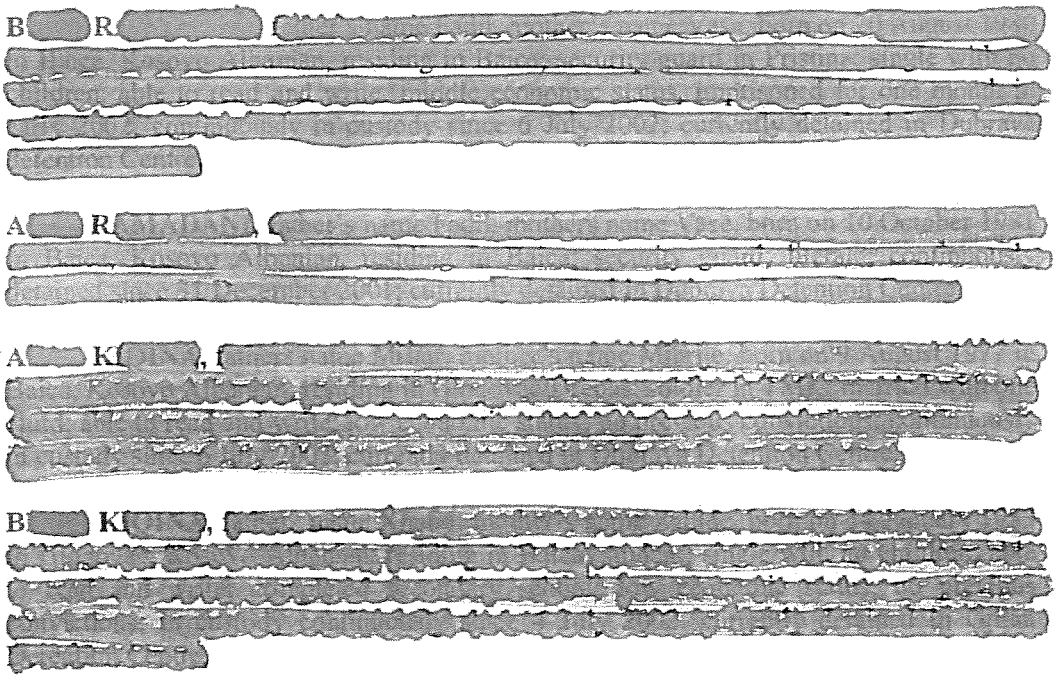
SUPREME COURT of KOSOVO

16 September 2009
Prishtine/Pristina
API.-KZI No. 4/2009

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 Norbert Koster and Guy Van Craen and Kosovo National Judges Miftar Jasiqi and Feizullah Hasani as panel members,

in the criminal proceedings against:



Deciding upon the appeals on the Supreme Court of Kosovo Judgment AP - KZ 393/2006 dated 20 May 2008 which, in partial reformation of the Verdict of the first instance District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005, convicted the four defendants of having committed the criminal offences of five **Aggravated Murders** and one **Attempted Aggravated Murder** in violation of Article 30 paragraphs 1 and 2 (item 1) and 3 of the Criminal Law of Kosovo (KCL) in relation to Articles 19 and 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CCSFRY),

as made applicable by UNMIK Regulation n. 1999/24 (conducts still criminalized under Articles 146, 147 items 3 and 11 in relation to Articles 20 and 23 of the PCCK), appeals which were filed by the defense counsels on behalf of B[redacted] R[redacted] on 28 August 2008, on behalf of A[redacted] R[redacted] on 28 August 2008, on behalf of A[redacted] K[redacted] on 28 August 2008 and on behalf of B[redacted] K[redacted] on 2 September 2008.

After having heard the submissions of the defense counsels Mr. H[redacted] M[redacted] Ms. V[redacted] B[redacted] ad Mr. I[redacted] Z. D[redacted], the submissions of Mr. B[redacted] R[redacted] Mr. A[redacted] R[redacted] Mr. A[redacted] K[redacted] and Mr. B[redacted] K[redacted] and opinion and motion of the OSPK Prosecutor Ms. Anette MILK in the session held on 15 September 2009 and
after a deliberation and voting held on 15 and on 16 September 2009.

Acting pursuant to Article 391 of the Law on Criminal Proceedings of SFRY (LCP) renders this

VERDICT

The appeals of **B[redacted] R[redacted]** filed by Defence Counsels H[redacted] M[redacted] and V[redacted] B[redacted] are **REJECTED** as not grounded.

The appeals of A[redacted] **K[redacted]** filed by Defence Counsels H[redacted] M[redacted] and I[redacted] Z. D[redacted] are **REJECTED** as not grounded.

The appeal of A[redacted] R[redacted] filed by Defence Counsel H[redacted] M[redacted] is **REJECTED** as not grounded.

The appeal of **B[redacted] K[redacted]** filed by Defence Counsel A[redacted] J[redacted] is **DISMISSED** as inadmissible.

Pursuant to article 50 of the CC SFRY, the time spent in detention on remand by each defendant is included in the amount of punishment.

The Judgment of the Supreme Court of Kosovo AP - KZ 393/2006 dated 20 May 2008 is fully **AFFIRMED.**

The costs of the second instance proceeding will remain in charge of the appellants.

With a separate ruling is decided about the detention on remand for each defendant, according to articles 353 and 387 LCP.

REASONING

Procedural History

1. In the spring 1998 H[redacted] H[redacted] a Police Officer employed by the Serbian government, was the object of an attempted murder committed at the junction of the road to T[redacted] 2 and the G[redacted]-S[redacted] road, where he had made arrangements to meet K[redacted] K[redacted]
When H[redacted] H[redacted] approached K[redacted] K[redacted] he was attacked by some men dressed in UCK uniforms emerged from the bushes and shooting at his vehicle.
H[redacted] managed to continue driving towards G[redacted] and escaped the ambush.

2. In the evening of 20 August 2001 H[redacted] H[redacted], his wife M[redacted], his son Xh[redacted] and his daughters M[redacted], A[redacted] and P[redacted] attended a wedding party at the house of S[redacted] and R[redacted] K[redacted] to celebrate the wedding of their sons B[redacted] and E[redacted] K[redacted]
The party took place in the village of B[redacted], R[redacted] K[redacted] was the sister of H[redacted] H[redacted].
H[redacted] family arrived at the party at about 6 pm and left around 11 pm, traveling in a red car along what is known as the bridge road or the L[redacted] neighborhood between the villages of B[redacted] and T[redacted]
When they approached the wooden bridge shots were fired at the car, only P[redacted] H[redacted] survived the ambush.

3. Against K[redacted] K[redacted] the public prosecutor filed on 3 July 2002 an indictment (n. 305/2002) for the attempted murder of H[redacted] H[redacted] occurred around April/May 1998 and illegal possession of a weapon occurred in 2002.

Against S[redacted] H[redacted] the public prosecutor filed on 11 September 2002 a direct indictment (n. 669/2002) for the attempted murder of H[redacted] H[redacted] occurred around April/May 1998.

Against S[redacted] H[redacted] B[redacted] R[redacted] A[redacted] K[redacted] A[redacted] R[redacted] Z[redacted] K[redacted] F[redacted] K[redacted] and B[redacted] K[redacted] the public prosecutor filed on 7 February 2003 an indictment (n. 523/2002) for complicity and aiding and abetting one another in a) the murders of H[redacted] H[redacted] M[redacted] H[redacted] Xh[redacted] H[redacted] M[redacted] H[redacted] and A[redacted] H[redacted] b) the attempted murder of P[redacted] H[redacted] c) participation in a group that commits murder and d) agreement to commit a criminal act occurred in the evening of 20 August 2001.

Against A[redacted] Xh[redacted] B[redacted] M[redacted] A[redacted] K[redacted] and M[redacted] Xh[redacted] the public prosecutor filed on 5 February 2003 an indictment (n. 415/2002) charging the first three for complicity in a) aiding and abetting the perpetrators of the murders of the H[redacted] family, b) aiding and abetting the perpetrators of the attempted murder of P[redacted] H[redacted]

c) failure to report the preparation of a criminal act, d) failure to report a criminal act or a perpetrator, e) aiding a perpetrator after the commission of the criminal act and the fourth one for f) aiding a perpetrator after the commission of the criminal act.

4. On 16 September 2003 the panel decided to consolidate the different indictments and to join the proceedings against S[redacted] H[redacted] and K[redacted] K[redacted] for attempted murder committed in 1998 with those regarding the other murders and attempted murder committed in 2001.
The venue of the trial was changed from Pristine to Gjilan by a decision of the SRSG on 7 October 2003.
The main trial started on 4 November 2003 and lasted to 7 April 2005

After 107 hearings the judgment was announced on 7 April 2005.

The defendants were found guilty of the following criminal offences:

- S[redacted] H[redacted] (indictment PP. No. 669/2002 of 11 September 2002),
i. Attempted murder of H[redacted] H[redacted] between 17 April and 30 May 2008, acting in complicity with K[redacted] K[redacted] and others.

- S[redacted] H[redacted] B[redacted] R[redacted] A[redacted] K[redacted] A[redacted] R[redacted] Z[redacted] K[redacted] F[redacted] K[redacted] and B[redacted] K[redacted] (indictment PP.No. 523/2002 of 7 February 2003),
ii Murder of H[redacted] H[redacted] M[redacted] H[redacted] Xh[redacted] H[redacted] M[redacted] H[redacted] and A[redacted] H[redacted] on 20 August 2001 on the road between the villages of B[redacted] and T[redacted] all of them in complicity and in aiding and abetting one another,

iii. Attempted murder of P[redacted] H[redacted] on 20 August 2001 on the road between the villages of B[redacted] and T[redacted] all of them in complicity and in aiding and abetting one another,

iv. Participation in a group that commits murder (of members of the H[redacted] H[redacted] family), all of them in complicity and in aiding and abetting one another,

v. Agreement in committing the criminal act of murder (of members of the H[redacted] H[redacted] family), all of them in complicity and in aiding and abetting one another.

- A[redacted] Xh[redacted] B[redacted] M[redacted] A[redacted] K[redacted] (indictment PP. No. 415/2002 of 5 February 2003),
vi. Failure to report the preparation of the criminal act of the murder of H[redacted] H[redacted] and his family.

- M[redacted] Xh[redacted] (indictment PP. No. 415/2002 of 5 February 2003),
vii. Aiding a perpetrator after he has committed the criminal act.

- K[redacted] K[redacted] (indictment PP. No. 305/2002 of 3 July 2002),

viii. Attempted murder of H[redacted] H[redacted] between 17 April and 30 May 2008, motivated by personal gain, ruthless revenge, other basic motives or for vendetta, acting in complicity with S[redacted] H[redacted].

ix. Unlawful possession of weapons between January 2001 and 6 April 2002.

The defendants were convicted as follows:
S[redacted] H[redacted] to the aggregate punishment of 30 years long-term imprisonment,
B[redacted] R[redacted], A[redacted] K[redacted] and A[redacted] R[redacted] to the aggregate punishment of 30 years long-term imprisonment,
Z[redacted] K[redacted] to the aggregate punishment of 11 years long-term imprisonment,
F[redacted] K[redacted] to the aggregate punishment of 21 years long-term imprisonment,
B[redacted] K[redacted] to the aggregate punishment of 11 years long-term imprisonment,
A[redacted] Xh[redacted], B[redacted] M[redacted] and A[redacted] K[redacted] to 4 years imprisonment each,
M[redacted] Xh[redacted] to 4 years imprisonment,
K[redacted] K[redacted] to the aggregate punishment of 6 years imprisonment.

The defendants A[redacted] Xh[redacted], B[redacted] M[redacted] and A[redacted] K[redacted] were acquitted from the charges of complicity in a) aiding and abetting the perpetrators of the murders of the H[redacted] family, b) aiding and abetting the perpetrators of the attempted murder of P[redacted] H[redacted], d) failure to report the criminal act of the murder of H[redacted] H[redacted] and his family or the perpetrators thereof, e) aiding the perpetrators of the murder of H[redacted] H[redacted] and his family after that commission of the criminal act.

5. All defendants filed appeals against the judgment of the District Court of Gjilan.
After a session held on 20 May 2008 the Supreme Court of Kosovo, with its judgment AP – KZ 393/2006, modified the judgment of the First Instance Court as follows:
i. The appeals filed on behalf of B[redacted] R[redacted], A[redacted] K[redacted], A[redacted] R[redacted] and B[redacted] K[redacted] were partially granted,
these four defendants were declared **guilty** of the criminal offences of five intentional aggravated murders and one attempted intentional aggravated murder, contrary to article 30 paragraphs 1 and 2 (item 1) and 3 of the KCL in relation to articles 19 and 22 of the CL of the SFRY, as made applicable by UNMIK Regulation n. 1999/24 (conducts still criminalized under articles 146, 147 items 3 and 11 in relation to articles 20 and 23 of the PCCK), because they jointly took the lives of H[redacted] H[redacted], M[redacted] H[redacted], Xh[redacted] H[redacted], M[redacted] H[redacted] and A[redacted] H[redacted] and attempted to take the life of P[redacted] H[redacted] in an insidious manner; on 20 August 2001 at 23:00 on a road between the villages of B[redacted] and T[redacted]
B[redacted] R[redacted] A[redacted] K[redacted] and A[redacted] R[redacted] were sentenced to a term of 30 years imprisonment, while B[redacted] K[redacted] was sentenced to a term of 11[1] years imprisonment.

[1] The sentence against Blerim Kiqina was determined in 10 years imprisonment but, with a ruling of the Supreme Court dated 18 November 2008 and made according to article 358 LCP, the term of 10 years was considered as a material mistake and it was corrected to 11 years according to the first instance judgment which was confirmed on this point.

B[redacted] R[redacted], A[redacted] K[redacted], A[redacted] R[redacted] and B[redacted] K[redacted] were acquitted from all the remaining charges against them.
ii. The appeals filed on behalf of S[redacted] H[redacted] and K[redacted] K[redacted] were partially granted and the two defendants were declared **guilty** of the criminal offence of attempted intentional murder, contrary to article 30 paragraph 1 of the KCL in relation to articles 19 and 22 of the CL of the SFRY, as made applicable by UNMIK Regulation n. 1999/24 (conducts still criminalized under article 146 in relation to articles 20 and 23 of the PCCK), because they jointly also with unidentified accomplices attempted to take the life of H[redacted] H[redacted] on 14 or 15 May 1998 near the junction between the road G[redacted]/S[redacted] and the road to T[redacted] 2.
K[redacted] K[redacted] was further found **guilty** of the criminal offence of unlawful possession of weapons contrary to article 199 paragraph 1 of the KCL and Section 8.2 of UNMIK Regulation 2001/17 (conduct still criminalized under article 328 paragraph 2 of the PCCK), from January 2001 until 6 April 2002 in Prizren.
S[redacted] H[redacted] was sentenced to a term of 5 years imprisonment, K[redacted] K[redacted] to an aggregate punishment of 5 years and 6 months imprisonment.
S[redacted] H[redacted] was acquitted from all the remaining charges against him.
iii. The appeals filed on behalf of Z[redacted] K[redacted], F[redacted] K[redacted], A[redacted] Xh[redacted] B[redacted] M[redacted], A[redacted] K[redacted] and M[redacted] Xh[redacted] were granted and they were acquitted from all the charges against them.

6. B[redacted] K[redacted] had been arrested on 4 July 2002, B[redacted] R[redacted] and A[redacted] K[redacted] on 6 July 2002, A[redacted] R[redacted] on 31 December 2002, all of them are kept in detention on remand since then.

7. The defense counsels of the convicted persons filed appeal against the verdict as follows.
The appeal of Mr. H[redacted] M[redacted] as defense counsel of defendant B[redacted] R[redacted] was filed on 28 August 2008.
The appeal of Ms. V[redacted] B[redacted] as defense counsel of defendant B[redacted] R[redacted] was filed on 28 August 2008.

The appeal of Mr. I[redacted] Z. D[redacted] as defense counsel of defendant A[redacted] K[redacted] was filed on 28 August 2008.
The appeal of Mr. H[redacted] M[redacted] as defense counsel of defendant A[redacted] K[redacted] was filed on 28 August 2008.

The appeal of Mr. H[redacted] M[redacted] as defense counsel of defendant A[redacted] R[redacted] was filed on 28 August 2008.

The appeal of Mr. A[redacted] J[redacted] as defense counsel of defendant B[redacted] K[redacted] was filed on 2 September 2008.

8. After the hand over of the case to EULEX Judges in January 2009, the Supreme Court of Kosovo scheduled the appeal session on 15 September 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.

9. The deliberation was taken by the Court on 15 and on 16 September 2009.

Court Findings

I

10. The appeal in favor of B[redacted] K[redacted] by his defense counsel A[redacted] J[redacted] dated 2 September 2008, pursuant to article 391 LCP was filed outside the cases foreseen by the law because:

1. to the defendant was not imposed the death penalty or a prison sentence of 20 years (art. 391.1 no. 1) but an aggregated punishment of eleven years of imprisonment;
2. the court of second instance did not conduct a hearing and did not make a determination of the state of facts different from the one made by the court of first instance (art. 391.1 no. 2);
3. the court of second instance did not modify a judgment of acquittal (art. 391.1 no. 3) but confirmed the first instance judgment of conviction.

The Judgment of the Supreme Court of Kosovo of 20 May 2008 is for B[redacted] K[redacted] a final decision, against which could be proposed only an extraordinary legal remedy.
The legal remedy proposed on behalf of the defendant has not only the name of appeal but also the reference to the legal provision (art. 430 Par. 1 items 1, 2 and 3 of PCPCK which is equivalent to the applicable art. 391 LCP) related to the appeal against a judgment of a court of second instance.
Thus, there is no doubt on what kind of legal remedy was proposed and that this legal remedy is not permitted under the law.
For these reasons this Court considers the proposed **appeal** as filed in a case not permitted by the law, it must therefore be dismissed according to article 383 LCP.

II

11. All the appeals filed in favor of B[redacted] R[redacted] A[redacted] R[redacted] and A[redacted] K[redacted] challenge the verdict issued by the Supreme Court of Kosovo in second instance for reasons related to:

- essential violations of the provisions of criminal procedure,
- erroneous and incomplete determination of the factual situation,
- violation of the criminal law and
- the decision on the punishment.

In order to avoid duplication it is useful to examine first all the procedural aspects raised by the appeals.
In the following parts of this judgment will be dealt with the other claims.

12. The investigated facts happened on 20 August 2001, when the procedural code in force in Kosovo was still the Law on Criminal Proceedings of the SFRY (LCP).
The indictments were filed between July 2002 and February 2003, whereas the main trial started on 4 November 2003.
On 6 April 2004 entered into force the Provisional Criminal Procedural Code of Kosovo (PCPCK), whose article 550 rules that "criminal proceedings at first instance in which the indictment, summary indictment or private charge was filed before the date of entry into force of the present Code but which have not been completed by this date shall be continued according to the provisions of the previous applicable law until:

1) the criminal proceedings are dismissed in a final form by a ruling; or
2) the judgment rendered at the main trial becomes final".

The provision of article 550 PCPCK makes it clear that in the present proceedings, whose judgment for the appellants B[redacted] R[redacted] A[redacted] R[redacted] and A[redacted] K[redacted] has not yet become final, the applicable procedural law is only LCP and not PCPCK.
No relevance on the issue of the applicable procedural law can have provisions like that of article 2.2 of the Provisional Criminal Code (see appeal of attorney I[redacted] D[redacted] on behalf of A[redacted] K[redacted] page 28 of English version), because these are referred only to the criminal law and not to the procedural.

13. The appeal on behalf of A[redacted] K[redacted] points out that the trial panel of the First Instance Court was originally composed with a judge (International Judge Carol Peralta) who during the main trial was replaced by another one (International Judge Nurul Islam Khan).
The appeal claims that Nurul Khan was not a reserved judge according to article 283 LCP, he did not assist in the proceeding while this had been attended by the previous judge Carol Peralta.
For this reason the new judge had not been informed about the proceedings until he joined the panel.
This would have allowed the two other judges to have influence on the replacing judge concerning his free judging on this case to the detriment of the accused.
The Second Instance Court would have ignored this basic violation of article 364 paragraph 1 item 1 LCP.

This matter should be investigated also ex officio regarding the proper composition of the court of first instance (article 376 paragraph 1 item 1 and article 364 paragraph 1 LCP).
This point of the appeal is ungrounded.
As it results from the record of the hearing of 24 June 2004, in this case article 283 LCP did not find application because no alternate judge was appointed who could follow the proceedings together with those who had been appointed since the beginning.
Before that hearing Judge Carol Peralta, who had been called to some other jurisdiction, was replaced by Judge Nurul Khan.

At that point the panel applied article 305 LCP which, in the case of substitution of a judge different from the Presiding Judge, provides the possibility for the panel either to recommence the main trial from the beginning or to decide to continue it and to read the records of the previous hearings.
The new judge was given all the trial records and the parties accepted that on this way all the records have been read.
It results therefore: that the new judge participated to the hearings from 24 June 2004 to the end of the proceedings, that he was given and read all the previous records, that the parties have accepted the change in the panel and the reading of the previous records.
No evidence does exist of any influence exercised by the other judges on judge Nurul Khan.

14. The appeal of attorney I[redacted]D[redacted] on behalf of A[redacted]K[redacted] (pages 11 and 20) claims that the statements of IPO R[redacted] H[redacted] dated 6 and 7 August 2002 and of P[redacted] H[redacted] dated 14 October 2002 were given before an Investigating Judge (Mr. Jean Pierre Lortie) against whom had been filed a request for disqualification and therefore had to suspend immediately all the work on the case according to article 43 LCP.

The examination of the file allows finding out that during the interview of witness IPO R[redacted] H[redacted] on 6 August 2002, the defense counsels filed a request of disqualification of the Investigating Judge Mr. Jean Pierre Lortie according to article 39 paragraph 6 LCP (page 12) and immediately after abandoned the Investigative Proceedings, which was therefore interrupted.
The Investigating Judge stated at the end of the minutes that the request would be send to the President of the District Court of Pristina, competent to decide on this issue, and that he would continue the hearing for the testimony of Mr. R[redacted] H[redacted] the following day 7 August, because of the urgency.
That testimony was actually continued the following 7 August.
On 11 August the Investigating Judge informed the defense counsels that the request for disqualification based on article 39(6) LCP is "rejected as incompliant with sections 7 and 9 of UNMIK Regulation 1999/7".
The same claim was already raised before and decided by the First Instance Court (rulings of 29 January 2004 and of 18 February 2005).

This Court observes that the request of disqualification made according to article 39 paragraph 6 LCP is the unique case where the judge, against whom the request is filed, is not obliged to suspend immediately all the works on the case.
According to article 43 LCP he "may, until the decision is made on the petition, take only those actions whose performance is required to avert postponement".
In this case the interview of R[redacted] H[redacted] by an Investigating Judge was a matter of urgency, considering that this witness was leaving the mission on 8 August and it was necessary to hear him before his leaving.
This was the reasoning given by the Investigating Judge and it appears to be correct.
There is no claim about the decision to reject the request of disqualification.

The investigative activity performed by that Investigating Judge after the dismissal of this request (included the hearing of P[redacted] H[redacted] on 14 October 2002) was therefore regular.
It can be remembered that Mr. R[redacted] H[redacted] was also examined and cross examined during the main trial.
There is no claim of inadmissibility regarding his trial statements.

15. The appeal of attorney V[redacted] B[redacted] (pages 5 – 6) claims that the Second Instance Court did not approve the request for the separation of the statement given by B[redacted] K[redacted] on 7 July 2002 before the Investigating Judge (Mr. Vagn Joensen), adding "who has been proposed to get expelled".
From the letter of the appeal it appears that against the Investigating Judge would have been proposed a request for disqualification before he took this statement.

This point can not be accepted.
The interview of B[redacted] K[redacted] on 7 July 2002 was the first interview performed by Investigating Judge Mr. Vagn Joensen, whereas the other defendants were interviewed only in the following days.
Within this act and in the whole case file there is no trace of request for disqualification of this judge.
Hence, no inability of the Investigating Judge can be found under this profile.

16. The appeal filed by attorney H[redacted] M[redacted] on behalf of B[redacted] R[redacted] A[redacted] R[redacted] and A[redacted] K[redacted] claims the illegality of the decision to conduct joint proceedings for the attempted murder of H[redacted] H[redacted] committed in 1998 (defendants S[redacted] H[redacted] and K[redacted] K[redacted] and for the murder of the H[redacted] family in August 2001.
This claim, raised already in the second instance, was rejected by that Court (page 11) since the decision to join proceedings did not constitute an essential violation of the provisions of the criminal procedure.
This Court deems the claim of the appellants as ungrounded considering that article 32 LCP provides the possibility to join proceedings regarding several persons and several criminal acts if there is a mutual relation among the criminal acts and the evidence is the same (paragraph 6) or if separate proceedings are conducted before the same court against the same person for more than one criminal act (paragraph 7).
In this case the decision to join the proceedings was correct according to paragraph 7 because the same person (S[redacted] H[redacted] was charged both of the facts of 1998 and of 2001.
This grounded also a mutual relation between the two facts.
Furthermore, paragraph 8 of article 32 LCP does not allow any appeal against the decision to join the proceedings.

17. Issues raised on the **admissibility** of evidence used by the lower courts.
Both the verdicts of the District Court of Gjilan and of the Supreme Court acting in second instance are based among other on the statements given 1) by defendant B[redacted]

K[redacted] in the investigating stage, 2) by protected witness MB and 3) by witness P[redacted] H[redacted].
All these sources of evidence are challenged by the appeals either because of formal and of substantial reasons.
Formal claims against these statements resolve themselves in a cause of inadmissibility, which must be examined also ex officio according to article 364 paragraph 1 item 8 LCP, while the substantial ones, regarding the reliability of them, can be examined only after having assessed this evidence as admissible.

18. Admissibility of the statements given by **B[redacted] K[redacted]** during the investigating stage.
B[redacted] K[redacted] gave a statement before the Police on 4 July 2002 and a second statement before the Investigating Judge on 7 July 2002.
All the appeals define both statements as inadmissible evidence and ask that they are separated from the case file and not used for the decision.

19. The statements given by B[redacted] K[redacted] before the Police on 4 July 2002.
The Second Instance Court (pages 11 - 13) ruled out as inadmissible the statements made by B[redacted] K[redacted] before the Police on 4 July 2002.
The reasoning is based on the violation of the provision under article 151 paragraph 2 and article 87 paragraph 4 of LCP, because the investigative act, including the waiver of the right to defense counsel by the accused, was never recorded in writing form and was never signed by the participants, that is B[redacted] K[redacted] and the Police Officers who interviewed him.
This statement therefore does not represent evidence on which the Second Instance Court or this Court can base its reasoning.

This should make superfluous any discussion on the statements given by this defendant before the Police on 4 July 2002.
The appeals claim however that, during his Police statements, B[redacted] K[redacted] was not informed of his rights, of the existing basis of suspicion and was not given the assistance of a defense lawyer in a case of mandatory defense, the video recording was made without authorization of the Investigating Judge and the defendant was not informed in advance of this kind of recording (i.e. appeal filed by attorney I[redacted] D[redacted] on pages 5 – 8, 10 of the English version).
In other part of the appeals it is claimed that the entire interview was fabricated by the Police, B[redacted] K[redacted] was forced and deceived and also the video recording was in a certain way manipulated (appeal filed by attorney H[redacted] M[redacted] on pages 8 – 9, appeal filed by attorney I[redacted] D[redacted] on page 16, appeal filed by attorney V[redacted] B[redacted] on pages 4 – 6).
According to the appeals, violation of basic rights of B[redacted] K[redacted] and undue pressures on him would have damaged not only the latter but also the other defendants and would have an effect which could invalidate the following statements given by B[redacted] K[redacted] himself before the Investigating Judge, since the content of these was the same already given to the Police.

Just for these reasons it is necessary here a very brief examination of the causes of inadmissibility different from those accepted by the previous Court.

The Second Instance Court was already interested by the appellants with the points listed above and, after reviewing the testimonies of the Police Officers present to the interview and the videotape itself, concluded that before the Police B[redacted]K[redacted] "was entitled to all the defense rights afforded to an accused by internal and international legal instruments applicable in Kosovo" (page 12) and that he was never subjected to any form of physical abuse, maltreatment or inappropriate conditions either during this interview or in the time between this and his appearance before the Investigating Judge.
As noted above the inadmissibility of this statement was related to the lack of a signed record of it.

This Court deems the assessment made by the Second Instance Court as correct and exempt from procedural or logical errors.
- Firstly it must be noticed that, according to the law applicable at the time of the interview, this was not a case of mandatory defense.
The opinion of the defense counsels is based on the erroneous opinion that a crime punishable with the heaviest penalty (imprisonment up to forty years) is a case of mandatory defense.
Applicable law in this case is article 70.1 of LCP which, among other cases which are not interesting here, prescribes as mandatory the defense when "proceedings are being conducted for a criminal act for which the death penalty may be pronounced".
The opinion of the defense is that, since death penalty was the heaviest penalty, the defense is mandatory any time the law imposes the heaviest penalty, even though death penalty was abolished and replaced by imprisonment up to forty years.

It must be reminded that LCP did not prescribe mandatory defense for punishment different from death penalty, even though it was possible to impose imprisonment for periods of twenty (art. 38.3 of CCSFRY) or more (art. 47 CCSFRY) years.
Death penalty was abolished by UNMIK Regulation 1999/24 Section 1.5 which did not provide for any replacement of it.
The following UNMIK Regulation 2000/59 amended Regulation 1999/24 "as of the date on which the present regulation enters into force".
Section 1.5 repeats that capital punishment is abolished, whereas Section 1.6 provides:
"For each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty years".
The last sentence of this Regulation provides: "the present regulation shall enter into force on 27 October 2000. The new section 1.6 shall apply only to crimes committed after that date".

The wording of the two UNMIK Regulation is clear in the sense that death penalty was simply abolished by Regulation 1999/24 and was not replaced by imprisonment with a maximum of forty years (the heaviest penalty mentioned by the appeals) introduced ex novo by Regulation 2000/59.

It is impossible to substitute something (the death penalty) which does not exist any more, because abolished with the previous regulation 1999/24.
This comes out clearly from the text of Regulation 2000/59, according to which the amendments to regulation 1999/24 apply only "as of the date on which the present regulation enters into force", that is 27 October 2000.
What happened is that the Regulation 2000/59 introduced a new penalty, which applies any time laws in force in Kosovo in March 1989 provide death penalty, but only for crimes committed after 27 October 2000.

If death penalty had been replaced with imprisonment up to forty years this would have been clearly stated in the UNMIK Regulation 1999/24.
Above all, a real replacement would have had the effect to make applicable the new punishment to all criminal offences eligible for death penalty even though committed before 27 October 2000.
Moreover the legislator would have specified that the replacement between these two penalties would have an effect on all connected institutes of the criminal proceedings, included the obligation of the defense. .
The above mentioned reasons do not allow to consider equivalent death penalty and imprisonment up to forty years, they are two different penalties, established by the legislator for different purposes and with different effects.
The abolition of death penalty has, as a collateral effect, the consequence to make not applicable to the present case the provision of article 70.1 LCP related to the mandatory defense.
Finally, as found out already by the Second Instance Court, ECHR does not envisage mandatory defense.

- Secondly, the review of the case file, especially of the testimonies of the police officers attending the interview of the afternoon of 4 July 2002 and of its videotape, convinces to share the assessment made by the Second Instance Court about the absence of any undue pressure, deception, promise made to B[redacted] K[redacted] or of inappropriate conditions (included small space in the room) during the interview.
The Police video recorded the interview upon request of the Prosecutor, according to his power to guide preliminary criminal proceedings, to take steps in proceedings, to delegate these to the law enforcement agencies (articles 45 paragraph 2 item 1, 49, 153 paragraph 2, 155 LCP) because at that moment the Investigating Judge had not yet been involved in this part of the investigation (in fact the request for an investigation against B[redacted] K[redacted] is dated 6 July 2002).
Thus there was no violation of provision of article 87 paragraph 1 LCP (violation that, anyway, has no sanction).
At the beginning of the video the Police Officer informs K[redacted] to "speak loudly so the microphone can pick you up", hence making him clear the presence of the recording.
As to the information of his rights, it must be reminded that when he voluntarily showed up at the police station that morning B[redacted] K[redacted] was still considered as a witness and only after his first admission on the facts his position changed in that of a suspect.
The interview of the morning, when K[redacted] was still a witness, was never used as evidence by the Courts.

After a consult with the Prosecutor and the indication of the latter, in the afternoon Police Officers interviewed B[redacted] K[redacted] as a suspect, not arrested or caught against his will.
He was repeatedly informed about his right to be assisted by a lawyer, to stop the interview at any time and to talk with a lawyer (see pages 1 and 34 of the transcription of the video record), right which he waived.
The explanation he gave in order to refuse the assistance of a lawyer (he did not want this thing to be spread) shows that this waive was made voluntarily and in an informed manner.
In this case the charges against him were contained in his own statements and it must be recalled that in the indictment is reported that before B[redacted] K[redacted] statements the police investigation had not produced evidence sufficient to justify charges.
Thus he was well informed about the charges.
His statements were spontaneous and voluntary, from the video it results that investigators were able to formulate questions only in order to complete or to clarify, but that they had not any previous knowledge of the personal involvement of the defendants and of other details narrated by K[redacted]
The latter showed up voluntarily in a day and a moment chosen by him and different from those indicated days before by the Police.
He was neither compelled to appear nor to answer.

The review of the videotape convinces of the absence of any pressure because the atmosphere of the interview and the questioning were very quiet, it lasted a reasonable time (two hors and two minutes), B[redacted] K[redacted] was free in the person, sitting in a normal position, he was offered cigarettes and water, never forced to answer to anything nor put in any inappropriate condition.
It can be excluded any manipulation of the video because there are no visible cuts or interruptions, questioning and answers are continue and logically related to each other.
The time of the interview stated by the proceeding officers (from 4.08 to 6.10 is two hours and two minutes) matches with the overall duration of the video, this also is a confirmation of the absence of cuts or interruptions in the video.
During the video interview there are no suggestions given by police officers to B[redacted] K[redacted] as to the answers to give.
In order to answer to a claim raised by the appeal filed by attorney H[redacted] M[redacted] (pages 8 – 9) it can be noticed that during the interview B[redacted] K[redacted] smokes only two cigarettes the first one between minutes 41 and 55, the second one at the end of the interview.
The absence of cuts or interruptions in the video confirms that there is only one cigarette between minutes 41 and 55.
The time this cigarette lasts can be explained with the fact that B[redacted] K[redacted] smokes this first cigarette very slowly and rarely, images show that the cigarette consumes itself very slowly.

20. As to the statements given before the Investigating Judge on 7 July 2002 the appeals claim that B[redacted] K[redacted] did not receive the warning prescribed by the law and that he did not receive a competent and effective defense.

The latter point is explained remembering that it is not known by whom was appointed the attorney who was present, the defendant had no possibility to consult him, the authorities did not ascertain if the appointed lawyer had "the experience and the competence matching the nature of the offence his client is accused for", during the interview the lawyer did not put any question to his client, the preliminary review of the file was not done, the basis for the suspicion of the prosecution was not discussed between the lawyer and the suspect, because of the inefficiency of the defense the defendant revoked this lawyer (appeal of attorney [redacted] pages 6 - 8, appeal of attorney V[redacted] B[redacted] page 6).
According to the appeals, the Police statements of B[redacted] K[redacted] influenced also his statements before the Investigating Judge because in the second occasion the defendant repeated "almost word per word" the previous one, as already noticed by the First Instance Court.

The Second Instance Court examined these issues (page 14) concluding for the regularity of the interview and the admissibility of this evidence.

This Court notices that the two interviews given by B[redacted] K[redacted] before the Police and the Investigating Judge are formally different.
Therefore their admissibility as evidence must be considered separately for each of them.
Secondly, the defendant was duly informed by the Investigating Judge about the charges against him.
It must be noticed that the request for investigation against B[redacted] K[redacted] was filed on 6 July, it contains the results of the first investigations (which did not involve any defendant) and the content of the police statements of B[redacted] himself (which in that moment were the unique piece of evidence to substantiate the charges against the latter and the others).
The Investigating Judge informed the accused of his right to silence and K[redacted] answered to have given a true statement to the Police and to be "willing to give a statement before the investigating judge as well".
He accepted the lawyer who had been appointed to represent him and stated to have had a conference with him before the hearing.
From these elements can be excluded any violation of the rights to the information to give to an accused according to article 218 LCP: actually he was informed of the charges, which he knew well because deriving from his own previous statements and decided to answer to the questions.
He was assisted and represented by a lawyer, who he expressly accepted and with whom he had a conference before the interview.
This excludes any violation of the right to a previous consult with his defense counsel and to the review of the file, considering that the charges against B[redacted] K[redacted] were substantiated only by his previous statements.
The claims of the appellants about the inefficiency of the defense are not corroborated by any evidence because the lawyer participated to the act and put questions.
From a communication of the same attorney to the Investigating Judge, dated 3 August 2002, we are informed that the lawyer attended all hearings related to the defendant,

visited him in the Detention Centre, asked information from the employees about his health conditions and informed the family.
This lawyer was not revoked because of lack of professionalism, as the appeals claim, but quit when the father of B[redacted] K[redacted] informed him that he could not afford his services as defense attorney.
No physical or psychological abuses on the defendant are demonstrated with relation to this interview, which was not attended by any Police Officer.
The assessment of the Second Instance Court must therefore be shared by this Court.

21. Admissibility of the statements given by protected witness MB.
The appeals (see appeal of attorney H[redacted] M[redacted] pages 4 - 5, appeal of attorney I[redacted] D[redacted] page 9 and appeal of attorney V[redacted] E[redacted] pages 9 - 10) claim the inadmissibility of the statements of MB because:

- she had a relation of cohabitation with defendant B[redacted] R[redacted], was therefore entitled to the right to be exempted to testify, was neither informed of this right nor asked by the Investigating Judge or by the Court if she wanted to waive this right;
- during the hearing of 27 May 2004, when she was heard by the First Instance Court, the public was excluded unlawfully without a decision of the court (violation of articles 290 and 364 paragraph 1 item 4 LCP) and the panel did not render a ruling in writing regarding the protective measures for this witness;
- at the main trial B[redacted] R[redacted] was denied the right to put questions to MB, contrary to article 314 LCP.

These claims are ungrounded and the statements of MB are to be considered admissible evidence.
As seen above, according to article 550 PCPCK in this case applicable law is only LCP and not PCPCK.
Article 227 paragraph 1 item 1 LCP exempts from the duty to testify only "the spouse of the accused" and nobody else, whereas art. 160 paragraph 1 item 1 PCPCK extends this exemption also to the "extra-marital partner of the defendant".
Pacifically MB was not the spouse of B[redacted] R[redacted], according to LCP she was therefore not exempted from the duty to testify.
Secondly, on 28 April 2004 the trial panel decided pursuant to Sections 2 and 3 of UNMIK Regulation 2001/20 to apply protective measures to a witness "well known to one of the defendants" and who had had "an intimate relationship with him".
It must be noticed that in the main trial only MB was given protective measures and that she had a relationship to B[redacted] R[redacted] and was therefore well known to him.
The ruling contains among others the decision to exclude the public from the hearing where this witness is heard.
Finally during the testimony of MB B[redacted] R[redacted] had the opportunity to put many questions to her.
The Presiding Judge only once did not allow a question of B[redacted] R[redacted] about details of their relationship because irrelevant, since the existence of this relationship had already been established.

22. Admissibility of the statements given by witness P[redacted] H[redacted].
a) In the Investigating stage.
The appeal of attorney I[redacted] D[redacted] (page 20) challenges the admissibility of the statements given by P[redacted] H[redacted] before the Investigating Judge on 14 October 2002.
Reasons for this claim are firstly the inability of the Judge to take any action during the time when it was pending a request of disqualification against him and secondly the fact that, despite of the request of the defense counsels of the defendants, the latter were not invited to take part to the act contrary to article 168 paragraph 4 LCP.
The first point was already examined and found not grounded above (see point **II.14**).
As to the second point it must be noticed that there was no violation of article 168 paragraph 4 LCP.
In the case file are to be found the receipts of the invitations sent to the attorneys R[redacted] K[redacted] B[redacted] K[redacted] I[redacted] D[redacted] H[redacted] B[redacted] F[redacted] V[redacted] H[redacted] M[redacted] F[redacted] Sh[redacted] M[redacted] D[redacted] Xh[redacted] M[redacted] and A[redacted] R[redacted] referred to the investigative proceedings to be taken in the days: 1, 10, 11, 14, 15, 16 and 17 **October 2002.**
This happened according to the provision of article 168 paragraph 4 LCP.
Therefore the claim of inadmissibility of the statements given by P[redacted] H[redacted] before the Investigating Judge on 14 October 2002 is ungrounded.
b) At the main trial.
P[redacted] H[redacted] witnessed at the main trial on 3 and on 4 December 2004.
The appeal of attorney I[redacted] D[redacted] on behalf of A[redacted] K[redacted] (pages 9 and 20) claims that the public was unlawfully excluded from these hearings with consequent essential violation of the provisions of criminal procedure.
This point is ungrounded since the testimony of Ms. P[redacted] H[redacted] at the main trial was taken through videoconference in a special session held <u>in camera</u>, according to article 330 paragraph 1 LCP where, obviously, the public could not be present.
Therefore there was not any violation of the criminal procedure.
At the main trial the defense counsels and the defendants had the possibility to examine P[redacted] H[redacted].

23. The appeal of attorney I[redacted] D[redacted] claims that the following acts should be excluded as inadmissible evidence:
- F[redacted], B[redacted] J[redacted] and A[redacted] K[redacted] witnesses statements given before the Police and the Court without previously being informed of their right (art. 227 LCP) to be released from the testimony because related with some of the defendants (pages 4 – 5);
- all the statements given by witnesses and suspects before the Police without the presence of the defense counsels, because the defense was mandatory (page 11);
- the reports issued by law enforcement authorities, containing the above mentioned and vitiated statements.

This point was already examined by the First Instance Court (pages 114 - 117 English version), which distinguished between admissible and inadmissible Police statements.

The statements considered as inadmissible were therefore not used by the first Court, whereas the other police statements were used but not "in a decisive manner to ground a finding against any of the accused" (page 117).

This Court notices that article 364 item 8 LCP envisages an essential violation of the criminal procedure if the verdict is based on inadmissible evidence "unless in view of the other evidence it is obvious that the same verdict would have been rendered even without that evidence".
This means that inadmissible but not decisive evidence does not affect the verdict with an essential violation of the criminal procedure.
From the First Instance verdict it is understandable that the police statements were not used in a decisive manner because the relevant and decisive evidence was other.
The reasoning of the First Court is correct and the claims of the appeal are therefore ungrounded.
In any case it must be added that, as correctly observed by the Second Instance Court (pages 14 – 15), the right envisaged by art. 227 LCP is related only to the witness whereas the accused have always the right to remain silent, which is wider than the right provided by article 227 LCP.
Any time one person was interviewed as an accused either by the Police or by the Investigating Judge, art. 227 could not find application.
As to the witness statements given before the Police in August and September 2001 by B[redacted], J[redacted], F[redacted], A[redacted] K[redacted] and other persons as well it must be noticed that at that time there were not yet accused, therefore article 227 LCP could not find application.
In fact, as reported in the indictment, at the time of the police investigation no sufficient evidence to support charges had been discovered and only after the first admissions of B[redacted] K[redacted] in July 2002, a formal investigation started.
Secondly, as noted above this was not a case of mandatory defense, therefore the accused could lawfully waive his right to the defense counsel, as already observed case by case by the First Instance Court in the above mentioned part.
Finally, the considerations above are valid also for the reports of the Police, whose part made with the statements of the defendants was not considered as decisive evidence by the First Instance Court.

24. The appeal of attorney I[redacted] D[redacted] on behalf of A[redacted] K[redacted] (pages 10 – 11) claims the inadmissibility of the phone list of the mobile network because obtained by the police illegally.

This point was already addressed by the first judgment (pages 117 – 118) noticing that the call details were asked on 23 November 2001 to the Directorate of Infrastructure Affairs/Communications, were obtained, then the list of phone calls was communicated to defense counsels.

The Second Instance Court made use of this list only establishing that the telephone call between Z[redacted] K[redacted] and B[redacted] R[redacted] had happened before the shooting.
Since this details did not confirm the statements of B[redacted] K[redacted] it was used in order to acquit Z[redacted] K[redacted] (pages 33 – 34).

From the case file it results a court order dated 19 July 2002 to which it was answered on 15 August 2002 with the list of calls of some mobile phones.

It must be pointed out that both the requests, of 23 November 2001 and of 19 July 2002, appear to be lawfully because either the Police (article 151 paragraph 2 LCP) acting before the starting of an investigation and the Investigating Judge (article 164 paragraph 1 LCP) had the legal power to perform necessary investigating actions and examine specified documents.

25. The same appeal (pages 9 – 10) claims the violation of article 364 item 7 LCP since in one of the final indictments (that dated 7 February 2003) B[redacted] K[redacted] was not included and despite of this he was convicted by the Court.

This point was already examined by the First Instance Court at the first hearing on 4 November 2003 (pages 18 – 20 English version).
It resulted that the name of B[redacted] K[redacted] was included in the original indictment, written in English, but was mistakenly missing in the first Albanian translation of the same document.
This problem was solved through the immediate preparation and hand over of new copies in Albanian of all the indictments, including the interesting one which, this time, included also B[redacted] K[redacted]
Thus the claim of the appellant is ungrounded.

26. Moreover, as to the essential violations of criminal procedure, the appeals claim:
- that the verdict of the Second Instance Court does not contain reason on decisive facts and is logically contradictory because through the acquittal of S[redacted] H[redacted] eliminates the motive of the crime whereas it maintains the conviction of its material perpetrators (appeal of attorney H[redacted] M[redacted] pages 2, 4, 7 – 9, appeal of attorney V[redacted] B[redacted] pages 11 – 12);
- that the verdict does not contain the essential elements of the criminal acts as to the objective and subjective elements and as to the verification of the incriminating actions of each defendant (appeal of attorney H[redacted] M[redacted] page 2), as to the perpetrators, the good which was threatened, the causing connection between action and threatened good (appeal of attorney [redacted] D[redacted] page 4), as to whom the weapons belong (appeal of attorney V[redacted] B[redacted] page 6);
- that the verdict exceeds the limits of the indictment, since in the enacting clause has been quoted only the legal qualification and the criminal act (appeal of attorney H[redacted] M[redacted] page 9).

This Court deems not grounded the above mentioned claims.
- The first point is related both to violation of the criminal procedure and to the claim of erroneous determination of the factual situation.
The latter will be object of examination in the next parts of this judgment.
As to the procedural aspect it must be noticed that the motive of a crime is not a part of the crime itself.

A crime is composed by two elements: a material one (the conduct) and a subjective one (the intent or the negligence) whereas according to the law the motive remains outside a crime.
The motive is obviously important to understand all the facts, but is not indispensable to demonstrate the responsibility of a defendant.
Under this point the challenged verdict can not be considered as illogical or incomplete.
- As to the second point, the challenged verdict examines specifically the facts and the evidence related to each defendant, their conduct and their intention, the connection between their action and the damage caused to the life of the victims, the criminal offences for which there is conviction (for the three appellants see pages 21 – 27).
It can be added that the conduct of a person, who from a very close distance voluntarily shots with an automatic weapon so many shots against a car, inside of which are six persons and through this action kills five persons, appears clearly to be intentional and causally linked with the death of the victims.
- As to the third point it can be noticed that the enacting clause is clear enough as to the conduct ("because they jointly took the lives of ... and attempted to take the life of ... in an insidious manner by ambushing them while they were travelling with their car and by firing towards them with more than one weapon numerous rounds of a 7.36 x 39 mm. caliber rifle"), the time and local circumstances ("on 20 August 2001, at or about 23:00, along a dirt road between the villages of B[redacted] and T[redacted]), the identification of the victims.
Through the above mentioned description of the fact the enacting clause does not exceed the indictment, where the same facts were charged to the same and other defendants. Actually the challenged verdict simply reduces the number of the defendants, the conducts and the crimes which were deemed as proved, without adding anything to the original charges.

III

The claims regarding the erroneous and incomplete determination of the factual situation.

27. The appeals (see appeal of attorney H[redacted] M[redacted] pages 2 – 3, appeal of attorney I[redacted] D[redacted] pages 23, appeal of attorney V[redacted] B[redacted] page 11) claim the incomplete determination of the factual situation because some important material evidence disappeared during the investigating stage and their results were never known.
The appeals refer particularly to the paraffin handle taken from F[redacted] and A[redacted] K[redacted] on 21 August 2001 and to the examination of some exhibits collected on the investigated spots which had to be examined in order to find fingerprints or DNA samples.

During the main trial the Prosecutor (on 2 November 2004) clarified that the cans of the drinks found at the crime scene were disappeared, on the other side however they were "left outside under the influence of nature forces" and thus there was no guarantee that any evidence could be found on them.
Secondly, also the evidence sent to Bulgaria for tests was disappeared.

This Court is of the opinion that this fact does not prevent a correct establishment of the factual situation because lack of evidence is always to benefit of the defendant.
On the other side a conviction can be pronounced only when incriminatory evidence exists beyond reasonable doubt.

28. The Second Instance Court grounds its judgment on the following factual evidence:
- the statements given by B[redacted] K[redacted] before the Investigating Judge on 7 July 2002;
- the statements given by protected witness MB;
- the statements given by P[redacted] H[redacted]
- the statements of other witnesses, among them N[redacted] L[redacted], about the passage of the cars of the defendants in front of his house on the night of the fact.

All the appeals challenge the reliability of the first three sources of evidence.

29. The appeals challenge the reliability of the statements given by B[redacted] K[redacted] before the Investigating Judge on 7 July 2002.
The grounds of the claims are substantially:
- the suspect that the confession was the result of undue pressure and a fabrication of the police;
- the fact that B[redacted] K[redacted] recanted his previous statements both before the Investigating Judge (on 11 October 2002) and at the main trial;
- some inconsistency of these statements with other evidence and particularly with
- the alibi of the defendants.

As to the claim related to **undue pressure** and physical abuse it must be recalled here what was noticed above (see point **II.19**) and already stated by the Second Instance Court about the absence of any abuse or inappropriate interrogation techniques employed by the Police on 4 July 2002 as it is made clear by the reviewing of the videotape and by the testimonies of the Police Officers present at the interview.
No abuse is claimed during the interview before the Investigating Judge.
The appeals raise doubts on the mental ability of B[redacted] K[redacted] (see appeal of attorney V[redacted] B[redacted] pages 3 and 17, appeal of attorney [redacted] D[redacted] page 15) but these doubts were convincingly rejected by the previous judgments (see judgment of the Second Instance Court page 14 and judgment of the First Instance Court page 99) according to the observations made by Dr. A[redacted] Sh[redacted] who excluded that B[redacted] K[redacted] could be defined psychotic.
There is no evidence of manipulation by the Police: he was interviewed in a correct manner on 4 July 2002 and when he went before the Investigating Judge no Police Officer was present.

30. The appeals (see appeal of attorney [redacted] D[redacted] page 16, appeal of attorney H[redacted] M[redacted] pages 8 – 10) claim that the narration of B[redacted] K[redacted] was the result of a **fabrication** made by the Police.

This issue together with the recantation made by K[redacted] before the Investigating Judge and at the main trial were addressed by the First Instance Court (pages 59 – 68, 118 – 122, 126 - 128) and by the Second Instance Court (page 15).
The previous judgments excluded any fabrication by the Police through a reasoning free from logical or legal errors.
Important points of this reasoning are, among others:

- the continuous presence of at least one International Police Officer with the defendant, who never was left alone with KPS Officer F[redacted] S[redacted];
- the care of the IPO to inform the International Prosecutor as soon K[redacted] started to incriminate himself;
- the details narrated by K[redacted] about the fact, details which could not be known in advance by the Police;
- the exclusion of any sign of maltreatment or undue pressure in the video recording;
- the unreliability of the accuses moved to the Police Officers by B[redacted] K[redacted] during his recantation.

This Court shares the assessment made in the first and in the second judgment, because in the case file there is no evidence of any fabrication by the Police.
To the reasoning of the first Courts can be added what follows.
Actually according to B[redacted] K[redacted] this fabrication allegedly started only from the morning of the 4 July 2002, the day of his interview, and not from one year before as it seems to be the claim of one appeal (of attorney I. D[redacted] page 16: "for almost a year he imprinted in his memory the lessons to be told at the right time and place according to the training he received, especially when it would be needed by the police officer").
But also on this way the version given by B[redacted] K[redacted] when he recanted his previous confession does not convince.
He stated that F[redacted] S[redacted] instructed him on the entire story, but F[redacted] S[redacted] has stated not to have had any access to the case file and to have been got involved in the case exactly on 4 July 2002.
A[redacted] D[redacted] confirmed that prior to the arrest of B[redacted] K[redacted] only International Police Officers had an investigative role in this case (hearing of 25 August 2004 page 31).
This excludes the possibility for F[redacted] S[redacted] to know the case and to give instructions on its details.
B[redacted] K[redacted] stated to have been instructed repeatedly by F[redacted] S[redacted] also in the following days until the moment of the interview before the Investigating Judge, but A[redacted] D[redacted] stated that B[redacted] was with him most of time before he was taken to the Investigating Judge, he stayed in the office with International Police Officers "because he was not comfortable in the cells" (page 13): this excludes that F[redacted] S[redacted] had the possibility to reach and to give him instructions.
B[redacted] K[redacted] stated (interview dated 11 October 2002 page 33) that, when he was taken to the Investigating Judge on 7 July 2002, the International Police Officer let him alone in a small corridor, after that arrived F[redacted] S[redacted] and refreshed his memory on what to tell the Judge.

This part is high incredible because K[redacted] was an arrested person, whom nobody would have left alone in a small corridor with the risk that he could escape.
Before the Investigating Judge on 11 October 2002 B[redacted] K[redacted] stated to have been maltreated by F[redacted] S[redacted] who grabbed him by the chin and moved him to the sides (page 30).
At the main trial K[redacted] added that F[redacted] S[redacted] had beaten him with a baton on his back.
Asked to explain why the fact of the baton was not mentioned in the minutes of the interview before the Investigating Judge, K[redacted] answered that on that occasion he had narrated also this detail but did not know what was written.
This explanation is contradicted by the minutes of the interview of the 11 October, where this very important fact is not noted and which were duly signed and on this way confirmed by K[redacted].
Moreover the wounds in the back of B[redacted] K[redacted] were not certified by a doctor despite the fact that he was in the hospital of Dubrava Detention Centre for physiological reasons (hearing 11 November 2003 page 41).
Only at the main trial B[redacted] K[redacted] introduced the suspicion that the cigarettes offered to him on 4 July could have contained some drug.
This allegation appears to be late and not credible, apart from being denied by the witnesses and by the images of the videotape which don't show any "strange" or not normal behavior of B[redacted] K[redacted] nor any sign of violence or threaten against him.
B[redacted] K[redacted] remembered to have been told of the possibility to go and live abroad and regarding this he mentioned he had liked England.
However before the Investigating Judge on 11 October 2002 B[redacted] K[redacted] stated to have spoken about this issue both with an American and an Albanian Police Officer, whereas at the main trial excluded to have had this discussion with an Albanian policeman.
Furthermore at the main trial he stated that there was no connection between the discussion about England and the investigated murder (hearing of 11 November 2003 page 35).
No evidence corroborates the claim of K[redacted] and of the appeals that he was proposed a benefit for his co-operation with the Police.
K[redacted] himself excludes any connection between the issue which State he liked and the ongoing investigation.
The First Instance Court has correctly noticed the unreliability of K[redacted] when he states that the suggestions prepared by S[redacted] would have been contained in only four pages A4, when the transcript of the video recording encompasses 36 (thirty six) pages in English.
Here can be added that some details given by K[redacted] as for example the screaming of P[redacted] H[redacted] in the middle of the shooting, could be known only to a person present on the spot and could not be suggested by the Police.

31. The appeal of attorney V[redacted] B[redacted] (page 6) claims that the challenged verdicts did not pay attention to the statement given by B[redacted] K[redacted] during the main trial, on this way violating the provision according to which "the court shall base its verdict solely on the facts and evidence presented in the main trial"(art. 347 paragraph 1 LCP).

The First Instance Court examined both legal and factual effect of the recantation made by B[redacted] K[redacted] (pages 124 – 128) explaining firstly that all the statements given by him had been presented and examined at the main trial and secondly the reasons why the Court believed to the first version and not to the recantation.
The Second Instance Court (page 15) confirmed the legal correctness of the use of the first statements given by K[redacted] and that the judgment could find its legal base on them.

This Court does not find any violation of the provision of article 347.1 LCP in the previous judgments, because the statements given by B[redacted] K[redacted] before the Investigating Judge on 7 July 2002 were correctly introduced ("presented") in the main trial through the mechanism provided by article 317 paragraph 3 LCP, that means the defendant was confronted with them by the Presiding Judge.

32. The appeals claim that the challenged verdict does not give any explanation of the decision to believe to the first statement of K[redacted] rather than to his **recantation** (appeal of attorney I[redacted] D[redacted] page 16).
Secondly they challenge the logic of the verdict because it allows reliability only to a part of the first statement of K[redacted] (appeal of attorney H[redacted] M[redacted] page 8, appeal of attorney V[redacted] B[redacted] page 5).

The second point will be examined in the next paragraph.
As to the first point it can be noticed that the reasons why the first and the second Courts judgments believed to the first statements of B[redacted] K[redacted] and not to his recantation is quite clear by reading the above mentioned parts of the first judgment.
"The trial panel concluded that the recantation of the confessions by B[redacted] K[redacted] was a belated attempt to save the accused persons he had implicated" (first instance judgment page 126).
This Court deems logically correct this reasoning.
At the moment of the first statements before the Police B[redacted] K[redacted] had apparently no reasons or interest to blackmail himself and the other defendants.
Once we can exclude any violence, undue pressure and fabrication by the Police there are no other reasons than the will to get "rid of the burden of guilty" for the death of the children, as remembered by A[redacted] D[redacted].
Meaningful is the narration made by IPO W[redacted] S[redacted] to the Investigating Judge as to the beginning of the co-operation of B[redacted] K[redacted].
After some questions about the feelings of the people in the community and of himself about the death of H[redacted] family, S[redacted] remembers:
"I believe I asked him "if you know who would do such things to children and you knew their names why would you protect them?" He responded because they would kill me. I think I asked "could you live with yourself if you knew people who did such things could remain free?" and I think I said: "if you know who was present at this shooting; who was at the bridge, you owe it to see these people are brought to justice". I believe I pressed at that point: "you know, don't you" he didn't say anything and I said "don't you" and he said "yes I do". I asked who were they. He gave the names and included himself".

Till that moment B[redacted] K[redacted] was interviewed as a witness, he was not charged of anything, under no arrest or other form of compulsion, had no benefit to obtain through an invented story.
He involved himself in the case, admitting to have been present and having helped the perpetrators.
It was easy to foresee that as a result of his statements he would be arrested, and this is exactly what happened.
No explanation different from those used by the first two judgments appears to be acceptable.
His confession has found also external corroboration on important facts and essential details, as it will be examined in the next part.

On the other side his recantation appears to be incredible as to the violence and the fabrication made by the Police, denied by other evidence (he stated to have remained at the wedding party for a continuous time since before H[redacted] family left to a time after this departure but on this point he was contradicted by the witnesses present at the party, among them P[redacted] H[redacted], motivated by the interest to go rid not only of judicial difficulties but also of any possibility of revenge against him and his family (the First Instance Court quotes a letter prepared by his familiars and "purporting to apologize to the accused").

33. The Second Instance Court (pages 18 – 22) defined the statements of B[redacted] K[redacted] dated 7 July 2002 as "internally plausible, consistent, detailed, and otherwise credible".
The judgment compared these statements with other evidence, finding corroboration in the ballistic examination and in the "physical facts of the shooting and the testimony of the surviving victim, P[redacted] H[redacted]".
The Second Instance Court however finds also some discrepancies, about at least two circumstances (related to his presence at the wedding party before the shooting and at the time when he met the perpetrators at the bridge) which could put in doubt his reliability not only about those specific points but also "as to remainder of his statements".
Nonetheless that Court noticed that "his entire testimony cannot and should not be discounted simply because it is not reliable in part... A person's statements may be trustworthy in many aspects, although not so in some specific areas".
That Court believed to find some external corroboration (the statements of MB, P[redacted] H[redacted] and other witnesses among them N[redacted] L[redacted]) which on one side could confirm parts of the statements of B[redacted] K[redacted] and on the other side was related individually to some other defendants (page 22).
Following its reasoning the Second Instance Court accepted:
- that B[redacted] K[redacted] was on the spot and took part in the murder (combining his confession and the testimony of P[redacted] H[redacted]);
- that B[redacted] R[redacted] took part in the murder (combining the statements of B[redacted] K[redacted] and of MB);
- that A[redacted] R[redacted] and A[redacted] K[redacted] took part in the murder as well (combining the above mentioned elements, the fact that the two defendants were always together with B[redacted] R[redacted] and the material possibility to be on the spot as resulting from the

testimonies of some witnesses about the route followed by the defendants during their journey back from the corn party).
The Second Instance Court disregarded the other parts of the statements of B[redacted] K[redacted] and consequently acquitted the other accused because it could not find any decisive corroboration on these points.

All the appeals challenge the choice of the Second Instance Court to accept part of the statements of B[redacted] K[redacted] which on the contrary should have been rejected in their entirety (the appeal of attorney H[redacted] M[redacted] page 8 mentions the method "of usage of evidence as per the need", see also the appeal of attorney V[redacted] B[redacted] pages 4, 9, 18: "according to such interpretation the Court lives it open to believe that there is also the truth in a lie" and "this can be interpreted only based on the testimonies which the Court likes").
Moreover they claim that the statements of B[redacted] K[redacted] contain many inventions or lies, different from the two points found by the Second Instance Court, which demolish entirely its reliability.

The examination of the alleged discrepancies of these statements and of the evidence which on the contrary could corroborate them will be done in the next paragraphs.
Here must be addressed the issue about the credibility given by the Second Instance Court only to a **part** of those statements.
This Court is of the opinion that the reasoning of the Second Instance Court is, on this point, not completely correct.
Following its own reasoning and starting from the realization of two well individuated discrepancies, the Second Instance Court divides the remaining statements of B[redacted] K[redacted] in two parts: the one which is reliable because corroborated by external evidence and the one which is not reliable because not corroborated.
On this way the Second Instance Court avoids to examine and finally to affirm or to deny the credibility of the statements of B[redacted] K[redacted] as a whole, but limits itself to choose the parts which finds to be corroborated whereas it excludes the other parts.
This reasoning appears to be excessively reductive and not justified both logically and legally.
Logically it can be noticed that the reliability of a statement must be assessed taking into consideration the reasons which can move the interested person to speak, the circumstances under which he gives his statement, the existence of any risk for him in talking to the Authorities, the manner of his speaking as to the internal plausibility, consistency and the given details.
The existence of external and corroborating evidence confers to the statement even more credibility, but strictly speaking it is not necessary for the examination of the credibility.
In case of positive assessment of the sincerity of a statement as a whole, the presence of single, well individuated discrepancies, errors or contradiction with different evidence can deny credibility to those specific and single points but not to the rest.
Usually any statement of witnesses or defendants represents a composition of many pieces of information, some collected directly by the person who speaks, some narrated to him by other persons.

Generally speaking, errors in the perceptions of some facts and erroneous information received by third persons about some parts of the testimony don't diminish its overall reliability.
This is true especially when the single facts which are the object of the testimony can be separated from each other.
This reasoning is valid also in case some specific parts of the statements are denied by contradictory evidence.
In this case the assessment of the Court must be very careful and prudent but it can not be affirmed simply that inaccuracy or also a lie on a single, well individuated and specific point automatically demolishes the overall credibility of the testimony.
If the reasons lying under the challenged point are detectable and are not extensible to the rest of the statements, then this second part can be assessed as reliable without any logical error.
Legally, the Court is not bound to exclude a testimony in its whole if only a part of it is challenged or found not true.
This relies on the principle of the free assessment of the evidence by the Court.
However free assessment is not arbitrariness and the Court must make clear the reasons of its choice, which must logically and legally stand.

34. In this case the statements given by B[redacted]K[redacted] before the Investigating Judge on 7 July 2002 appear to be credible as a whole, despite of the presence of the two discrepancies noted by the Second Instance Court.
It was already noticed above (see point **III.32**) that he presented himself spontaneously to the Police, was free and not under any form of compulsion, had no benefit to obtain.
His statements were first of all self incriminating and because of them he was arrested and later on convicted.
He had no reasons to charge the other defendants with false accuses; he had no enmity against them and by breaking the "law of silence" he was well aware of the risk of a revenge against him and his family, especially considering that they live in a small environment where everybody knows and is related to the others by familiar or friendly links.
The unique reason which remains in order to explain his confession appears to be the remorse for the death of the children.
This appears to be incompatible with the intention to slander the other defendants.
It can be added, repeating the assessment already given by the Second Instance Court, that his statement was "internally plausible, consistent, detailed, and otherwise credible".
They found many external pieces of corroboration, as both the First and the Second Instance Courts recognized (respectively pages 123 and 124 and 22 – 24), which confirm his general credibility and his participation in the ambush.
They found also some important corroboration in external evidence linked specifically and individually to other defendants, as it will be examined further on.

The Second Instance Court has explained the reasons which stay under the two circumstances where the narration of B[redacted]K[redacted] was contradicted by other evidence (page 21): "it may be said that B[redacted]K[redacted] version of the contradictory statements are his attempt to cast himself in a better light so as to reduce, if not eliminate his

criminal responsibility. In essence he claimed that he did not want to participate in the ambush, but was obliged to do so because of intimidation of B[redacted] R[redacted]'.
These reasons appear to be plausible and explain these discrepancies without putting in doubt the rest of the narration because are not related to the overall fact of the murder, to the admission to have been present on the spot or to the responsibility of the other defendants in the shooting.
Secondly it can be noticed that the assessment of the overall credibility of the confession of B[redacted] K[redacted], made taking into consideration on one side the internal aspects of his statements and the reasons which moved him to talk to the Authority and on the other side the existence of external corroborating evidence, respects the provisions of articles 223 and 323 LCP according to which a confession by the accused does not relieve the Court of the duty to present other evidence and on the other side the provision of article 347 paragraph 2 LCP according to which the Court has the duty to evaluate each piece of evidence individually and in connection with other evidence.

35. Before to express any definitive assessment about the reliability of the statements of B[redacted] K[redacted] it is necessary to examine the claims regarding **discrepancies** different from those already found by the Second Instance Court.

The appeal of attorney I[redacted] D[redacted] (pages 17 – 19, 23 – 24) challenges the reliability of the statements of B[redacted] K[redacted] dated 7 July 2002 because his narration of the events of 20 August 2001 would be denied by other pieces of evidence as to:
- the meeting at the Xh[redacted] T[redacted] bar in the afternoon;
- the fact that B[redacted] R[redacted] and A[redacted] K[redacted] were informed by N[redacted] K[redacted] that H[redacted] H[redacted] would have attended the wedding party in B[redacted] this allegedly happened in the first afternoon when H[redacted] family itself had not yet decided to go to that party.
- the arrival of two Police Officers (A[redacted] Xh[redacted] and B[redacted] M[redacted]) at the wooden bridge short before the shooting;
- the time B[redacted] and J[redacted] K[redacted] spent in G[redacted] with L[redacted] M[redacted] and Sh[redacted] B[redacted] in the evening;
- the telephone calls among the defendants.
The same appeal claims furthermore that the involvement of S[redacted] H[redacted] and the price he allegedly offered for the murder was not proved at all and this defendant was consequently acquitted.

It can be noticed that, even though all these points are connected with the narration of B[redacted] K[redacted], none of them is referred to the exact moment of the murder.
Contradictory evidence related to these points can be considered in relation to the general reliability of K[redacted] but in itself is not able to deny the part of his narration of the moment of the murder, simply because it doesn't refer to that moment.
After this first and general consideration it must be observed that the contradictory evidence mentioned by the defense does not appear convincing.
- The meeting in Xh[redacted] T[redacted] bar is denied by persons who during the trial were accused, thus had an interest to defend themselves and the others, or were linked to them by familiar or friendly relationship.

Furthermore the indication of the presence of a long list of persons could contain some not voluntary errors.
Other factual elements, as the lack of a register of presences at the TMK in 2001 (page 129 of the first judgment), the absence of A K from the work the day of the fact (witness S H, page 132), the proximity[2] of Xh t b (where defendants deny to have been in the afternoon of 20 August) and E restaurant (where they, included F K, admitted to have been that afternoon, pages 133 - 135) don't confirm the statements of the defendants and don't allow to assess their narration as a contradictory evidence to the statements of B K.
- B K refers to have heard that B R and A K were informed through N K about the attendance at the wedding party by H family.
B K was not present when this news was collected from N K.
Therefore this information could have been false, or based only on a probabilistic hypothesis due to the family relation between H and R H (brother and sister) without diminishing for this only reason the reliability of B K.
Therefore the doubt rising from the alleged time of this information (the early afternoon when the victims had not yet decided to go to the wedding party) is not decisive on the reliability of his statements.
Anyway it must be reminded that pacifically A K and B R, in the presence of the other accused, spoke exactly with N K about the presence of H family at the wedding.
This discussion happened in the absence of B K during the corn party, where B R took information about the daughters of H H
Thus, the core of the information referred by B K is true: B and A were informed by N.
- The defense affirms that on the time given by B K (at or about 22:30) it was impossible for KPS A X and B M to be at the wooden bridge, because they were in a distant place for work and with colleagues.
This can be true, but it must be examined bearing in mind that B K showed not to be precise with the time he spoke about.
Actually he indicated 22:30 for the arrival of the two Police Officers and a time between 22:50 and 23:00 for the shooting, when it is clear that the shooting occurred at 23:17.
Substantially he mistakenly "anticipated" the time of the shooting.
B K had not a watch with himself and refers time he learned from other people.
In other words the arrival on the spot of the two KPS mentioned by K could have occurred after 22:30.
The consequence is that, based only on the time of work of A Xh and B M it is not possible to demonstrate the inconsistency of the statements of B K.
On the other side it is true also that A Xh and B M admitted to have arrived at the crime scene around at 23:20 or 23:30, before other members of the Police and that for a while they did not inform anybody of the murder.

[2] According to A K (hearing 13 January 2004 page 29) the two premises are in front of each other on the two sides of the same road.

The difference between the statements of K[redacted] and those of A[redacted] Xh[redacted] and B[redacted] M[redacted] is if the latter arrived on the crime scene before or after the shooting.
The statements of A[redacted] Xh[redacted] and B[redacted] M[redacted] could have been dictated by a defense interest, since they were accused at the main trial.
Moreover, how could B[redacted] K[redacted] know that, among all KPS Officers of the region, exactly A[redacted] Xh[redacted] and B[redacted] M[redacted] arrived on the spot?
Also this element appears not to contradict the reliability of B[redacted] K[redacted]
- Also the time spent by B[redacted] and J[redacted] K[redacted] in G[redacted] with the two girls appears not to be decisive because Sh[redacted] B[redacted] gives a time indication (between 20:00 and 21:30 without being sure, hearing 16 November 2004 page 11) related to the meeting with B[redacted] and J[redacted] K[redacted] which appears to be compatible with the arrival of the latter at the wedding party before the shooting.
- The Second Instance Court has examined the telephone calls among the defendants concluding for the acquittal of Z[redacted] K[redacted] because the time of his call to the phone of B[redacted] R[redacted] did not match with that indicated by B[redacted] K[redacted]
Other telephone calls were not recorded.
However B[redacted] K[redacted] does not refer to have personally received calls but speaks about calls made and received by others, i.e. B[redacted] R[redacted] and J[redacted] K[redacted]
Inaccuracy on this point could be explainable through errors in the perception of the fact, or through false information received by the others without involving necessarily a lie.

The point related to the acquittal of S[redacted] H[redacted] will be examined in the next paragraph together with the same claim as raised in the appeal filed by attorney V[redacted] B[redacted]

36. The appeal of attorney V[redacted] B[redacted] (pages 12, 17, 19 – 22) challenges the statements of B[redacted] K[redacted] on the following additional points.
- The acquittal of S[redacted] H[redacted] by the Second Instance Court deprived the crime of its motive as indicated by B[redacted] K[redacted]
Moreover, since the motive is "the intimate factor which helps to decide and to undertake a certain action" and is considered as "a constitutive element of the criminal offense" the exclusion of the motive contained both in the indictment and in the first judgment should have had as a consequence the acquittal also of the material perpetrators and appellants because of the principles of extension among defendants of the reasons for acquittal.
- The color of the car of S[redacted] H[redacted]
- The conduct of F[redacted] and J[redacted] K[redacted] regarding the supply and the transport of the weapons.
- The instructions given by B[redacted] R[redacted] to J[redacted] K[redacted] to call him at the moment H[redacted] family would leave the party and the following call.
- The telephone call between Z[redacted] K[redacted] and B[redacted] R[redacted]
- The transport of the perpetrators to the wooden bridge by F[redacted] K[redacted]
- The conduct of Z[redacted] K[redacted] waiting for the perpetrators at the car wash.
- The time of the ambush.
- The position and the conduct of the perpetrators during the ambush.
- The screaming of P[redacted] H[redacted] in that moment.

Here must be recalled the considerations made above because, except for the last two, the remaining remarks are not related to the very moment of the murder and all can find an explanation different from the voluntary insincerity of B K
The Second Instance Court has acquitted S H and the other defendants because of lack of corroborating evidence and not because of the existence of evidence which contradicted the statements of B K
This is valid for the motive of the crime, for the supply of the weapons, for the telephone calls different from that between Z K and E R, for the conduct of Z K
It can be added what follows.
- The lack of a proved motive makes inapplicable legal provisions linked to the particular reasons of a murder, as in this case article 30 paragraph 2 item 5 CLK which was excluded by the second Court.
However, contrary to what is claimed by the appeal, the exclusion of a particular motive or of a particular purpose of a crime does not mean automatically that the material perpetrators must be acquitted.
As noticed above, the motive remains outside the structure of the crime of murder, made only by a material (the conduct) and a subjective (the intention) element.
- The color of the car of S H appears to be a detail not very important.
Nonetheless, in this case it does not seem that the statements of B K were wrong.
The First Instance Court (page 129) recalls that H himself arrived to admit to have had just a brown A among many cars he possessed.
- J K was tried separately; there is no assessment of the Second Instance Court about the evidence related to him.
Anyway the appeal itself claims the lack of evidence which can confirm these two points of the statements of B K and not the existence of contradictory evidence.
- The telephone call between Z K and B R and the transport of the perpetrators to the bridge as allegedly made by F K were examined by the Second Instance Court in a correct manner.
The existence of these discrepancies does not diminish the overall reliability of B K on the other points.
Anyway, B K did not state to have been present to the transport of the perpetrators to the bridge and to have seen F K acting as the chauffeur of B R, A R and A K but to have simply referred what B had said to A
- As already noticed above, B K was not in possession of a watch and could refer the times of single facts only approximately.
This explains the apparent obvious mistake in the time of the ambush, referred by K as between 22:50 and 23:00 and ascertained through the log of the N military base at 23:17.
The First Instance Court (pages 127 – 128) addresses the issue related to if and at what moment B K left the party in a correct way, demonstrating that he had left the party some minutes before H family and was in time to reach the wooden bridge before the shooting.

The Second Instance Court confirms this point noticing that K[redacted] referred some details of the ambush, which could be known only to a person who was present at it.
Doubts raised by the defense counsels about the reliability of the witnesses present at the party appear without consistence.
- The position of the perpetrators at the ambush and the fact that B[redacted] K[redacted] supplied one of them with ammunition are details not denied by contradictory evidence.
- The screaming of P[redacted] H[redacted] in the middle of the shooting is a detail confirmed both by B[redacted] K[redacted] and P[redacted] herself, which confers high reliability to this part of the narration of the former and confirms that he was really on the spot during the ambush.
On this point the reasoning of the Second Instance Court is correct and must be sustained.

37. The appeal of attorney H[redacted] M[redacted] (page 6) challenges the statements of B[redacted] K[redacted] on the points related 1) to the number of the weapons which fired, 2) to the number of cartridges used, 3) to the fact that B[redacted] R[redacted] allegedly fired twice and 4) to the fact that B[redacted] K[redacted] was actually present at the crime scene.

These points are ungrounded.
- As to the number of weapons which shot that night and the number of casings retrieved the Second Instance Court (pages 18 – 19):
  - affirms the consistency of the results of the ballistic expertise according to which at least two different weapons fired with the statements of B[redacted] K[redacted] who spoke of three weapons firing;
  - accepts the hypothesis that B[redacted] K[redacted] may have not been able to see if A[redacted] K[redacted], who was on the other side of the road fired his weapon;
  - recognizes that some cartridges might not have been recovered.

The reasoning of the challenged verdict appears to be correct.
In addition it must be considered that already the First Instance Court (page 166) recalled the unprofessional manner used by the crime forensic team which examined the crime scene only the day after the shooting and in a very poor way.
Therefore it is no possible to exclude that some casings were not recovered.
- As to the number of time B[redacted] R[redacted] would have shot it must be noticed that the statements of B[redacted] K[redacted] are not denied by the findings at the crime scene and are confirmed by the statements of P[redacted] H[redacted] about her screaming just in the middle of the shooting.
- The appeal claims that, according to the testimony of P[redacted] H[redacted], B[redacted] K[redacted] was still at the wedding party when her little sister informed her that their father had decided to leave.
The appeal deems impossible for B[redacted] K[redacted] to be at the place of the ambush at the same time.
In addition to what already observed (see point **III.36**) about the presence of B[redacted] K[redacted] at the crime scene, it can be noticed that the claim of the appellant is denied by reading the whole statement of P[redacted] H[redacted] who (hearing 4 December 2004 page 15), after having told the Court that E[redacted] K[redacted] was present when her sister informed her of the decision to leave, explains that "however it took about 20 minutes for us to actually get out and leave".

This was because her father and her brother were not together and they spoke to some relatives.
"Then he left about 10 minutes later. 15 minutes later we took off'.
In another point of her statements (hearing 3 December 2004 page 13) she remembers that B[redacted] K[redacted] left the party 30 or 45 minutes before she and her family.
It can be concluded that B[redacted] K[redacted] had enough time to reach the crime scene.

Thus the discrepancies alleged in the appeals appear to be inconsistent.

38. A definitive assessment of the credibility of the statements given by B[redacted] K[redacted] before the Investigating Judge on 7 July 2002 can be made only after the comparison of them with corroborating (upon which see the next paragraphs) and contradictory evidence.
Contradictory evidence remained to be examined is that referred to the **alibi** of the defendants.

All the appeals claim that the challenged verdict did not consider in the right way the proposed alibi of the three defendants according to which they, together with all friends with whom they had just had the corn party, left M[redacted] K[redacted] compound in B[redacted] using five cars (a white M[redacted], a white O[redacted] C[redacted], a red V[redacted] P[redacted], a dark blue A[redacted] and a second A[redacted] dark green in color) and driving in a convoy through the C[redacted] E R[redacted] road reached D[redacted] and the Xh[redacted] T[redacted] bar, where they remained all the evening.
The time they left B[redacted] and reached D[redacted] (before 23:00), the fact that they drove together, the road chosen which is different from that of the murder, the fact that they arrived together in D[redacted] and that remained there together would not have been considered by the challenged verdict, which therefore would be wrong.

It must be noticed that the versions given by the many persons who participated to the corn party differ from each other on some important points about the travel from the place from the corn party to D[redacted] and that these discrepancies don't sustain the proposed alibi.
P[redacted] Sh[redacted] M[redacted] (hearing 27 July page 17) stated to have been in the car driven by Xh[redacted] K[redacted] (red VW P[redacted]), theirs was the last car of the convoy.
I[redacted] D[redacted] (hearing 19 October 2004 page 14) stated to have been in the car of Z[redacted] K[redacted] (A[redacted] dark, black or blue), together with P[redacted] R[redacted] M[redacted], he remembered without being completely sure that they were the last car of the convoy behind that of F[redacted] K[redacted].
F[redacted] K[redacted] (hearing 27 January 2004 page 27) stated to have left the place of the corn party in his car (A[redacted] dark green) together with F[redacted] H[redacted], their was the last car of the convoy.
F[redacted] H[redacted] (hearing 14 September 2004 page 35) stated to have been in the car with F[redacted] K[redacted], they were the last car of the convoy.
Nonetheless they were the first ones to reach Xh[redacted] t[redacted] bar, a short time before the others.

Asked if at any time he and Florim were leading the convoy or if they changed their route other than the convoy he answered: no (page 50).
Xh[redacted]K[redacted] (hearing 3 November 2004 page 15) remembered that the first car was driven by Z[redacted] K[redacted], the last by F[redacted] K[redacted], Xh[redacted] car was the penultimate.
E[redacted] G[redacted] said (hearing 13 October 2004 page 38) that B[redacted] R[redacted] was driving the first car.
This Court notices that the above mentioned statements don't support the alibi of the defendants because it is not clear how the convoy was composed, what were the first and the last car and above all how was it possible that a car which allegedly left for the last one (F[redacted] K[redacted] A[redacted]) arrived for the first one without overtaking the others or getting a different road.

The defendants claim to have been always together during the travel to D[redacted] composing a convoy of five cars.
On the contrary it can be noticed that some evidence, already taken into consideration by the first two judgments, deny this point of the alibi of the defendants.
Witness F[redacted] H[redacted] admitted to have arrived in front of the Xh[redacted] t[redacted] bar together with F[redacted] K[redacted] as the first ones and that the others arrived only some minutes later.
This witness (hearing 14 September 2004 page 15) was asked about the time the convoy left the place of the corn party in B[redacted] and answered that it was close to 11:00 p.m.
He was confronted with his previous statements where he had mentioned different times from 22:30 (Police statement 27 August 2001) to 23:30 (Police statement 10 July 2002).
He was then remembered to have stated to the Police (statement of 12 July 2002) "I said everything I know concerning the case of date 20.08.2001. I can only guarantee only F[redacted] K[redacted] because I was all the time with him and for the others I cannot guarantee if they did or did not commit this crime".
To this observation F[redacted] H[redacted] replied to be able to guarantee for F[redacted] K[redacted] because they were together all the time and "I cannot speak about other people because there were other things on which they insisted on me saying but I wasn't there and I didn't know what happened. There were four or five cars and I wasn't following what every car was doing" (hearing 14 September 2004 page 16).
Furthermore F[redacted] H[redacted] remembered that when he and F[redacted] K[redacted] arrived at Xh[redacted] T[redacted] bar he saw his brother S[redacted] H[redacted].
He was confronted with his Police statements dated 10 July 2002 where he had said: "when we entered the t[redacted] bar I saw only A[redacted] KPS and he was in uniform, after 5 minutes my brother S[redacted] and another of his colleague": and confirmed this statement (hearing 14 September 2004 page 17).
About the time of the arrival of the others F[redacted] H[redacted] spoke about a short time or some minutes.
He was repeatedly confronted with his previous statements: before the Police on 12 July 2002 he had said that "Z[redacted] K[redacted], I[redacted] D[redacted] and P[redacted] M[redacted] came there immediately after us" whereas B[redacted] R[redacted], A[redacted] R[redacted], A[redacted] K[redacted], E[redacted] G[redacted] and Xh[redacted] K[redacted] arrived "5 or 10 minutes later".
F[redacted] H[redacted] replied that they arrived after him and F[redacted] K[redacted] without being able to be precise on the minutes (pages 18 and 37).

His brother, witness S[redacted] H[redacted] (hearing 5 October 2004 pages 8, 11, 16, 17, 18, 19) stated to have left his home at 11:00 or 11:10 p.m., to have arranged a meeting for a coffee with a colleague, to have parked his car and to have seen his brother F[redacted] and F[redacted] K[redacted] in a car or just gone out of the car on the street.
S[redacted] H[redacted] went to buy cigarettes, 4 or 5 minutes after having parked his car he met his colleague M[redacted] and 3 or 4 minutes after this meeting the two of them entered Xh[redacted] T[redacted] bar.
In the bar he saw his brother F[redacted] and F[redacted] K[redacted] together with Z[redacted] K[redacted] and P[redacted] M[redacted], all of them were putting together some tables.
When he first saw his brother and F[redacted] K[redacted], the witness did not see B[redacted] R[redacted] but Xh[redacted] K[redacted].
In the bar S[redacted] H[redacted] sat together with M[redacted], at another table was sitting another colleague A[redacted] K[redacted].
Some time later he and his colleagues received a request of help and left the bar.
At the time he left, S[redacted] H[redacted] remembered that in the bar were present among others B[redacted] and A[redacted] R[redacted]
While he was sitting in the bar, he firstly saw B[redacted] R[redacted] in a shop close to the bar, buying some food.
S[redacted] H[redacted] was confronted 1) with his Police statements dated 12 July 2002 when he had said: "while we were talking at the separate table with my colleague H[redacted] M[redacted] approximately 7 to 8 minutes passed when the other part of the group arrived. B[redacted] R[redacted], A[redacted] R[redacted], A[redacted] K[redacted], Z[redacted] K[redacted], B[redacted] K[redacted], J[redacted] K[redacted] and the others" and 2) with his statement before the Investigating Judge (26 November 2002 page 2) when he said: "when I gave my first statement I cannot visualize the time, after that statement I was thinking about that and used my logic and came to the conclusion that B[redacted] R[redacted], A[redacted] R[redacted], A[redacted] K[redacted], Z[redacted] K[redacted], B[redacted] K[redacted], J[redacted] K[redacted] and the others came about 8 minutes after me in the tea bar. I am not sure about Z[redacted] K[redacted], I am sure about the other names".
To this confrontation H[redacted] answered he did not remember to have said to the Police that he had seen that they "arrived" but that after 7 or 8 minutes he was sitting in the bar speaking with his colleagues he "saw" the others in the bar.
He was confronted with another passage of his statements before the Investigating Judge when remembered: "I don't know from where they came when I saw the above mentioned suspects coming into the bar after me".
He replied to have noticed the presence of the others in the bar.
Witness H[redacted] M[redacted] (hearing 6 October 2004) remembered to have reached the Police station of D[redacted] at 23:00, to have then met S[redacted] H[redacted] and to have entered the bar together with the latter, while at the bar he saw 5 or 6 persons putting a couple of tables together.
After some minutes (3 or 4) other 4 or 5 persons arrived on foot and joined the first group.

The statements of S[redacted] H[redacted] confirm those of his brother F[redacted] on the point that S[redacted] and his colleague M[redacted] entered the Xh[redacted] T[redacted] bar some minutes after F[redacted] and F[redacted] (F[redacted] speaks of around 5 minutes).

The two statements are consistent to each other on the fact that the others, among them B[redacted] and A[redacted] R[redacted] and A[redacted] K[redacted] arrived some minutes later (S[redacted] remembers a time between 7 and 8 minutes after his arrival, F[redacted] mentions 5 to 10 minutes after his own arrival). H[redacted] M[redacted] has confirmed that a first group was already in the bar whereas a second group arrived later on.
Considering:

1) the starting time of the narration of S[redacted] H[redacted] (a time between 23:00 and 23:10 when he left his home),
2) the time he spent to reach the centre of D[redacted] where he saw his brother F[redacted] and F[redacted] K[redacted] (he indicated to need generally a time between 10/15 minutes, page 41),
3) the time S[redacted] H[redacted] needed to meet his colleague M[redacted] after having parked the car (4 or 5 minutes),
4) the time the two of them needed to go to the bar (3 or 4 minutes)
5) and finally the time the defendants reached the bar after S[redacted] H[redacted] (7 or 8 minutes)

it can be concluded that the claim of the defendants to have arrived in D[redacted] and at the bar all together and before the time of the shooting doesn't stand.

It can be added that the defendants stated that at their arrival at Xh[redacted] bar S[redacted] H[redacted] and his colleagues were already there.
They claimed that both F[redacted] and S[redacted] H[redacted] were lying but this was not proved.

F[redacted] K[redacted] has remembered that by the return he and F[redacted] H[redacted] were on the last car of the convoy.
Just before leaving the place of the corn party he met B[redacted] K[redacted] who informed him about his wedding and invited him to join his party.
F[redacted] replied not to have time, drank a little and in order to honor him pulled out his gun and shot five times in the air.
This episode, which obviously delayed the leaving from the corn party was not noticed by other participants (see i.e. E[redacted] G[redacted] P[redacted] R[redacted] M[redacted], Xh[redacted] K[redacted]) despite their assumption to have been together all the time.

E[redacted] G[redacted] (hearing 13 October 2004 pages 24 and 31) stated to have been in the car (white M[redacted]) driven by B[redacted] R[redacted] and to have given his own car (white O[redacted] C[redacted]) to A[redacted] R[redacted] and A[redacted] K[redacted]
A[redacted] drove the car and had drunk maybe more than 20 beers.
According to E[redacted] G[redacted], there was not any particular reason why he was in the car of B[redacted] and let his own car to A[redacted]
This narration appears to be little reliable because there was no reason for E[redacted] G[redacted] to be in a car different from his own and it could be dangerous to let his own car to a person, A[redacted], who had drunk so much.
It can be recalled that N[redacted] L[redacted] (hearing 23 November 2004 pages 21, 22) saw A[redacted] R[redacted] driving the white M[redacted] and did not see any passenger on that car[3].

[3] On Nazmi Leku's testimony see paragraph 42.

Finally it must be noticed that the alibi of the defendants is given by the statements of the defendants themselves or of persons who are related to them by links of family, friendship or common belonging to a military corps.
All this allows doubts on their sincerity and will to co-operate in the investigation.

The above mentioned elements don't allow this Court to consider as proven the alibi of the defendants 1) as to their arrival at the Xh[redacted] T[redacted] bar all together and 2) as to the moment of their arrival at the bar at a time which would be incompatible with the presence of the appellants at the crime scene when the murder happened.

39. It can be concluded that the above mentioned reasons, linked to the motives of his confession, to the accuracy and consistency of his statements (see point **III.34**), to the absence of significant discrepancies (see points **III.35 – 37**) and to the inconsistency of the alibi of the appellants (see point **III.38**) confirm the credibility of the statements given by B[redacted] K[redacted] before the Investigating Judge on 7 July 2002.
As stated already by the First and the Second Instance Courts his statements find also important corroboration in other evidence which confirms either his general credibility and the specific points of his narration related to the involvement of the three appellants in the murder.
It must be noticed that, although important, external corroboration represents only something which, both logically and legally, confirms the credibility of B[redacted] K[redacted] after that his credibility has already been demonstrated by the above mentioned elements.
In other words the statements of B[redacted] K[redacted] – because found credible – ground already by themselves his own responsibility and that of B[redacted] R[redacted], A[redacted] R[redacted] and A[redacted] K[redacted] for the charged criminal offences.

40. The Second Instance Court found a first corroboration to the statements of B[redacted] K[redacted] in those of P[redacted] H[redacted].
The statements of the victim is used to confirm the presence of B[redacted] K[redacted] at the crime scene because both of them say that in the middle of the shooting it was heard the screaming of a girl (P[redacted] H[redacted]), which was a detail that could be known only to a person present on the spot.
The Second Instance Court found a second point of contact between the statements of these two persons referring to the slowing down of the car of the victims by approaching the bridge.

The appeals challenged this point in a very generic way (see appeal of attorney V[redacted] B[redacted] pages 9 and 21) claiming that the two statements were not similar.
This Court shares the opinion of the Second Instance Court because the narration of B[redacted] K[redacted] (statements of 7 July 2002 page 3) and P[redacted] H[redacted] (statements of 14 October 2002 pages 9 and 10) match and therefore support each other in the part referring to the screaming of the girl "in the middle of the shooting" (H[redacted] page 10), that means that the shooting continued after her screaming, exactly as narrated by B[redacted] K[redacted]

The appeal of attorney I[redacted] D[redacted] (page 21) challenges the statements of P[redacted] H[redacted] on another point related to the car and the persons inside it, which approached the car of the victims few minutes after the assault.
This point was already accepted by the Second Instance Court and there is no reason to change its assessment.

It can be added that not only the slowing down of the car of the victims as narrated by B[redacted] K[redacted] found corroboration in the statements of P[redacted] H[redacted], but also the position the car reached after the shooting – just at the exit of the bridge as described by K[redacted]– was confirmed by the photos of the crime scene.
As correctly concluded by the Second Instance Court these elements confirm the presence of B[redacted] K[redacted] at the crime scene and his participation in the crime.

41. The reliability of the statements of witness MB.
The first two judgments assessed the statements of MB as reliable.
The Second Instance Courts (pages 24 and 25) used them as corroboration of the statements of B[redacted] K[redacted] in order to ground the responsibility of B[redacted] R[redacted] for the murder of H[redacted] family.

The appeals challenge the reliability of the statements of MB because:
- of reasons of revenge against B[redacted] R[redacted] (see appeal of attorney H[redacted] M[redacted] pages 5, 9, appeal of attorney I[redacted] D[redacted] page 27, appeal of attorney V[redacted] B[redacted] pages 7, 8, 10, 22, 23);
- of the fact that her testimony was indirect, she only supposed but could not demonstrate the content of the confidence received by B[redacted] R[redacted] (appeal of attorney V[redacted] B[redacted] pages 23, 24).

This Court does not share the claims of the appellants for the following reasons.
- It must be observed that MB was not – both legally and practically – an "anonymous" witness, even though the first two Courts address her on this way.
Legally, the ruling dated 28 April 2004 makes application of Sections 2 and 3 of UNMIK Regulation 2001/20, which are referred to the Petition (Section 2) and to the Protective Measure for injured Parties and Witnesses (Section 3).
That ruling did not apply Section 4 which refers to the Order for Anonymity.
Among the protective measures allowed by Section 3 paragraph 1 there is the omission of names (item a) and the assignment of a pseudonym (item d).
The ruling decides that the name of the witness shall not be disclosed and that he will be identified only by initials.
Thus the reference to the anonymity of this witness in the first two judgments is not precise because she was a "protected" not an "anonymous" witness.
Practically, MB was well known not only to B[redacted] R[redacted], with whom she had a relationship, but also to A[redacted] K[redacted] who testified about this relationship.
It can here be added that Section 4 paragraph 2 item d of UNMIK Regulation 2001/20 prescribes that "the need for anonymity of the witness or injured party to provide justice outweighs the interest of the accused in knowing the identity of the witnesses in the conduct of the defense".

But in this case the defense of B[redacted] R[redacted] was not limited in any way by the pseudonym given to this witness, because the defendant knew her identity very well.

- It was claimed in the appeals that B[redacted] R[redacted] and MB cohabited.
This is not sustained by the evidence indicated by the appellants themselves.
A[redacted] K[redacted] (hearing 14 January 2004 page 23) stated to the Investigating Judge and then at the trial that this girl and B[redacted] R[redacted] had an adventure, she was with B[redacted] R[redacted] not many times.
K[redacted] had a bar for a period of one or one and a half month in the year 2001.
He gave the keys of his bar to B[redacted] and the girl so that they could spend the night together.
From the verdict of the District Court of Pristine dated 20 May 2002 and related to the divorce of B[redacted] R[redacted] and R[redacted] R[redacted] Sh[redacted] is to understand:
- that they got married on 2 April 2001;
- that they divorced on 20 May 2002 in mutual agreement;
- that both stated that the marital relations between them in the beginning were good, but later on deteriorated to such an extent that made impossible the joint living between them.
B[redacted] R[redacted] (hearing 27 May 2004 page 35) stated to have had a relation with MB since the beginning of June 2001 to the beginning of January 2002 when they broke up.
From the above mentioned evidence it is not possible to conclude that B[redacted] R[redacted] and MB cohabited because during their relationship R[redacted] was still married and lived with his family.
Moreover the possibility to spend a couple of nights together in a bar or elsewhere, within a very short period can not be defined as cohabitation.

- The appeals remember that, according to witness S[redacted] F[redacted] (hearing 24 January 2005), MB wanted to marry B[redacted] R[redacted] and wanted him to get divorced from his wife. In one occasion she told B[redacted] R[redacted]: "marry me, otherwise you will have troubles".
Moreover, at the trial MB has admitted to have had problems with B[redacted] R[redacted]
Appeal of attorney V[redacted] B[redacted] claims that MB tried to force B[redacted] R[redacted] to get married with her, but she did not reach her goal because of the fact that B. R[redacted] was a married person and adds to be "quite logical" that a girlfriend with a conflict of interest could try at any time to get revenge for the fact she didn't become his wife.

In her statements (hearing 27 May 2004) MB explained to have had a relationship with B[redacted] R[redacted] but after some time they had some problems because she wanted to work in D[redacted] but B[redacted] didn't accept this.
She tried to break up with him and he threatened her by saying he would kill her, he slapped her.
Their relationship ended.
Later on MB was not informed that B[redacted] R[redacted] had divorced.
She didn't go voluntarily to the Police to give statements about B[redacted] R[redacted] but was called by the Police in November 2002.

After her statements before the Investigating Judge on 6 November 2002 she was threatened by A[redacted] R[redacted] in order to let her change her testimony.
At that time B[redacted] R[redacted] was already in detention.

The first two judgments disregarded this claim of the defense on the base of an identical reasoning: "first there is no explanation as to what was meant by "trouble". Second, S[redacted] F[redacted] is unable to recall what year she may have said that, much less the month, week or day" (judgment of second instance page 25).
This Court shares the assessment of the first two courts because the term "trouble" appears to be too generic to involve a blackmail before a Court regarding a charge of murder.
To this can be added that 1) the time between the end of their relationship (January 2002) and her statements before the Police (November 2002), 2) the fact that she didn't go voluntarily to the Police but was summoned and 3) the circumstances that at that time B[redacted] had already divorced and was in detention did not sustain the suspect of a revenge by MB.
At the moment of her statements she cared so little about B[redacted] R[redacted] not to be even interested to know if he was still married or not.
By then their relationship was over for a long time.
She did not go voluntarily to the Police in order to blackmail B[redacted] and take revenge on him.
On the contrary she was summoned by the investigators and narrated what she knew, referring what B[redacted] had told her and without trying to exaggerate or to refer details not fallen under her direct perception.
Despite of the threats she received after her statements, she maintained her testimony.
At the time of the threats A[redacted] R[redacted] was still free, in fact he was arrested on 31 December 2002.
All these elements exclude any will of revenge by MB.

- This Court deems as not grounded the claim of the appeals related to the insufficiency of the testimony of MB to demonstrate that in his confidence about the murder B[redacted] R[redacted] was speaking the truth.
MB referred to have spoken to B[redacted] about the murder immediately after it and on phone, she asked him if he was the murder and he interrupted immediately the call, recalled her from another phone whose number did not appear and reproached her for the lack of prudence ("are you normal? How can you say something like that to me over the phone?").
On that occasion B[redacted] was "nervous and aggressive".
Secondly he gave her different details as: "we will kill all spies", adding that H[redacted] H[redacted] was a spy during the war and "it could not be much longer for H[redacted]".
Some time after the murder B[redacted] told her to have killed H[redacted] family along with someone else ("I will kill you as we killed H[redacted]").
He explained to her that he could not kill only H[redacted] because the latter was in the car with his family and the survivors could have recognized the perpetrators.

It must be considered that these confidences were made by B[redacted] R[redacted] to MB during their relationship, that means within January 2002.
At that time B[redacted] K[redacted] had not yet given his statements about the murder and the number of the perpetrators (4 July 2002).
Thus, only who was at the crime scene was able to refer to MB that the material perpetrators were more than one.
This detail matches with the statement of B[redacted] K[redacted] and with the ballistic expertise.
H[redacted] H[redacted] had worked in the Police with the Serbian, therefore he could be deemed a "spy".
After her statements MB was threatened in order to let her change her testimony.
All this convinces of the sincerity of the confidences made by B[redacted] R[redacted] to MB.

- The statements of B[redacted] K[redacted] demonstrate the responsibility of B[redacted] R[redacted] for the charged criminal offence.
They are confirmed by the coinciding statements of MB and all other credible evidence, like the ballistic expertise.
The demonstration of the responsibility of B[redacted] R[redacted] goes beyond any reasonable doubt.
On this point the conclusion of the Second Instance Court must be accepted and sustained by this Court.

42. The challenged verdict (pages 25 – 27) grounds the responsibility of A[redacted] R[redacted] and A[redacted] K[redacted] on the following evidence:
- from the testimonies of N[redacted] K[redacted] P[redacted] R[redacted] M[redacted] F[redacted] H[redacted] and E[redacted] G[redacted] it results that B[redacted] R[redacted], A[redacted] R[redacted] and A[redacted] K[redacted] were in the K[redacted] yard at the corn party and that they left together with the others in a time between 22:00 and 22:30;
- thus the three appellants were together immediately before the shooting, left the corn party together and did so at such time that enabled them to be at the crime scene before H[redacted] family arrived;
- all these people left K[redacted] yard no more than 15 or 20 minutes before H[redacted] H[redacted] and his family left the wedding party;
- thus B[redacted] R[redacted], whose responsibility was established on the base of other and independent evidence (that is the statements of B[redacted] K[redacted] and of MB), had not enough time in order to reach the place of the ambush unless he went by car;
- also the other participants in the ambush had to drive together from the corn party to the crime scene;
- witness N[redacted] L[redacted] confirms this hypothesis because he saw the convoy of five cars passing in front of his home <u>before</u> the shooting;
- since the house of N[redacted] L[redacted] is located at a distance (800/900 meters) from the crime scene that can be traveled by car within few minutes the Second Instance Court concluded that this convoy had been used by B[redacted] R[redacted] to reach the wooden bridge;
- the same conclusion was adopted also for A[redacted] R[redacted] and A[redacted] K[redacted] because they were all the time together with B[redacted] R[redacted] and with the latter were transported by the same convoy and dropped off at the crime scene.

In other words the Second Instance Court finds a corroboration to the accuse moved by B[redacted] K[redacted] in the fact that A[redacted] R[redacted] and A[redacted] K[redacted] traveled together with B[redacted] R[redacted] and had the concrete possibility to be dropped off at the crime scene with him;
- as particularly to A[redacted] K[redacted] the Second Instance Court finds that it is proven that he was part of the ambush, whereas the absence of shells from a third weapon doesn't diminish the credibility of B[redacted] K[redacted] and the responsibility of the appellant.

The appeals challenge this point (appeal of attorney H[redacted] M[redacted] page 6, appeal of attorney I[redacted] D[redacted] page 27, appeal of attorney V[redacted] B[redacted] page 15) claiming:
- a mistake of the Second Instance Court in the assessment of the time needed by the defendants to travel the distance (800/900 meters) from the house of N[redacted] L[redacted] and the crime scene in a time compatible with their participation in the ambush;
- the mistake made by the challenged verdict, where it does not consider that N[redacted] L[redacted] did not see the cars of the defendant on the wooden bridge when he arrived there with his wife and his daughter few minutes after the shooting.

This Court deems both objections as ungrounded.
Actually the three defendants had the concrete possibility to be at the crime scene on time to take part in the ambush.
Basing on the statement of N[redacted] L[redacted] (hearing 23 November 2004 page 17) it can be noticed that he saw the convoy in front of his house.
The distance from his house to the wooden bridge (800/900 meters) is such that could be traveled within few minutes.
In order to be clearer it can be noticed that 1 Kilometer is traveled:

- by a car with a speed of 60 kph in 1 minute;
- by a car with a speed of 30 kph in 2 minutes;
- by a car with a speed of 20 kph in 3 minutes;
- by a car with a speed of 10 kph in 6 minutes;
- by a car with a speed of 6 kph in 10 minutes.

6 kph appears to be a speed which can be easily kept also on foot.

N[redacted] L[redacted] narrated to have seen the convoy approximately 25 or 30 minutes before hearing the shooting (page 29).
He explained that he saw the convoy while he was opening the gate of his yard.
After this he went to his car, noticed that the car had a flat tire, tried to pump it, observed that the pumping was to no avail then substituted the tire.
These operations took him 15 minutes (page 31).
Then he returned in his house, where his wife was waiting for him in order to start to prepare their daughter, who had to be brought to the hospital.
The house was without electricity and to prepare the child took 15 to 20 minutes.
During the preparation of the child N[redacted] L[redacted] heard the shooting (page 17).
Then he, his wife and the child entered their car and went towards the hospital of D[redacted] driving through the road of the wooden bridge, where they found the car of the victims with the holes of the bullets.

N[redacted] L[redacted] turned his car and reached the hospital through the other road, passing by his house.
When he finally returned home from the hospital, he saw the lights of the police cars.

It must be added that Xh[redacted] K[redacted] (hearing 3 November 2004 page 14) has explained that in the evening of 20 August he had left his T[redacted] bar and went to the corn party traveling through the road of the wooden bridge.
When he returned to his bar he traveled through the C[redacted] E R[redacted] road.
Xh[redacted] K[redacted] explained that the road from D[redacted] G[redacted] to the road of the bridge was an asphalt road, whereas the C[redacted] E R[redacted] was not an asphalt road.
He added that both roads were in "normal conditions" and remembered it took to him 10 to 15 minutes when he went from his t[redacted] bar to the place of the corn party through the road of the wooden bridge and to have used 15 minutes approximately when he returned back through C[redacted] E R[redacted] road.
Obviously the distance from Xh[redacted] t[redacted] bar to the place of the corn party is longer than that from the house of N[redacted] L[redacted] to the wooden bridge.

It can be concluded that people who were in front of the house of N[redacted] L[redacted] 25 or 30 minutes before the shooting would be perfectly able to reach the wooden bridge in a time compatible with their participation in the ambush also in the case they had traveled slowly (20 kph = 3 minutes), very slowly (10 kph = 6 minutes) or even by the speed of a walking man (6 kph = 10 minutes).
And this conclusion is valid independently from the direction those cars had when N[redacted] L[redacted] saw them.
In fact that witness saw those cars only before going to check his own car, after that his attention was caught by other things.
He described that road as a "busy" road, used whenever someone wants to come to B[redacted] (page 24).

The second point of the appeals appears to be not grounded simply because 1) B[redacted] K[redacted] stated that the perpetrators abandoned the crime scene on foot, 2) N[redacted] L[redacted] remembered to have heard the shooting when he was still in his house and his wife was helping their daughter to put on clothes and that when he left his house it took him about ten minutes to reach the wooden bridge.
Thus the perpetrators had all the necessary time after the shooting in order to abandon the crime scene without being seen by N[redacted] L[redacted].

The claims of the appeals as to the responsibility of A[redacted] R[redacted] and A[redacted] K[redacted] are therefore without foundation.
Their responsibility is demonstrated by the statements of B[redacted] K[redacted]
Furthermore these statements find corroboration in the other elements mentioned already by the Second Instance Court: the two appellants were together with B[redacted] R[redacted] immediately before the shooting, they traveled together with him from K[redacted] compound towards the road of the wooden bridge, they had the concrete possibility to be at the crime scene together with B[redacted] R[redacted] and finally the two of them were again together with B[redacted] R[redacted] after the shooting in the Xh[redacted] T[redacted] bar.

The ballistic expertise confirms that the shooters were more than one.
As to A[redacted] K[redacted] the reasoning of the Second Instance Court must be shared because it is proven that he was part of the ambush, whereas the absence of shells from a third weapon doesn't diminish the credibility of B[redacted] K[redacted] and the responsibility of the appellant (see above point III.37).
All this goes beyond any reasonable doubt.

IV

43. The appeals claim the violation of article 378 LCP as to the sentencing because while the First Court imposed a punishment of 30 years imprisonment for four criminal offences, the Second Instance Court imposed the same punishment but only for two criminal offences.
Furthermore the aggravating circumstance of the insidious manner of the murder would be erroneous.

These points are ungrounded.
The First Instance Court applied article 71 paragraph 2 item 1 of PCCK in conformity with article 48 of CCSFRY, imposing as an aggregate punishment only the long term imprisonment of 30 years.
The Second Instance Court applied, more logically, article 30 paragraph 3 of KCL, which provides one unique (not aggregate) punishment from 10 to 40 years imprisonment if a person has committed "several premeditated murders".

The reasoning of the Second Instance Court appears to be correct, since in this case can not be applied a "long term imprisonment" (introduced by a law, PCCK, entered into force after the murder and less favorable for the defendants) but only the punishment of imprisonment.
Already for this reason articles 71 paragraph 2 item 1 PCCK and 48 CCSFRY are not applicable.
But there is more.
Article 30 paragraph 3 KCL unifies a plurality of murders in a unique criminal offence, for which is foreseen a unique (not aggregate) punishment, which was actually applied in this case.
This legal provision is special (lex specialis) in comparison to article 48 CCSFRY and article 71 PCCK and prevails on the latter.
By the Second Instance Court there was not any "reformatio in pejus" simply because the criminal offences for which the defendants were convicted did not vary, but were unified according to article 30 paragraph 3 KCL and punished only once with a penalty which had already been imposed for the first aggravated murder.
In fact the Second Instance Court affirmed the conviction of the defendants for the charge of murder aggravated by the insidious manner (art. 30 paragraph 2 item 1 KCL), which alone is already punishable (and had been concretely punished by the First Instance Court) with 30 years imprisonment.

The punishment for other murders was absorbed and included in the first punishment, according to article 30 paragraph 3 KCL.

The Second Instance verdict must be confirmed also on the second point.
It exists the aggravating circumstance of the insidious manner of the murder because the victims were ambushed and taken by surprise: this is an insidious way of assaulting people by definition.

V

44. The Judgment of the Court of Second Instance is affirmed in its entirety.

For this reason the costs of the proceedings of Third Instance will be borne by the four appellants.

According to article 50 of the CC SFRY, the time spent in detention on remand by each defendant is included in the amount of punishment.

With a separate ruling is decided about the detention on remand for each defendant, according to articles 353 and 387 LCP.

Dated this 16th day of September 2009.
API.-KZI No. 4/2009

Prepared in English, an authorized language.

International Presiding Judge
Emilio Gatti

International Recording Officer
Andrea Chmielinski Bigazzi

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International Judge
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Kosovo National Judge
Miftar Jasiqi

Kosovo National Judge
Feizullah Hasani

Legal Remedy

No appeal is possible against this Judgment. Only a request for the protection of legality is possible, to be filed with the court which rendered the decision in the first instance, within 3 months of the service of this decision (art. 451 – 460, 551 PCPCK).