He was however found to be in touch with the reality and the surroundings and capable of making sound judgment.
He was not found to be psychotic.
The mental state of the defendant allowed him to understand the charges, to instruct his counsel, to make a sound decision about his plea, to understand the consequences of his plea, to follow the court proceedings and to challenge the witness, in other words to stand trial.
The expertise added that "high doses of neuroleptics (major tranquillizers) can affect his cognitive function".
Those administered to the defendant in this concrete case did not result to be high doses of neuroleptics as observed by the first Court according to the opinion of the same psychiatrist appointed for the expertise (minutes of the hearing of 6 March 2008).
Finally, from the minutes it results that the first judge followed the behavior of the defendant during the hearings, assessing directly his participation and his way to communicate with the Court and his defense counsels: this direct observation supported the decision of the first Court to proceed.

It can be concluded that during the main trial there was no violation of the rights of the defendant under this viewpoint.

It can be added, as to the present phase, that in the case file there is an opinion of Doctor N[redacted] Sh[redacted] Dubrava Detention Centre dated 15 July 2009 assessing that Osman Zyberaj "will be able to attend a short court trial on 21 July 2009".
The defendant has been present at the session before this Court on 21 July 2009, without raising any issue on his present health conditions.

16. The appeal claims the lack in the enacting clause of any description about the alleged cruelty of the crime of murder (Count 1), the manner how and the weapon with which the victim was shot.
Analogue remarks are raised in connection with Count 2, which does not contain the essential characteristics of the charged criminal act with reference to the willingness of the act.

The point related to the alleged cruelty of the crime of murder has lost its importance, since this Court has decided to exclude the aggravating circumstance provided by article 147 item 5 PCCK for factual reasons.
This Court deems the rest of this point of the appeal as ungrounded.
According to article 403 paragraph 1 item 12 there is a substantial violation of the criminal procedure only if the enacting clause is "incomprehensible or internally inconsistent".
Articles 396 paragraph 4 and 391 paragraph 1 PCPCK make it clear that the enacting clause must contain as "necessary data": the act of which the defendant has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed and facts and circumstances on which the application of pertinent provisions of criminal law depends.
On the contrary, in the statement of grounds (reasoning part) for the judgment "the court shall state clearly and exhaustively which facts it considers proven or not proven, as well as the grounds for this".

In this case the enacting clause (Counts 1 and 2) contains the clear indication of the criminal acts of which the two defendants are found guilty that is the murder of H[redacted] and the attempted murder of N[redacted]R[redacted]
In both counts are indicated the role of the two defendants as co-perpetrators, their material conduct in the shooting the two victims, their subjective attitude in the intention to deprive the victims of the life.
Count 3 makes it clear that each defendant was in possession of a weapon with which he shot.

So far the enacting clause appears to be fully comprehensible and internally consistent, whereas better and more accurate explanations are to be read only in the reasoning part.

17. Contradiction between enacting clause, where the criminal acts under Counts 1 and 2 are qualified as being done in complicity without mentioning a specific plan and prior agreement and the reasoning part of the verdict, where this prior agreement is mentioned.

This argument is not grounded for the same reasons explained in the previous point.
It is enough that the enacting clause indicates the form of responsibility of each defendant (in this case in co-perpetration with another person), whereas it is the task of the reasoning part to explain what in this case the meaning of complicity is, if a prior plan and premeditation or the arrangement of the very moment of the fact.

18. Internal contradiction of the reasoning part of the challenged verdict as to the motives of the murder: in one part the reason of the murder is that H[redacted] R[redacted] was a protected witness in a trial against a relative of O[redacted] Z[redacted], in another part the reason is indicated in the fact that H[redacted] R[redacted] was the opponent of the defendant.
The appeal stresses the importance of the motive of the conduct because the challenged verdict charges the accused with the criminal offence foreseen by art. 147 item 8 PCCK, that is murder for the purpose of concealing another criminal act.

This point of the appeal is ungrounded.
It must be noticed firstly that the challenged verdict does not apply the legal provision of article 147 paragraph 1 item 8 to the charges for which the two defendants are convicted.
In the enacting clause the purpose of concealing another crime is not considered as a part of the charged crimes of murder and attempted murder.
Only the reasoning part (pages 24 – 25) mentions item 8 of article 147 paragraph 1 of PCCK, this is however an obiter dictum which was not used in order to determine the responsibility of the defendants nor the punishment against them (pages 27 - 28).
To indicate art. 147 item 8 PCCK in the reasoning part can be therefore considered as superfluous and does not represent a substantial violation of the criminal procedure.
Secondly, the reasoning part presents two possible motives of the criminal offences: a rivalry between H[redacted] R[redacted] and the Z[redacted] family and the fact that the former was a witness in a trial against some KLA members, among them a close relative of the defendant.
These motives are presented as "possible motivation" of the criminal acts, they are not necessary alternative to each other.
On the contrary the quality of witness in a trial against a member of the Z[redacted] family could be considered as a part of the rivalry between this victim and that family.
Thus, there is no contradiction in the reasoning as to the motives of the crimes.

19. Lack of reasons regarding the following decisive facts:
if the motive of the murder was to eliminate a protected witness, did O[redacted] Z[redacted] know of this quality of the victim and how did he know this?
in this case what was the reason to eliminate N[redacted] R[redacted]?
what perpetrator shot what injured party?
since at the crime scene were found shells coming from one only weapon, how was it possible that both accused shot?
were other persons in the vicinity and were they endangered?
from what position did the accused fire the weapon?

This part of the appeal is ungrounded.
As seen above, the reasoning part indicates as "possible motivation" of the crimes the rivalry between H[redacted] R[redacted] and the family Z[redacted] and the quality of witness of the same R[redacted].
Firstly, that R[redacted] had worked for the Secretariat of the Internal Affairs of Serbia is proven by the testimony of his brother N[redacted] and of the wife of the defendant, B[redacted] Z[redacted].
Thus, this particular was well known by the defendant and his family.

O[redacted] had been a KLA member.
Z[redacted] and R[redacted] family come from the same village [redacted] O[redacted] and N[redacted] attended the same elementary school.
According to B[redacted] Z[redacted] H[redacted] was responsible for a sort of persecution of O[redacted] family and in general of all Albanians.
This reason is able to constitute the motive of the charged criminal offences.
Secondly, on 29 September 2005 started in Prizren DC a trial against a close relative of the defendant (B[redacted] Z[redacted].
The criminal offences were related to a detention centre allegedly conducted by KLA members in [redacted] Village in [redacted] Municipality of Rahovec/Orahovac during the months between May and August 1998.
Among the victims detained in that detention centre was also M[redacted] R[redacted] brother of H[redacted] and N[redacted]
O[redacted] Z[redacted] results to have been present among the public at the first hearing (see the list of the participants in the exhibits folder).
N[redacted] R[redacted] witnessed in that trial.
The existence of this trial is here proven by the testimony of N[redacted] R[redacted]
Clearly O[redacted] Z[redacted] was in a position to be informed about the details of this trial because of his family, local and military connections.
The First Instance Court indicates this trial as a possible motivation of the crimes and this hypothesis appears to be logical.
It is not the unique motivation and it is not in contradiction with the rivalry between the two families or between H[redacted] R[redacted] and the Albanians.

As to the reasons to eliminate N[redacted] R[redacted]
The first Court indicates clearly (page 24) that the action was directed not only "to take the lives of the two victims, but also in order to intimidate a certain faction of the community, and in order to instill a general fear within that faction and the community at large".
This constitutes a valid reason of the attempt to murder also N[redacted] R[redacted] as a part of the opposite faction as brother of H[redacted]
Furthermore it can be added that N[redacted] was present at the murder of H[redacted] he knew O[redacted] Z[redacted] was therefore a dangerous witness of the crime.

The challenged verdict (page 7 -9 and 25 - 26) indicates clearly that both the defendants had a weapon with which both of them shot against H[redacted] R[redacted] as proven by the testimony of N[redacted] R[redacted] (hearing of 6 March 2008 pages 11 and following).
The aggressors were two to three meters distant from the victims, they arrived behind Hasan and in front of N[redacted] R[redacted] coming from an angle, from the right.
The shots exploded were a plurality and after having struck H[redacted] Z[redacted] drew his gun on N[redacted] and shot again.
On the market place were present around 10 or 20 people, there were vehicles and persons also in the precise place of the shooting, this caused a general commotion and danger.
These elements answer the questions of defense on decisive facts.

The issue related to the number of weapons and of the shells will be examined in the chapter related to the factual reconstruction.

20. Lack of a serious analysis of the collected evidence, both separately and in relation to each other, lack of evaluation of the credibility of conflicting evidence in violation of the provisions of articles 387.2 and 396.7 PCPCK.
As examples of this kind of violations the appeal indicates the lack of reasoning as to the motives of the crimes against the two R[redacted] motives which should be different and are not clarified by the first judge and the lack of reasoning as to the motive of the crimes by the defendant Sh[redacted] who did not know and never dealt with the victims.

This point is not grounded.
The challenged verdict assess the collected evidence both separately (pages 6 – 17) and as a whole (pages 18 – 27).
The motives of the attack against the two victims are correctly investigated as seen in the previous point.
The appeal on behalf of Z[redacted] rises in different points questions related to the position of the other defendant, Sh[redacted] Sh[redacted]
All of them will find examination and reply in the part dedicated to this appellant.

21. The appeal raises doubts on the legality of the recognition made in the Courtroom by the witness N[redacted] R[redacted] in relation to defendant Sh[redacted] Sh[redacted] meaning that the evidence was inadmissible and the witness not credible.

The admissibility and the probative value of the recognition of Sh[redacted] Sh[redacted] will be examined in the part related to the appeal of this defendant.
Here can be noticed that the possible inadmissibility of a part of a piece of evidence, due to violation of procedural proceedings does not automatically affect with unreliability the other part of it.
In this case, the possible mistake in the proceedings made by the first judge in relation to the recognition of Sh[redacted] does not mean that the other statements of the witness related to the fact and to the other defendant are not credible.
The reasoning of the challenged verdict makes it clear that N[redacted] R[redacted] knew O[redacted] Z[redacted] since they were of the same village.
In his testimony N[redacted] R[redacted] explains to have attended the same elementary school of the defendant, thus they knew each other personally and very well.
That O[redacted] Z[redacted] was one of the aggressor was stated by N[redacted] since the very first moment of the Police investigation (see witness L[redacted] V[redacted]) without any previous and external influence and constantly repeated until the main trial.
Thus no violation of the criminal procedure can be seen as to the identification of Z[redacted] by this witness.
Since, as it will be shown in the next chapter, the defense has failed to demonstrate the will of N[redacted] R[redacted] to blackmail O[redacted] Z[redacted] or at least a mistake in the identification of this defendant this point of the appeal does not stand.

22. The appeal raises doubts on the possession by Shqiprim Shala of the car seen on the crime scene.
Also this point will be examined in the part related to the appeal on behalf of Shqiprim Shala.

Erroneous and incomplete corroboration.

23. The appeal challenges the verdict as to the assessment of credibility of the witness Nezim Rustemi on whom the challenged verdict is entirely based.
Nezim had strong reasons to accuse untruthfully Osman Zuberaj
The appeal alleges the existence of a suspicion that the brother of the two victims, that is Murat Rustemi was kidnapped and liquidated by KLA units where Osman Zuberaj belonged to.
Between the two families existed a rivalry and members of Rustemi family continuously threatened members of Zuberaj family.
The existence of revenge between two families puts in doubt the legal qualification of the charged criminal offences.
Also in this case the appeal asks again for what reason Shqiprim Shala had to take part in this crime.

This point is ungrounded.
The reasons indicated in the appeal don't ground the suspicion that the testimony of Nezim Rustemi is false.
Firstly, Osman Zuberaj was not one of the defendants of the trial for the kidnapping of Murat Rustemi.
That trial did not constitute a reason for Nezim Rustemi to falsely accuse just Osman Zuberaj for the murder of Hasan Rustemi
Nezim indicated the name of Osman immediately after the shooting, it was a genuine statement made before any outside influence could be done on the witness, for this reason his statement is credible.
The existence of a sort of persecution of Osman Zuberaj family and in general of all Albanians made by Hasan Rustemi represents a reason for an act of revenge against him and not for a false charge of murder made by Nezim against Osman
As to the legal qualification of the charged act it must be noticed that article 147 item 11 PCCK can find application also in case of a revenge.
The position of Shala will be examined further on.

24. The appeal challenges the logic of the verdict on the point of the weapons which shot on the critical day.
Since on the spot were found only three shells belonging to the same weapon the first judge fails to explain why he deemed as correct that two different weapons shot.
The appeal claims that the Court of First Instance did not accept the motion of a reconstruction of the crime scene or at least of a ballistic expertise on the erroneous ground that this activity can not be done at the trial stage.

The original request filed by the defense of O[redacted]Z[redacted]j on 1 April 2008 pointed out the necessities:

1. "to correct possible failures related to the crime scene inspection, or to eliminate contradiction and illogical statements, stemming from an unprofessional inspection;
2. to establish the manner of commission of the offence, if it was not already investigated at the crime scene;
3. to establish the accuracy of the statements collected from witnesses and injured parties, and eventually assess the defense or the statements of the accused in relation to circumstances connected to the spot of the crime scene".

In his original request the defense stressed that according to the testimony of N[redacted] R[redacted]at the moment of the shooting on the spot were present three vehicles: the car of the victims and two trucks, while according to the testimony of I[redacted], who was the first police officer to reach the crime scene, no trucks were found.
Other witnesses confirmed that at the moment of the police inspection no trucks were found at the crime scene.
In its original motion the defense requested that at the reconstruction of the crime scene were present N[redacted]R[redacted]and the witnesses and expert witnesses heard at the main trial in order to establish the facts and their traces.

This point of the appeal is ungrounded.
The reasoning of the first judge (pages 20 – 22) does not mention the inadmissibility of new investigations at the trial stage.
It points out the necessity of reasonability in fact and time and the concrete feasibility of this kind of motions.
The first judge refused because the request arrived late during the main trial, it arrived after the testimony of the main witness, N[redacted]R[redacted]and after his departure from Kosovo.
The parties were well aware of the situation of protected witness of N[redacted]R[redacted], of the fact that he lives protected outside Kosovo and of the extreme measures taken during the attendance of this witness at the main trial.
To assure his presence at the reconstruction was assessed as impossible and excessively risky.
The first Court deemed as meaningless a reconstruction of the event without the presence of the victim.
Finally the Court of First Instance assessed as useless the activity asked by the defense because the information the Counsel hoped to gain were for the most part already in the record (topography and the general characteristics of the crime scene) and additional elements, such the presence or the absence of certain vehicles, appeared to be "not of significant evidentiary value in determining how the victims were shot".
Moreover the defense had not explained the value of the possible evidence in order to counter the evidence of the prosecution.

This Court shares the opinion of the first judge.
The original request of the defense failed to indicate what kind of contradictions could be discovered through the requested reconstruction, thus failed to demonstrate the concrete necessity and utility of this judicial activity.
The defense requested the presence on the spot of N[redacted] R[redacted] which, as stated by the first judge, was highly risky if not impossible.
The request of the defense did not take into consideration the result of the crime scene report (page 1295 of the case file) which states that, despite the readiness of the intervention of police officers, upon their arrival they "found the crime scene contaminated because the citizens had surrounded the spot with pepper nets, which we think had contributed to the erasure of the footprints, and had transported the bodies to the hospital".
The contamination of the crime scene and the transportation of the victims to the hospital do not exclude the departure of vehicles before the arrival of the Police, fact which could explain the difference between the statement of N[redacted] R[redacted] and the other witnesses on this specific point.

As seen above the appeal of O[redacted] Z[redacted] insists on the point of the two weapons which allegedly shot the victims while at the crime scene and from the body of H[redacted] R[redacted] were recovered shells and bullets coming from only one weapon.
According to the defense this could justify the requested reconstruction on the crime scene, also without the presence of N[redacted] R[redacted]
This Court deems this request as ungrounded.
The number and the quality of the wounds suffered by H[redacted] R[redacted] give evidence of three or four firearm shots fired against him, two of them were retained by his body (see the autopsy report and the testimony of Dr. A[redacted] S[redacted].
To these three or four shots must be added the shots exploded against the second victim N[redacted] R[redacted], who reported three different wounds caused by firearm shots.
Also accepting the hypothesis according to which H[redacted] R[redacted] was reached by only three bullets and that one of those bullets exit from his body and hit his brother, it must be concluded that at least two other shots were exploded against N[redacted] R[redacted]
This means that on that occasion at least five different bullets wounded the two victims.
The fact that only three shells were found on the spot can be explained through the contamination of the crime scene caused by the first aid to the victims before the arrival of the Police.
In other words the remaining shells can have been dispersed during the assistance operations.
Another possible explanation is that the aggressors used two different types of weapons, one which ejects and another one which does not eject shells.
At the main trial N[redacted] R[redacted] stated not to have focused on the type of the weapons and not to be able to refer if each aggressor had an automatic pistol or a revolver (page 11).
Analogue considerations are to be done for the bullets different from those recovered from the body of H[redacted] R[redacted] which went evidently dispersed in the treatment of the victims.

In any case the finding on the spot of shells exploded by only one weapon does not exclude the presence of a second weapon, does not diminish the logic of the first judgment and does not make it necessary to order new proceedings activity for the reconstruction of the criminal offences.

25. The appeal raises doubts on the number of the persons who shot and on the effective participation of Sh[redacted] Sh[redacted] to the fact, pointing out that the article of the "Lajm" gazette spoke about only one perpetrator.
Moreover the narration of a telephone call received by the journalist Q[redacted] K[redacted] can not prove the identity of the aggressors.

It must be noticed that the article of the gazette was written hastily by the witness on the basis of first information, thus it can contain some mistakes without supporting the hypothesis that the charge against Sh[redacted] was "invented" later.
Secondly, the first judge explicitly qualified the testimony of Q[redacted] K[redacted] about the telephone call he received in the evening of 12 October as "circumstantial evidence": since this witness did not know the voice of O[redacted] Z[redacted] he was not able to recognize him and to give therefore direct evidence of responsibility of this and of the second defendant.
The first judge used K[redacted] testimony as a corroboration of the identification of the defendants made by N[redacted] R[redacted]i (page 27).
This Court notices that the journalist made it clear not to have learned the names of the aggressors as O[redacted] Z[redacted] and Sh[redacted] Sh[redacted] from any other source before that telephone call.
K[redacted] fixed immediately the content of this call in an e-mail sent to the Police and to his Journal.
This allows qualifying his testimony as genuine and sincere: he actually received a telephone call by a person who said to be O[redacted] Z[redacted] and to have killed H[redacted] R[redacted] in co-perpetration with Sh[redacted] Sh[redacted]
This circumstantial evidence corroborates convincingly the recognition of Z[redacted] made by N[redacted] R[redacted] whereas the position of Sh[redacted] Sh[redacted] will be examined further on.
It can still be added that both the news article and the telephone call give an account on the reasons for the murder.
The Lajm remembers that H[redacted] R[redacted] was an "active worker of the Ministry of Interior Affairs of Serbia" and a witness in the trial against "S[redacted] K[redacted]'s group".
During the telephone call the man, who qualified himself as O[redacted] Z[redacted] explained that the murder of H[redacted] was done in the name of people because of his anti national activity, was made in midday and by not masked people in order to inform the population about who are friends and who are enemies, promising the "same fortune of traitors" against whom who desecrate values of liberation war.
These motives are the same recognized by the first judge as the ground of the crimes.

26. The conviction of O[redacted] Z[redacted] for the criminal offence related to the possession and use of a weapon on 10 October 2005 i[redacted] would be based on mere suppositions.

This point is as the previous ones based on the allegedly erroneous reconstruction of the factual situation.
The factual reconstruction made by the first judge is correctly based on evidence and not on supposition, thus this point of the appeal is ungrounded.

Violation of the criminal law

27. As to Count 1 the appeal claims primarily that the challenged verdict did not give any reason why the charged acts were committed with cruelty and violence (art. 147 item 5).

This point has lost its importance, since this Court has decided to exclude the aggravating circumstance provided by article 147 item 5 PCCK for factual reasons.

28. Secondly, the appeal claims that it is not credible that the murder was aiming to prevent H[redacted] witness in the S[redacted] case (art. 147 item 8) since that R[redacted] had refused to testify in that trial because of fear.
Actually his brother, N[redacted] was a witness in that trial, but it is not demonstrated that O[redacted] knew this fact because the identity of that witness was at that time unknown.
Moreover the appeal stresses that according to the testimony of B[redacted] the defendant had reasons to kill H[redacted] which were different from the testimony in that trial.
The same grounds are alleged in order to challenge Count 2.

This Court is of the opinion that the first judge correctly individuated the motivations of the murder and of the attempted murder as seen above.
Actually the challenged verdict does not contain conviction of the two defendants for the aggravating circumstance foreseen by article 147 item 8 PCCK that is to commit a murder in order to conceal another criminal offence.
Thus the quality of witnesses in another trial of the two victims is not paramount in the decision of the first judge.
The verdict however makes it clear (page 25) the motivation of the crimes, on one side in the past conduct of H[redacted] against O[redacted], his family and all Albanians, explaining that according to his wife the defendant had good reasons to fear and to look for revenge against the victim.
On the other side the testimony of H[redacted] and of his brother N[redacted] in the S[redacted] case is indicated as another possible motivation of the crime.
The contrary observation of the defense don't appear to be decisive, considering that the main trial against S. K[redacted] had just started, that N[redacted] had not yet testified in it, that also H[redacted] could have been called to testify and could have finally accepted this role.
O[redacted] followed closely that trial, as it results from the list of the public which participated to the hearings.
And even journalists as Q[redacted] were informed of the possible testimony of H[redacted] in that trial.

The same reasons are valid for the attempted murder of N[redacted] R[redacted] charged in Count 2.
As seen above N[redacted] was to kill because he was brother of H[redacted] R[redacted], that is a persecutor of Z[redacted]'s family, because he was a witness in the trial against S. K[redacted] and B[redacted] Z[redacted] and finally because he was a witness of the murder of K[redacted]

29. The appeal claims that Count 3 is mistakenly referred to the criminal act envisaged by art. 328 paragraphs 1 and 2 PCCK.
Since it was not proven that the defendant had committed the criminal offences of murder and attempted murder he should have been charged as to the weapons only with the criminal offence provided by paragraph 1 or with the criminal offence provided by paragraph 2 of art. 328.

This point is ungrounded.
As it was clarified above (see point **I.12**) the correct legal qualification of Count 3 is according to article 328 paragraph 2 PCCK because of the unauthorized ownership, control and possession of the weapon, whereas the use of it falls within the fact related to the aggravated murder and attempted murder.
The evidence collected (see the testimony of N[redacted] R[redacted]) supports effectively the conviction of the defendant for this criminal offence, because O[redacted] Z[redacted] was in possession of a weapon for which he had no authorization to possess one.
It is therefore clear that the conduct of the defendants integrated only one criminal offence: that envisaged by paragraph 2 of article 328 PCCK.

The decision on the conviction

30. The appeal deems the sentence as decided by the first judge as unfair and harsh, aimed exclusively to deter other persons from committing criminal offences while deciding that for the accused it does not exist any possibility of rehabilitation.
On this way the first judge has forgotten the past in the army of the two defendants, the heavy injuries Z[redacted] his family and their co-villagers suffered from the Serbs, the present activity as well estimated businessmen and the family status of the two defendants, the absence of previous convictions.
The sentence was too harsh especially if compared with those inflicted in Den Haag against the "kings" of the war.
Also in the case of their guiltiness the two defendants would be considered as heroes in their community because of the role in favor of the Serbs played by the late H[redacted] R[redacted] during the war.
Thus the severe conviction would not reach the result to prevent other people to follow the example of the accused.

The first judge has considered the purposes of punishment, as set forth by art. 34 PCPCK, the aggravating circumstances (art. 147 no. 5 PCCK) that outweigh the mitigating ones, the degree of criminal liability, the motives of the act, the danger caused by the public

nature of the assassination, the gravity of the offence and the defendants behavior and decided to impose long term imprisonment (25 years) for Count 1, long term imprisonment (25 years) for count 2, 6 years for Count 3 and 3 years for Count 4, finally it determined the aggregated punishment in 25 years imprisonment.

This Court shares in general the assessment made by the District Court especially as to the gravity of the offence.
The murder happened in October 2005, six years after the end of the conflict in Kosovo.
Whatever may have done H[redacted] R[redacted] on one side and O[redacted] Z[redacted] on the other side during the conflict, this had to be considered part of the past.
In peace time any claim for crimes committed during the previous war must be referred to the Judiciary.
An act of revenge, as that of Z[redacted] appears to be, is never an act of justice.
As proven by the telephone call made by Z[redacted] to Q[redacted] K[redacted] the defendant wanted to extend in the present time the effects of the conflict, scaring the members of the contrary faction in order to force them to join his party.
The criteria applied by the first judge appear therefore to be correct.
Aggravating circumstances are clearly prevalent on the mitigating ones indicated by the appeal.
This Court has decided to unify Counts 1 and 2 in a unique criminal offence of aggravated murder according to article 147 item 11 PCCK.
Thus, the punishment for this criminal offence is only one and no more two as it was according to the challenged verdict.
The amount of the punishment as imposed by the first judge for the count related to the aggravated murder can not be considered too harsh bearing in mind the gravity of the plural offenses and that it is near to the minimum of the long term imprisonment (twenty one years).
The punishments for the two different criminal offences of unauthorized ownership, control and possession of weapons, as imposed by the first judge, appears to be correct as well.
Count 3 is related to a functional and very dangerous weapon, which was used to commit a murder and to attempt to commit a second murder; Count 4 is in relation to another functional and dangerous weapon, which was ready for use.
A lower punishment would not be able to deter the defendant and others from committing similar offences against other "enemies" in the future.
The imposed punishment fulfils, as to the nature and the measure also its rehabilitation aim, considering the need for the defendant to understand how to live peacefully with former opponents.
The aggregated punishment must remain long term imprisonment for a term of 25 years according to article 71 paragraph 2 item 1 PCCK.

Petition filed by defendant O[redacted] Z[redacted]

31. On 29 October 2008 the defense counsel of G[redacted] Z[redacted] forwarded to this Court as an attachment to his appeal a letter of the defendant dated 25 October 2008.

In this letter the defendant claims to have been in a serious health condition, both physical and psychological during the course of the main trial that did not allow him to follow the proceedings.
Since then his condition would have changed for the better.
He requests the case to be sent for re-trial because during the main trial he could not speak a word and many others who have a lot to say were not summoned.
Z[redacted] adds to "accept to have murdered H[redacted] R[redacted] (chief of the Serb Intelligence Service) and to have wounded his brother" explaining to be the only person involved in that case.
During the session before this Court O[redacted] Z[redacted] repeated his request and played guilty for the charged murder.

As seen above (see point **I.7**) the second part of this petition represents a guilty plea and not a new piece of evidence.
For this reason it was decided not to hold a hearing to take new evidence.

As to the first part of the petition containing a request for re-trial this Court observes as follows.
Article 424.1 PCPCK obliges the court of second instance to annul the challenged verdict and to return the case for re-trial in case of substantial violation of provisions of criminal procedure or because of an erroneous or incomplete determination of the factual situation.
The request of the defendant is based primarily on his precarious health conditions during the main trial.
On this point it must be confirmed what noticed above (see point **II.15**): during the main trial there were no substantial violations of provisions of criminal procedure because the health conditions of the defendant were continuously monitored and the defendant was found to be able to stand trial.

Secondly, the request of the defendant is related to his silence during the main trial and to the existence of many informed persons who were not summoned.
In this sense it refers to an erroneous or incomplete determination of factual situation.
On this point the request for re-trial, as it is formulated, is generic and therefore inadmissible.
In fact on one side the defendant does not state his defense, giving details of the facts, on the other side he fails to indicate the persons of the new witnesses and the facts on which they should be heard.

Therefore the request of a re-trial formulated by the defendant O[redacted] Z[redacted] must be rejected.

32. All this put under consideration the Court of Second Instance decides to partially grant the appeal filed on behalf of O[redacted] Z[redacted] as to the legal qualification of Counts 1, 2 and 3 and to reject the remaining part of the appeal and the petition filed personally by the defendant as well.

III

33. The appeal of Mr. R[redacted] H[redacted] from Prizren as defense counsel of defendant Sh[redacted] Sh[redacted] was filed on 11 August 2008.
The judgment of first instance is challenged due to:

- essential violations of the provisions of the criminal proceedings,
- the erroneous and incomplete assessment of the factual situation,
- violation of the criminal law and
- the ruling on the criminal sanctioning.

The defense counsel proposes:

- to amend the verdict and to acquit the accused from all the criminal acts, or
- to revoke the verdict pursuant to art. 420 paragraph 1 item 3 PCPCK and to return the case to the first instance court.

This court deems as grounded the point of the appeal related to the erroneous determination of the factual situation made by the first judge as to the defendant Sh[redacted] Sh[redacted]
In this case all that is required for a correct determination is a different assessment of already determined facts and not the collection of new evidence (article 424 paragraph 4 PCPCK).
This different assessment leads to a modification and not to the annulment of the judgment (article 420 paragraph 1 item 4 and article 426 paragraph 1 PCPCK).
Granting this point makes it necessary to acquit this defendant from all the charges and superfluous the examination of the other points of this appeal (article 396 paragraph 9).

Erroneous and incomplete determination of the factual situation

34. According to the appeal the Court of First Instance did not provide any piece of evidence about the implication of Shyqeri Shala in the criminal offences.
The identification by the victim happened two years after the facts, after he had many opportunities to get informed about the accused and in an unlawful manner.
The Police Report dated 13 October 2005 about the conversation between the policeman Xh[redacted] M[redacted] and the journalist Q[redacted] K[redacted] about the telephone call the latter had received from the alleged perpetrators did not mention Sh[redacted] Sh[redacted]
There was no evidence that Sh[redacted] possess fire weapons: on the contrary the ballistic expert mentioned three shell casings as found on the crime scene, all three were fired from the same weapon and had the same characteristics as the bullets found in the body of the victim, this clearly would eliminate the defendant as the owner of any kind of weapon.
The first judge omitted to consider that Sh[redacted] Sh[redacted] had no motive at all to commit the charged criminal offences.
The first judge disregarded the alibi of Sh[redacted] provided by witnesses A[redacted] J[redacted] Sh[redacted] K[redacted] and Xh[redacted] Th[redacted] alibi that made for him impossible to be present on the crime scene at the critical moment.

The First instance Court grounds his judgment of guiltiness against Sh[redacted] Sh[redacted] on five pieces of evidence: the testimony of N[redacted] R[redacted], the possession by the defendant of an Opel Vectra burgundy, the telephone calls between the mobile phone of the two defendants immediately before the shooting, the testimony of O[redacted] K[redacted] the presence of Sh[redacted] in [redacted] few minutes before the fact as proven by two defense witnesses.
These elements were assessed as precise, serious and converging as to ground the responsibility of the defendant for the charged crimes.

This Court does not share the assessment of the first judge and deems this point of the appeal as grounded.

Firstly it must be noticed that reasonable doubts exist on the identification of the second shooter as Sh[redacted] Sh[redacted] by the injured party and eyewitness N[redacted] R[redacted]
It must be noticed the differences existing between the identification made by this witness in relation to each defendant.
N[redacted] R[redacted] stated immediately after the incident to a Police Officer (witness I[redacted] V[redacted] to have recognized one of the shooters as O[redacted] Z[redacted]
The same statement was made by R[redacted] to the Police in his first interview dated 11 October 2005 at the hospital of Pristine.
On that occasion he explained to know very well Z[redacted] his home-brew.
R[redacted] repeated to know the first shooter as Z[redacted] both before the Police (27 October 2005) and at the main trial, where the witness explained to know the defendant because they are from the same village and went to elementary school together.

In his first statement dated 11 October 2005 R[redacted] gave a description of the second shooter as around 35 years old, short, dark skinned, with short beard and in black jacket, but said not to be sure to be able to identify him.
During his second interview by the Police on the 27th October R[redacted] described the second shooter and added to have been told by members of his own family that the second suspect was Sh[redacted] Sh[redacted] page 000249).
He explained not to know Sh[redacted] and after these statements he was shown a photo line up, which contained also the picture of this defendant.
R[redacted] was not able to recognize him.
A third time R[redacted] was interviewed by the Police on 8 July 2007, this time he indicated the picture no. 4 in a photo line-up as that of Sh[redacted] Sh[redacted] saying however not to be sure by the pictures.
Only during the main trial he recognized with sureness defendant Sh[redacted]
This recognition seems however to be doubtful.
N[redacted] R[redacted] started his trail statement with the sentence "Yes, I am an injured party. My brother was killed by O[redacted] Z[redacted] and Sh[redacted] Sh[redacted]
Later on, after having individuated Z[redacted] R[redacted] was asked to look throughout the courtroom and see if he could identify someone related to the shooting incident.
R[redacted] pointed to Sh[redacted] Sh[redacted]

The defense counsel observed that in the moment of this identification there was no public in the courtroom and that in the same row of the accused were sitting only three defense counsels.
The Prosecutor pointed out the presence of other nine persons in the courtroom, at least four of them were not clearly acknowledged as security.

This point is of paramount importance.
Differently from the identification of Z[redacted] which happened at the very first moment because R[redacted] knows him since many years, the identification of Sh[redacted] was "progressive".
Firstly he did not recognize him, later on he was informed by some familiar about the name of his aggressor but also on this occasion he did not recognize the picture of Sh[redacted]
Only at the third attempt, almost two years after the incident, he recognized without sureness the picture.
Finally R[redacted] arrived at the main trial already knowing that both Z[redacted] and Sh[redacted] were the aggressors and recognized Sh[redacted] person in a very particular situation, in an empty courtroom, near his defense counsels.
All this allows the doubt that R[redacted] can have suffered, through the suggestions of the media or of his family, external influences on his memory and ability to recognize the second aggressor.
He may have been brought to convince himself more and more about the identification of Sh[redacted] as one of the perpetrators.
It appears significant the first sentence of this witness before the first Court where he indicated Sh[redacted] as one of the perpetrators before having seen and recognized him with sureness.
This allows a reasonable doubt on this identification.

Secondly, Sh[redacted] possessed at the critical time a car that for type (Opel Vectra) and color (burgundy) is similar, if not alike to the car which was used by the aggressors in order to block the one of the victims and later on to escape from the crime scene.
The car of Shala was never found by the Police.
This element constitutes only a circumstantial evidence, because there is no indication of characteristics (plate number, marks on the bodywork, particularity of the inside of the car and similar) which can conduct to the certain identification of that as the car belonging to this defendant and not only as a similar one.

Thirdly, from the documents acquired during the investigation it results the following telephonic traffic between the telephone of O[redacted] Z[redacted] and that of Sh[redacted] Sh[redacted]
Z[redacted] calls Sh[redacted] at 16.10.52, duration 42 seconds,
Sh[redacted] calls Z[redacted] at 16.17.52, duration 14 seconds,
Z[redacted] calls Sh[redacted] at 16.19.05, duration 17 seconds.
These calls represent another circumstantial evidence, because they happened few minutes before the shooting, when Z[redacted] was seen by N[redacted] R[redacted] using his telephone two or three times.
Bearing in mind that Z[redacted] in a few minutes from those calls was going to attempt to kill two persons, whom he had already seen on the market place, it is very difficult to

believe that he was making some telephone calls in order to speak about meaningless subjects, as a debt of 80 Euros.
On the other side it must be considered however that the text of the telephone calls is not known and it is no possible to be sure that Z[redacted]nd Sh[redacted]oke about the murder.
Moreover, it is not known where the two telephones were at the moment of the calls.
The documents in the case file don't indicate the telephone cell where each telephone was.
This makes it impossible to deny the defense of Sh[redacted] who pretends to have been already near Gjakova when he tried to contact Z[redacted] with his telephone.
A third doubt is given by the fact that during the very same minutes, when Z[redacted] and Sh[redacted] call each other, the telephone of Z[redacted] calls also another number (044/200629 at 16.13.26, duration 43 seconds).
In the minutes immediately after the shooting Z[redacted] telephone receives two calls from 044/315667 (at 16.25.35, 20 seconds and at 16.26.19, 46 seconds) and calls 044/504.031 (at 16.30.47, 26 seconds) and 044/200629 (at 16.33.52, 08 seconds).
Without any other information it is not correct to attribute evidentiary value only at the telephone calls between Z[redacted] and Sh[redacted] and not at the other contemporary calls.
At the same time however it can not be excluded that the calls which were important for the murder were only those between the phone of Z[redacted] and the phones of people different from Sh[redacted].
The evidence given by the three telephone calls between the two defendants represents a circumstantial evidence, which can corroborate other evidence but which, if considered alone, is unable to ground the responsibility of Shala.

Fourthly, it was noticed above the value of circumstantial evidence of the telephone call received two days after the shooting by the journalist Q[redacted] K[redacted]
Even though the narration made by K[redacted] about the content of the telephone call is credible[1], this element alone is unable to ground the responsibility of Sh[redacted]

Fifthly, the defense witnesses confirmed the presence of Sh[redacted] in [redacted], near the green market in a period between 3 and 4 p.m.
Also Sh[redacted] admitted to have been in that village at that time, that is some minutes before the shooting.
Xh[redacted] Th[redacted] however stated to have seen Sh[redacted] leaving towards Gjakova and his own restaurant, and the defendant himself stressed to have left to Gjakova and later on to Albania.
Also this element represents circumstantial evidence, because indicates the proximity of the defendant both in the space and in the time to the shooting without being able to demonstrate with sureness that he was there just at the moment of the murder.

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[1] In relation to the objection raised by the appeal and related to the number of the persons mentioned during this telephone call it must be noticed that the original e-mail written by Q[redacted] K[redacted] short time after having received this call contains both the names of Q[redacted] Z[redacted] and Sh[redacted] Sh[redacted]
This e-mail was immediate and therefore must be considered on this point more reliable than the report written the following day by Xh[redacted] M[redacted] after a brief conversation with K[redacted]
K[redacted] has always stated to have heard two names and this was confirmed also by X[redacted] M[redacted] the main trial (hearing of 11 March 2008 page 36).

The above mentioned material is formed by a direct (the testimony of N[redacted]R[redacted]) and four circumstantial evidence.
Only the first one is theoretically able, alone, to ground a judgment of conviction because it is related directly to the crime in the point where it indicates Sh[redacted] as one of the perpetrators of the murder.
As it was discussed above, this direct piece of evidence does not convince fully and allows reasonable doubts on the actual identification of this defendant by the witness.
All other pieces of evidence are not able, alone, to ground a judgment of guiltiness, because each of them is not exhaustive and allows alternative explications contrary to the position of the Prosecutor.
Even all together these pieces of evidence don't appear to be sufficient to eliminate the reasonable doubt under discussion.
This is because no one of them can supply the lack of sureness presented by the other evidence.
In other words the addition of all these elements does not fill up the gaps presented by each of them.

Even though the other remarks raised by the appeal (as the number of the weapons which shot on the critical day and the alleged absence of a reason for which Sh[redacted]had to attempt against the lives of the victims) are not convincing, the above mentioned considerations don't allow to reach beyond any reasonable doubt a judgment of conviction toward Sh[redacted]Sh[redacted]

Since it is not certain his participation to the indicted criminal offences, Sh[redacted]Sh[redacted] must be acquitted from all the charges.

V

The verdict of first instance was partially modified as to the legal qualification of three Counts related to the conduct of O[redacted]and as to the acquittal of Sh[redacted]Sh[redacted]

The Judgment of the Court of First Instance is affirmed in the remaining parts.

The partial modification of the First Instance Judgment has effect on the costs of the proceedings of Second Instance which will be borne only by O[redacted]Z[redacted]

With a separate ruling it is decided about the detention on remand for each defendant, according to article 426 and 393 KCCP.

Dated this 21th day of July 2009.
Ap.-Kz No. 481/2008

Prepared in English, an authorized language.

International Presiding Judge
Emilio Gatti

International Recording Officer
Annette Andersen

International Judge
Maria Giuliana Civinini

International Judge
Guy Van Craen

Kosovo National Judge
Salih Mekaj

Kosovo National Judge
Avdi Dinaj

Legal Remedy

An appeal is possible against this Judgment (art. 430 KCCP), it must be filed in written form with the Supreme Court of Kosovo within fifteen days from the date the copy of the judgment has been served.