SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 153/2008
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 12 January 2010 in the Supreme Court building in a panel composed of International Judge Gerrit-Marc Sprenger as Presiding Judge, International Judges Maria Giuliana Civinini and Emilio Gatti and Kosovo Judges Fejsullah Hasani and Tahir Rrecaj

And with Valentina Gashi as Court Recorder,

In the presence of the

International Public Prosecutor Theo Jacobs, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsel E[redacted]A. N[redacted] for the defendant B[redacted]K[redacted]

In the criminal case number Ap-Kz 153/2008 against the defendant:

B[redacted]K[redacted], born on [redacted], male, Kosovo national, Albanian ethnicity, last known residence in Kosovo [redacted] village (municipality of [redacted]), fathers name N[redacted], mother's name H[redacted] B[redacted], escaped from Dubrava Prison (Istog) on 30 November 2008 and since that time at large.

In accordance to the Verdict of the District Court of Peje/Pec (Kp No. 412/06), **the defendant was found guilty of the following criminal offenses:**

[i] Of committing the criminal offence of **Murder** of Kosovo Police Officers S[redacted] T[redacted] and I[redacted] H[redacted] contrary to Article 30, paragraphs 2 and 3 of the Criminal Code of the Socialist Autonomous Province of Kosovo (CC SAPK), conduct still punishable according to Articles 147 and 23 of the Criminal Code of Kosovo (CCK);

[ii] Of committing the criminal offence of **Attempted Murder** of Kosovo Police officer H[redacted] L[redacted] contrary to Article 30, paragraph 2 of the Criminal Code of the Socialist Autonomous Province Kosovo (CC SAPK), as read in conjunction with Article 19 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), conduct still punishable according to Articles 147, 20 and 23 of the Criminal Code of Kosovo (CCK);

[iii] Of committing the criminal offence of **Causing General Danger**, contrary to Article 157, paragraph 1 of the CC SFRY, conduct still punishable according to Articles 291 and 23 of the CCK:

[iv] Of committing the criminal offense of **Use of Unauthorized Weapons**, contrary to UNMIK regulation 2001/7, conducts still punishable according to Articles 328, paragraph 1 and 23 of the CCK;

[v] Of committing the criminal offense of **Unlawful Possession of Weapons**, contrary to UNMIK Regulation 2001/7, conduct still punishable according to Articles 328 paragraph 1, 23 of the CCK.

And was convicted:

To a longterm imprisonment of **27 (twenty-seven) years** for the above criminal act of Murder, according to Article 147, paragraph 11 of the CCK.

The Defense Counsel of the accused timely filed an appeal, dated 08 February 2008, which was registered with the Registry of the District Court in Peje/Pec on 26 March 2008.

Thus, the First Instance Judgment is challenged as for the first 4 (four) criminal acts, the accused was sentenced for as follows:

- The violation of essential provisions of the criminal proceedings
- The wrong and incomplete verification of the factual situation
- The violation of the criminal law
- The decision of imprisonment

In his appeal, the Defense Counsel proposes to either modify the appealed Judgment by freeing the defendant Bedri Krasniqi from the first 4 (four) counts of the indictment or annul the First Instance Judgement, especially it's first 4 (four) counts and return the case to the first instance level for retrial.

The OSPK, through International Public Prosecutor Deborah Wilkinson, submitted an opinion and motion on the appeal, dated 02 December 2008 and proposes to reject the appeal as being without merits and unfounded, pursuant to Article 423 of the KCCP.

Based on the written Verdict in case Ap.-Kz. No. 153/2008 of the District Court of Peje/Pec, the Supreme Court of Kosovo, following the deliberations on 12 January 2010, hereby issues the following:

VERDICT

Pursuant to Art. 25, par. 1, Art. 26, par. 1, Art. 385, Art. 391, Art. 420, par. 1, sub-par. 2, Art. 423 of the KCCP the appeal filed on behalf of the accused **B[redacted] K[redacted]** is hereby **rejected.**

B[redacted] K[redacted], born on [redacted], male, Kosovo national, Albanian ethnicity, last known residence in Kosovo [redacted] village (municipality of [redacted]), fathers name N[redacted], mother's name H[redacted] B[redacted] escaped from Dubrava Prison (Istog) on 30 November 2008 and since that time at large, for the criminal offences of murder, attempted murder, causing general danger, use of unauthorized weapons, and unlawful possession of weapons is found:

GUILTY

[i] Of committing the criminal offence of **Murder** of Kosovo Police Officers S[redacted] T[redacted] and I[redacted] H[redacted], contrary to Article 30, paragraphs 2 and 3 of the CC SAPK, conduct still punishable according to Articles 147 and 23 of the CCK;

[ii] Of committing the criminal offence of **Attempted Murder** of Kosovo Police officer H[redacted] L[redacted] contrary to Article 30, paragraph 2 of the CC SAPK, as read in conjunction with Article 19 of the CC SFRY, conduct still punishable according to Articles 147, 20 and 23 of the CCK;

[iii] Of committing the criminal offense of **Unlawful Possession of Weapons**, contrary to UNMIK regulation 2001/7, conducts still punishable according to Articles 328, paragraph 2 and 23 of the CCK;

[iv] Of committing the criminal offense of **Unlawful Possession of Weapons**, contrary to UNMIK Regulation 2001/7, conduct still punishable according to Articles 328 paragraph 2 of the CCK.

Consequently, the Supreme Court of Kosovo issues the following

SENTENCE

The First Instance decision of the Pejë/Peć District Court (Kp No. 412/06) dated 19 September 2007 is **partially affirmed**.

The count of Use of Unauthorized Weapons **is modified** into Unlawful Possession of Weapons, conduct still punishable according to Articles 328 paragraph 2 of the CCK.

The Court establishes that the Count [iii] of the First Instance Judgment and namely Causing General Danger **is absorbed** by Count [i].

The accused B[redacted] K[redacted]i **is sentenced** to a long term imprisonment of **27 (twenty-seven) years** for the above criminal act of Murder, according to Article 147, paragraph 11 of the CCK.

Pursuant to Art. 391, par. 5 of the KCCP, the sentence includes the time the accused has already spent in pre-trial custody from the 24 March 2006 until his escape from Dubrava Detention centre on 30 November 2008.

The **costs** of the proceedings will remain in charge of the appellant based on Article 121, paragraph 2 of the KCCP.

The decision on costs is based on Article 391, paragraph 1 items (6); Articles 99; 100, paragraph 2; 102 of the KCCP.

REASONING

Procedural History

1. On 24 November 2003, shortly before or after 08:00 hrs a.m., Kosovo Police Officers S[redacted] T[redacted], I[redacted] H[redacted] and H[redacted] L[redacted] were travelling along the Decane/Decani-Peje/Pec road when they were shot by one or more individuals who drove up besides them and speeded away after having fired several rounds of ammunition into the vehicle of the victims. As a result of the shooting incident, Kosovo Police Officers S[redacted] T[redacted] and I[redacted] H[redacted] died as a result of the gun-shot wounds they received, whilst Kosovo Police Officer H[redacted] L[redacted] sustained serious injuries, but survived the attack.

2. The Public Prosecutor of Peje/Pec issued a Ruling on Initiation of Investigation (ROII) dated 06 April 2004, against B[redacted] K[redacted], A[redacted] S[redacted] and M[redacted] B[redacted] for the reported crimes. The investigation was neither expanded nor suspended. On 08 October

2004, the Pre-Trial Judge of the District Court of Peje/Pec, acting upon request of the International Public Prosecutor issued an order for arrest and international wanted notice against the suspect B[redacted] K[redacted]. The suspect was found on 24 March 2006 in Prishtine/Pristina in the possession of a pistol "Beretta" caliber 9mm, but without a Weapons Authorization Card (WAC). On 27 March 2006, the Pre-Trial Judge imposed detention on remand against the suspect, which was extended periodically according to the law since then.

3. On 15 September 2006, the International Prosecutor issued an indictment against the defendant B[redacted] K[redacted] (PP. No. 185/2004), which was registered and filed with the District Court in Peje/Pec on 21 September 2006. Thus, the defendant was charged with the criminal acts of Murder (contrary to Article 30, paragraphs 2 and 3 of the Criminal Code of the Socialist Autonomous Province of Kosovo (CC SAPK), committed in co-perpetration; **Attempted Murder** (contrary to Article 30, paragraph 2 of the CC SAPK, as read in conjunction with Article 19 of the CC SFRY), committed in co-pertetration; **Causing General Danger** (contrary to Article 157, paragraph 1 of the CC SFRY), committed in complicity; **Use of Unauthorized Weapons**, contrary to UNMIK regulation 2001/7, committed in complicity and **Unlawful Possession of Weapons**, contrary to UNMIK Regulation 2001/7.

4. The indictment was confirmed by the International Confirmation Judge of the District Court of Peje/Pec on 15 December 2006.

On the same day, the International Confirmation Judge rendered a separate ruling on the inadmissibility of evidence originated from investigative actions carried out in 2006, long after the 6 (six) month expiry date of 06 October 2004, and the documents collected as a result thereof. Namely, the interrogation of the defendant B[redacted] K[redacted], the Prosecutor's request and issuance of an order for protective measures in respect to two anonymous witnesses, a Prosecutor's request for DNA expert analysis, a Prosecutor's request under Article 238 of the PCPCK, for the identification of the suspect through an extraordinary investigative opportunity, the extraordinary investigative opportunity hearing on 20 July 2006 before the Pre-Trial Judge and the testimony of witness #2 after a line up of six people during the said hearing.

On 15 February 2007, the Supreme Court of Kosovo dismissed the appeal of the International Public Prosecutor at the end of the appeals process for this regard confirming the Confirmation Judge decision.

5. The Main Trial commenced on 15 May 2007 and continued in altogether 10 (ten) sessions until 19 September 2007.

After the hearing of many witnesses during previous hearings, on 03 July 2007 the admission of the statement of witness "A" before the police was proposed by the Representative of the injured parties, since the witness did not appear in front of the Court even after compelling summons and lately was not found at all. The defendant and the Defense Counsel specifically told the Court that they would not need the opportunity

to inquire the witness, as foreseen under Article 156 paragraph 2 of the PCPCK. They agreed to have his statement read out into the minutes. The Court found that there was an exceptional justifiable circumstance within the provisions of Article 154 paragraph 2 of the KCCP, for it could not have been foreseen by the Confirmation Judge. The Prosecutor agreed that the evidence be admitted and by Ruling dated 03 July 2007, the panel ordered that the statements of witness "A" would form part of the file records.

6. With the same Ruling of the Court dated 03 July 2007, on the admission of evidence, the Court also made the following findings: i) According to Article 368 Paragraph 1, Subparagraph 3 of the PCPCK, following an agreement by the parties at the instant of the Defence Counsel, the interview of witness "B", the statements of witnesses A[redacted] H[redacted], S[redacted] F[redacted], V[redacted] H[redacted], N[redacted] L[redacted], I[redacted] B[redacted] and A[redacted] K[redacted] and the transcript of the audio interview of protected witness "B" of April 2006 would be read out into the minutes and that they would form part of the file records. ii) Moreover, following the request of the International Public Prosecutor for DNA expert analysis to the effect that owing to the provisions of Article 192 as read with Article 195 of the PCPCK, a DNA analysis cannot be carried out without a court order, there could be no limitation to the period within which a request of such an order can be made and in the absence of such a limitation, the court at every stage of the proceedings has both statutory and inherent power to issue an order regarding protective measures for a DNA analysis. Conclusively, the court found that the outcome of the order for DNA analysis could be admissible at any stage of the proceedings.

7. The defendant B[redacted] K[redacted] has been convicted on 19 September 2007 to 27 (twenty-seven) years imprisonment by Verdict of the District Court of Pejë/Pec (P. Nr. 412/06), dated 19 September 2007, for the crimes of:

- Murder of Kosovo Police Officers S[redacted] T[redacted] and I[redacted] H[redacted] contrary to Article 30, paragraph 2 and 3 of the CC SAPK, conduct still punishable according to Articles 147 and 23 of the CCK;
- Attempted Murder of Kosovo Police Officer H[redacted] L[redacted], contrary to Article 30, paragraph 2 of CC SAPK as read in conjunction with Article 19 of the CC SFRY, conduct still punishable according to Articles 147, 20 and 23 of the CCK;
- Causing General Danger, contrary to Art. 157, paragraph 1 of CC SAPK, conduct still punishable according to Articles 291 and 23 of CCK;
- Use of Unauthorized Weapons, contrary to UNMIK regulation 2001/7, conducts still punishable according to Articles 328, paragraph 1 and 23 of the CCK;
- Unlawful Possession of Weapons, contrary to UNMIK Regulation 2001/7, conduct still punishable according to Articles 328, paragraph 1 and 23 of CCK,

8. The defendant in fact pleaded guilty only to the charge set out in the 5th count. During his arrest on 24 March 2006, B[redacted] K[redacted] was in actual possession of and brought on his person outside his house, a pistol "Beretta" calibre 9mm, without any authorization (WAC). In the defendant's statement dated 25 March 2006 and his testimony before the Pre-Trial Judge on 27 March 2006, Krasniqi candidly admitted his possession of the said pistol.

9. Within the same judgment which convicted the defendant B[redacted] K[redacted] for the above mentioned crimes, the District Court of Pejë/Pec, pursuant to Art. 393, paragraph 5 of the CCK, with a separate Ruling rendered on 19 September 2007, extended the detention on remand of B[redacted] K[redacted] until the judgment would have become final. The Verdict has been notified to the defendant, the prosecution, the detention centre, and the Disctrict Court of Peje/Pec in its English and Albanian versions on 5 February 2008, and to the Defence Counsel of the defendant on 8 February 2008.

10. In the meantime, B[redacted] K[redacted] escaped from Dubrava Prison on 30 November 2008. On 1 December 2008, the Director of Dubrava Prison issued a Wanted Notice pursuant to Article 544, paragraphs 3 and 4 of the KCCP in relation to the escape.

11. The Appeal of the Defence Counsel dated and filed on 18 February 2008, was timely filed within the Peje/Pec District Court in accordance with Article 398, Par.1 and 399, Par. 1 of the KCCP.

The Office of the State Prosecutor of Kosovo filed its opinion and proposal dated 2 December 2009 within this Court, on the same day.

FINDINGS OF THE COURT

12. The Supreme Court did not find any grounds to challenge the First Instance Judgment nor violations of the law under Article 415 of the KCCP (Article 423 of the KCP).

A. Substantial violation of the provisions of the Criminal Procedure

I. ACCEPTABILITY OF WITNESS STATEMENTS CONSIDERED BY THE FIRST INSTANCE COURT AS EVIDENCE

1.) On admissibility of witness statements:

13. The Defense Counsel in his appeal has stressed that the First Instance Judgment was based on unacceptable evidence and therefore would concern Article 403, paragraph 1, sub-paragraph 8 and 12 and sub-paragraph 2, items 1-2 of the KCCP. The Court had violated Art. 156, paragraph 2 of the KCCP, because the evidence was not collected according to the law. The Court especially had considered the statements of witness "A" and protected witness "B" given to the police as well as the testimonies given by the witnesses A[redacted] H[redacted], S[redacted] F[redacted], V[redacted] H[redacted], N[redacted] L[redacted], I[redacted] B[redacted] and A[redacted] K[redacted] Their statements had been read out into the minutes, although the Defense had not agreed on that. The Defense had only agreed for them "being read during the court proceedings". Since this was not the case, the Defense had had no possibility to object the evidence. This in the first place would refer to the testimony of witness"A", who did not appear in front of the court at all.

14. After checking the minutes of the revant hearings, the Supreme Court of Kosovo finds that **there is no inadmissibility of witness statements** as claimed by the Defense Counsel.

15. Whilst protected witness "B" contrary to what the appeal claims for personally had stated in front of the First Instance Court on 27 June 2007 and thus the Defense had the possibilility to interrogate the witness and oppose his statement, the relevant provision for the admissibility of witness statements in general is Article 156, paragraph 2 of the KCCP, which provides as follows:

(2) A statement of a witness given to the police or the public prosecutor may be admissible evidence in court only when the defendant or defense counsel has been given the opportunity to challenge it by questioning that witness during some stage of the criminal proceedings.

16. Within the session held on 03 July 2007, the **Defense Counsel amongst others has proposed for the police statements of fifteen witnesses**, who never had stated in front of the court, *to be read for the minutes*. According to the minutes of the Court session dated 03 July 2007 (p.4), he in this context explicitly referred to the following witnesses:

KP Officers:

- *R[redacted] Z[redacted]*
- *G[redacted] K[redacted]*
- *S[redacted] F[redacted]*
- *M[redacted] B[redacted]*
- *B[redacted] A[redacted]*
- *R[redacted] S[redacted]*

Civilians:

- *A[redacted] H[redacted]*
- *V[redacted] H[redacted]*
- *V[redacted] H[redacted]*
- *S[redacted] Z[redacted]*
- *B[redacted] F[redacted]*
- *N[redacted] L[redacted]*
- *V[redacted] B[redacted]*
- *I[redacted] B[redacted]*
- *A[redacted] K[redacted] alias G[redacted]*

17. On request of the Presiding Judge, **the Defense pointed out to consider five out of these witnesses**, namely G[redacted] K[redacted]i, S[redacted] F[redacted]j, A[redacted] H[redacted]j, V[redacted] H[redacted]j and N[redacted] L[redacted]j **as *essential***, although it did not seem him crucial to hear any of them in front of the court (p. 5 of the minutes, dated 03 July 2007).

On the proposal of the Defense, the First Instance Court ruled on 03 July 2007 for the police statements of the witnesses Skender Fetahaj, Adem Haxhaj, Veton Haxhaj, Nimon Loshaj, Islam Berisha and Ali Kastrati to be admissible and read out into the minutes in order to *form part of the file records* (Ruling dated 03 July 2007 (KP Nr. 412/06), p.2). The police statements of the witnesses in question had all been taken immediately after the crime in December 2003 and therefore are not to be considered outside the investigation period, which ended on 06 October 2004.

18. It goes without saying that through his proposal the Defense Counsel has waived his right to interrogate and confront the said witnesses under Article 156, paragraph 2 of the KCCP. According to Article 368, paragraph1, sub-paragraph 3 of the KCCP, *... the testimony of witnesses ... may be read according to to a decision of the trial panel ... if the parties agree that the direct examination of the witness ... who has failed to to appear, ..., be replaced by reading the records of his or her previous examination.* The only possible understanding of the proposals of the Defense Counsel to read witness statements without hearing the witnesses themselves in front of the court is that the Defense Counsel thus representing the defendant has agreed to consider these statements without interrogating the witnesses directly again.

To say it in the words of the Public Prosecutor's opinion on the appeal, it deems frivolous that the Defense now pretents to claim for the inadmissibility of evidence; he himself has proposed to be considered by the First Instance Court before. On request of the Public Prosecutor, who had made this a condition for his consent, the Defense Counsel moreover had clearly confirmed in court to waive his right to appeal on this issue, thus saying: *"If I agree to have them* (the witness statements) *read into the minutes, why would I have to make an appeal?"* (Court minutes dated 03 July 2007, p.7).

19. Also, the **statements of protected witness "A"** were just read into the minutes of the Main Trial during the session dated 03 July 2007. Whilst this was done on the motion of the injured parties, it also reads clearly from the minutes of the session (p. 8-9) that the defendant had agreed to proceed in the said way. This is why the defendant and his Defense Counsel have waived their right to interrogate the witness directly in front of the Court as well.

2.) On the requirements of Article 368, paragraph 1 of the KCCP:

20. From the verbal explanations of the Defense Counsel during the session on 12 January 2010 the Supreme Court understands that the Defense is concerned about the fact that on 03 July 2009 the aforementioned witness statements have been considered to be part of the minutes, but without reading them physically and that this could be considered to be a violation of Article 368, paragraph 1 of the KCCP.

21. The Supreme Court finds that there is no violation of Article 368, paragraph 1 of the KCCP, which could lead to the squashing of the First Instance Judgment. The provision reads as follows:

(1) Except in cases provided for in the present Code, records containing the testimony of witnesses, the co-accused or participants who have already been convicted of the criminal offence as well as records and other documents regarding the findings and opinions of expert witnessesmay be read according to a decision of the trial panel only in the following cases:

1) *If the persons, who have been examined have died, become afflicted with mental disorder or disablility or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;*
2) *If the witnesses or expert witnesse refuse to testify at the main trial without lawful reasons or*
3) *If the parties agree that the direct examination of a witness or expert witness who has failed to appear, irrespective of whether he or she has been summond or not, be replaced by reading the records of his or her previous examination.*

Although the wording of the relevant provision as well as its systematical context under Chapter XXXIV, Section 7 (Presentation of Evidence) of the KCCP and especially a look on Article 364 of the law clearly show that in the first place a physical reading of the questionable testimony by the presiding judge is wanted, the Supreme Court considers that this was not needed in the case at hand and that the fact that this was not done, does not violate the law in a way that the Judgment must be sqashed. The purpose of Article 368, paragraph 1 of the KCCP is to make sure that all parties of a trial are getting aware of the contents and the specific importance of a witness statement, thus facing a proposal to consider the statement as being part of the minutes.

22. In the case at hand it clearly reads from the minutes dated 03 July 2007 that the Defense Counsel himself had proposed for the police statements of the witnesses G[redacted] K[redacted]i, S[redacted]r P[redacted]aj, A[redacted] H[redacted], V[redacted]a H[redacted] and N[redacted] L[redacted] to be read out into the minutes and that he at that time already knew them and was willing to read them loudly himself (Court minutes dated 03 July 2007, p.3). It illuminates from the same document (p.4) that he also had knowledge about the contents of the video recorded interview of protected witness "B". The Defense Counsel in this context clearly has pointed out that there was no need for him to have these documents read loudly in the Court, but to have them "seen as read into the minutes" only (p.4 and 5). It also becomes clear from the minutes that after the proposal of the Representative of the Injured Parties the question was discussed, whether or not the Defense Counsel would agree to the police statement of protected witness "A" to be read out into the minutes and that the Defense Cousel as well as the

defendant at that time had been aware of this statement (p.9). Since also the Prosecutor has made clear that he knew about the contents of the questionable evidence (p.5) and its consideration never was challenged by the Representatvive of the Injured Parties, it can be understood that all parties of the Main Trial have been aware of the evidence in question and its importance for the case. Therefore, the way of consideration of this evidence as done by the First Instance Court is covered by Article 368, paragraph 1 of the KCCP.

II. INADMISSIBILITY OF OTHER EVIDENCE CONSIDERED BY THE COURT DUE TO IT BEING OBTAINED AFTER THE TERMINATION OF INVESTIGATION

23. Finally, according to the appeal, the essential violation of provisions of the criminal procedure would occur in relation to the fact that the First Instance Judgment was based on evidence, which was collected in violation of Articles 220 and 225 of the KCCP, meaning although the pre-trial procedure was not extended and thus already terminated. Therefore, the rights of the Defense Counsel, as protected through Article 403, paragraph 1, sub-paragraph 2, items 1 and 2 of the KCCP, had been violated.

24. The Supreme Court of Kosovo in the first place finds that the relevant claims of the appeal are not substantiated at all. Therefore, it is neither possible nor needed for the appeal panel to go into any details in this context.

25. Notwithstanding this fact, it illuminates from the Rulings of the Confirmation Judge that the admissibility of every peace of evidence was carefully checked on a one-by-one basis. This clearly reads from the Confirmation Ruling dated 15 December 2006 as well as from the separate Ruling on inadmissibility of evidence, also dated 15 December 2006 (KP 412/06). Especially the latter rules clearly that the formal investigation period had expired on 06 October 2004 and that all evidence collected by the Public Prosecutor after that date is considered inadmissible due to the fact that the investigation period was not extended. Accordingly, none of this evidence was admitted at the trial.

26. Nevertheless, it deems necessary to focus on **the details of the expert opinion on DNA analysis**, which was requested and submitted after the investigation period already was over but considered to be admissible by the Main Trial panel. Whilst on 15 December 2006 the Confirmation Judge at the District Court of Peje/Pec ruled the Prosecutor's request for DNA expert analysis inadmissible due to the fact it was submitted after the investigation period had expired on 06 October 2004, the Main Trial panel of the First Instance Court was of a different opinion. By Ruling dated 03 July 2007, the Presiding Judge of the First Instance Court decided that the DNA request and analysis would be admissible evidence, since there was no limitation to the period within which a needed court order for DNA analysis can be requested,

according to Article 192 as read with 195 of the KCCP (Court Ruling dated 03 July 2007, p.4).

27. The Supreme Court of Kosovo, having checked the relevant parts of the case files finds that the request of the District Public Prosecutor of Peje/Pec to issue an order on DNA analysis is dated 01 September 2006, whilst the Order on DNA analysis of the Pre-Trial Judge at the District Court of Peje/Pec is dated 07 September 2006 and the DNA Examination Report (Ref.-No. 511-01-41-III/01-9402.NO of the Forensic Centre "Ivan Vucetic" within the Ministry of the Interior of the Republic of Croatia, was issued on 06 December 2006 and submitted to the Court after that.

In general it is crucial to say that indeed the law does not provide any clear decision whether or not the admissibility of the DNA analysis and its request and Court order is bound to the limits of the investigation period, as it was discussed between the Confirmation Judge and the Main-Trial President in the case at hand. It goes without saying that the investigation period, which is started with the public prosecutor's Ruling on Initiation of Investigation as soon as a reasonable suspicion for the commission of a criminal offence has been established, is limited to 6 (six) months – and in case of extension up to a maximum of altogether 18 (eighteen) months – of duration (Articles 220 and 225 of the KCCP). At the other side, according to Article 192 as read with Article 195 of the KCCP no DNA analysis ever can be made without being ordered by a judge.

The answer may be found in Article 220, paragraph 3 of the KCCP, which rules on the aim of the investigation as follows:

(3) The aim of an investigation is to collect evidence and data necessary for deciding whether to file an indictment or to discontinue proceedings and to collect evidence, which might be impossible to reproduce at the main trial.

On this background it can be understood that the timely limitation of the investigation period does not completely exclude the collection of new evidence after its expiry. This is even more relevant after an indictment was duely filed and thus the purpose of the investigation period was reached. Especially in case of a DNA analysis it can easily be imagined that an allegedly relevant DNA sample is collected during the course of proceedings, but long time after the investigation was closed. If in these cases the expiry of the investigation period would exclude the possibility of considering this kind of new and maybe decisive evidence, this would lead to the result that important parts of evidence simply would be cut off and cannot have been in the interst of the law maker.

28. In the case at hand, the indictment was filed on 15 September 2006, meaning after the DNA request was submitted to the Court and after the Court Order on DNA analysis was issued, but long before the DNA Examination Report was made and sent. However, since there was no positive result of the DNA analysis due to the fact that not enough DNA material was found, the question is of pure academic nature and

without any impact on the case at hand. Therefore, there is no need to decide on the above issue in the context at hand. It may be considered that irrelevant evidence does not affect a verdict at all, as it also clearly was said in the old law (Article 364, paragraph 1, item 8 of the Yugoslavian Law on Criminal Procedure (LCP).

III. INCOMPREHENSIBILITY OF THE ENACTING CLAUSE DUE TO IMPROPER CITATION OF CORRESPONDING CRIMINAL OFFENCE ARTICLES UNDER THE CCK

29. The appeal also claims that the enacting clause cannot be understood, because the quotations of the criminal acts and their legal qualification would be unclear. The enacting clause would refer as well to the relevant provisions of the CC SAPK as to the provisions of the CCK, although it would be impossible to apply both laws at the same time.

30. The review of the First Instance Judgment shows clearly that there is no inconsistency or incomprehensibility of the enacting clause, thus quoting provisions from the CCK and the CC SAPK at the same time and/or mixing them up. The Court in its Judgment has correctly stated *the legal designation of the act and the provisions of the criminal law applied*, as required by the relevant provision of Article 391, paragraph 1, sub-paragraph 2 of the KCCP.

Since the criminal acts in question have been committed on 24 November 2003, they thus have occurred before the Provisional Criminal Code of Kosovo (PCCK), which is now the CCK, has entered into force on 06 April 2004. Therefore, the applicable criminal law is the CC SAPK, which without exceptions and consequently has been applied and quoted by the First Instance Court and which also clearly can be read from the enacting clause of the challegend Judgment. It in this context may be underlined that of course the enacting clause also refers to the relevant provisions of the CCK, which are currently applicable thus setting the criminal acts in question under punishment also after 06 April 2004. However, it is clearly understandable that the First Instance Court does not mix provisions from criminal codes out of different periods, but just was interested to briefly point out that the criminal acts in question are still punishable under the now applicable law.

B. Erroneous and incomplete determination of the factual situation

I. ERROR OF THE FIRST INSTANCE COURT ON IT's FACTUAL FINDINGS

31. The main focus of the appeal lays on the validation of facts as being done by the First Instance Court. The Defense Counsel in his appeal discusses at

length his opinions and interpretations of various items of the evidence in a way which differs from those found by the First Instance Court. According to the Defense Counsel, the Court had not recognized many inconsistencies within and between a big numbers of witness statements, as in brief there are especially:

1. the involvement of an Audi car into the crime at all, since according to many witness statements the brand of the vehicle would differ between Audi and Mercedes;
2. even insofar the vehicle was clearly defined as an Audi, it could not be said, whether or not the Audi car that went towards the village of Raushiq was coming from the main road between Peje/Pec and Decan/Decani before, where the crime took place;
3. not all the shells found in the Audi (but only some of them) had been identical with the ones found in the crime scene, whilst some others had not been fired from an AK-47 machine gun and some might be of older age;
4. the defendant B[redacted] K[redacted] had not been inside the Audi, after the crime had happened; this would occur from the statement of KP Officer S[redacted] Z[redacted], who would know the defendant very well but had not recognized him while having met the Audi car immediately after the crime; as far as other witnesses (protected witnesses "B" and "A" as confirmed by KP Officer G[redacted] K[redacted]) had identified the defendant in a police photo album and qualified him as the driver or stated that other witnesses had done so, these identifications had either not been trustworthy or the witnesses themselves would not be reliaible;
5. the defendant never, neither on the day of the crime nor at any other time, had been driving a white Audi car but a dark blue one; as far as witnesses had stated the opposite (KP Officer R[redacted] B[redacted]), they would not be reliaible;
6. It had not been positively proven that the defendant Bedri Krasniqi ever had been inside the Audi car; a DNA sample as "the evidence of the century" had not been brought with a positive result; only one out of three fingerprints found at the trunk opener of the Audi car clearly was defined as from the left middle finger of the defendant, whilst the others not clearly even were stemming from him; this would be even more decisive since the crime scene and the building of the MOLIKA company as well as the place where the Audi car was found in the village of Rosuje had not been under full control of the police but allegedly been contaminated on 24/25 November 2003.

The only possible consequence for the Court to decide the case, according to the Defense, had been a decision *in dubio pro reo* as provided by Article 3, paragraph 2 of the CCK.

32. Having reviewed the minutes of the altogether 10 (ten) Main Trial sessions as well as the reasoning of the Judgment of the First Instance Court, the Supreme Court finds that none of the arguments of the Defense Counsel made on the issue are persuasive. The factual findings of the First Instance Court as well as its evaluations on the evidence are supported by coherent, sound reasoning and logic.

1.) The First Instance Court has taken a complete and sound scope of evidence, as follows:

33. **The evidence taken:** After the defendant on 15 May 2007 had pleaded "not guilty" to all the charges brought against him except the one concerning Illegal Possession of Weapons, the witness I[redacted] was heard. The witnesses N[redacted], R[redacted], J[redacted] and F[redacted] were interrogated in front of the Court on 22 May 2007, whilst on 23 May 2007 the witness R[redacted] gave his testimony. On 29 May 2007 the witnesses V[redacted], B[redacted], H[redacted], I[redacted] and S[redacted] testified before the Main Trial panel and on 26 June 2007 the witnesses I[redacted], I[redacted] and M[redacted] gave theire statements. On 27 June 2007 protected witness "B" was heard, whilst protected witness "A", although duely summoned, failed to appear. Nevertheless, his witness statement given to the police was read out into the minutes on 03 July 2007 on the proposal of the Representative of the Injured Parties, which all parties had agreed to, as elaborated before (point A.I. of this reasoning, p.9, item 19 and p.10, item 22). Finally, on 02 July 2007 the witnesses G[redacted] and H[redacted] were interrogated.

On 03 July 2007, Investigation Forensic Case file Nr. 03-369 (2003-DA-3581) that was already part of the court records was submitted as evidence at the instant of all the parties. Also, the defendant testified. Moreover, besides the reading out of the police statement of protected witness "A", all parties agreed for the video recorded interview of protected witness "B" as well as the police statements of witnesses A[redacted], S[redacted], V[redacted], I[redacted] and A[redacted] to be read out into the minutes, which was done as already pointed out before (point A.I. of this reasoning). Although the First Instance Court found the DNA request and expertise admissible, it was considered that there was no positive result in terms of DNA, due to the lack of sufficient DNA material.

2.) The First Instance Court has elaborated and evaluated evidence and based its opinion as follows:

34. **The type and shape of the car:** The witnesses I[redacted], F[redacted], R[redacted], S[redacted] as well as protected witness "B" and witnesses N[redacted], I[redacted] and A[redacted] have stated that immediatly after the shooting they saw an Audi of light color, which in most

of the cases was described as white, whilst the witness A K[redacted] has recognized it as light grey and the witness F Z[redacted] has defined the color as yellow. A white Audi with three people inside also was observed following the later victim S[redacted] T[redacted] by protected witness "A" on several occasions during the week, before the crimes had been committed. Only the witness V H[redacted], whose statement was found to be inconsistend with the forensic findings at the crime scene, had stated that the car, the shootings had been done from was a white/grey metallic Mercedes. This in the beginning was also the idea of witness A K[redacted] who later corrected himself telling that the car also could have been an Audi. According to the witnesses B P[redacted] and I J[redacted], they had met a young girl, when they were searching the perpetrators car on the road towards [redacted]. She also had observed a white Audi with one flat tyre, taking the road to Loxhe with a very high speed. The flat tyre also was confirmed by the witnesses S Z[redacted] and R B[redacted]

35. **The finding of the car:** The witness R B[redacted] finally found a white Audi 80 after the advice of the police patrol that was searching for the perpetrators car. The Audi was located 5 to 6 kilometers from Turjake village and secured by police tape. The witness J F[redacted] in this context confirmed that from a distance of about 30 meters he saw the white Audi and observed two armed people, who had come out and tried to push the car, after it had got stuck in the mud. Having in mind that a car cannot successfully be pushed without a driver being inside, he assumed that there was a third person sitting at the steering wheel. The witness was able to describe at least one of the persons outside more detailed. In this context also the witness N A[redacted], who confirmed 80 % of his police statement but did not say which 20 % would be wrong, pointed out that police found footprints around the car in the mud and that there was a cartridge in the aerea of the front seats of the car. Protected witness "B" finally identified the found white Audi from a police picture shown to him as the one, he had seen before driving away from the crime scene.

36. **The number and description of inmates:** The witnesses I B[redacted], R B[redacted], protected witness "B", N L[redacted] and A K[redacted] stated that there had been more than 1 (one) persons inside the car, the shooting was done from and they in parts gave a description of the inmates. Whilst I B[redacted] was of the opinion that there had been altogether 4 (four) people inside the car and after his observation the driver was a big blond with short and almost shaved hair, Ramadan Buqolli saw 3 (three) people inside the car and protected witness "B" recognized 2 (two) people sitting in the front of the car and alleged that another person could have been in the back. However, after protected witness "B" the driver and the other recognized person, both had shaved hair and were looking like young blondes, thus being between 23 and 25 years old and that they had had blue eyes. N L[redacted] described a young blond with shaved hair in the back of the car and A K[redacted] saw two

people in the front and one in the back, all of them about 170 – 180 cm tall and between 20 and 30 years old, with short hair. Although the witness in the beginning was talking about brown or black hair of the inmates, he later pointed out that he was not at all sure about their hair color.

37. **The identification of the driver:** Finally protected witness "B" had identified the driver of the car in a police photo album as being shown at picture no. 7, which is the picture of the defendant B[redacted] K[redacted]. In his police statement also protected witness "A" had identified the person at picture no. 7 of the same police photo album, thus the defendant B[redacted] K[redacted], as having been the driver of the white Audi car, which had three well identified persons inside and which the witness had observed several times during the week, before the murders happened. Only the witness S[redacted] Z[redacted], who had recognized two people sitting in the front seats of the Audi, has not identified B[redacted] K[redacted] as the driver, thus stating that he knew the defendant and would have recognized him. However, the witness made clear that a reconition was not possible to him, since he did not have the chance to see the faces. Finally, witness R[redacted] B[redacted] had stated that some months before the murders during the course of a traffic check he had stopped the defendant driving a white – or banana colored – Audi.

38. **The reliaiability of the witnesses:** The First Instance Court in this context considered the fact that some witnesses did not recall all details of their previous police statements anymore, when they were stating in front of the Court. However, witness I[redacted] B[redacted] pointed out that he had stated the truth in front of police and sticked to this statement. Also R[redacted] B[redacted] confirmed the contents of the evidence given to the police on 10 January 2004 and the signature below was his. In the same manner, the witness B[redacted] P[redacted] confirmed the contents of his statement given to the police on 23 December 2003 and on 10 February 2004 as well as the witness I[redacted] J[redacted] did in relation to his police statement dated 26 November 2003. Witness N[redacted] A[redacted] stressed that only 80 % of his police statements would be correct but refused to substantiate, which 20 % would not match his observations. Thus, the panel took into account only the totality of his evidence. Finally, protected witness "B" – after first having confirmed that in front of police he had told the truth – later completely denied the contents of his statements given to the police on 04 December 2003 and on 14 January 2004. He told that he had been maltreated by the police; in detail by them coming to his house without prior notice and that because of this his children had got scared. The Court on this background has interrogated KP Officer G[redacted] K[redacted] who had interviewed the protected witness "B". Witness Kelmendi amongst others has pointed out that after having taken the evidence he first had read out the statement to protected witness "B" point by point and then asked him to sign against each answer he gave.

39. **The finger print expertise:** The UNMIK finger print expert Nasko Lalev has stated in front of the Court and based on his written expertise. He pointed out that based on the fingerprint findings at the hatchback of the Audi 80 4 (four) fingerprint pictures had been submitted to him through the investigating Police Officer and that one of them, finger print A-2, was matched against the ten print data base of UNMIK, AFIS. On that occasion, the right middle finger of candidate APIS#KS008469 was found to be identical to the latent finger print, which was compared to the data of altogether 50 candidates. Thus it was found that the finger print belonged to the defendant, B[redacted] K[redacted].

40. **The alibi of the defendant:** The First Instance Court also has considered the statements of the defendant as well as of the Defense witnesses I[redacted] K[redacted], M[redacted] B[redacted] and Z[redacted] and G[redacted] S[redacted], who have underlined that any involvement of the defendant into the murders is most unlikely due to him having an alibi. Whilst the defendant had stated that on 24 November 2003, the morning when the crimes had been committed, he woke up between 07:00 and 07:30 hrs and then went in order to cut some wood, before he helped his cousins to construct their cow shed, the witness I[redacted] K[redacted] confirmed that on the questionable day the defendant was at his own place before 07:00 hrs in the morning, but that he had seen the defendant at approximately 07:00 hrs standing at his balcony and rubbing his eyes. Later he had been with him between 07:30 and 09:00 hrs. The witness I[redacted] G[redacted] who remembered the 24 November 2003 exacly, since it was the eve of Bajram, but did not have any memory to the Bajram eve of 2005, stated that he went to the house of the defendant between 06:30 and 07:00 hrs and that the latter had told him that his father had gone to Peje/Pec and the witness M[redacted] B[redacted] told that he had seen the defendant in front of his house between 07:00 and 07:10 hrs. Whilst the witnesses I[redacted] G[redacted] and M[redacted] B[redacted] just did not have any memory of the defendant ever having driven a white Audi car, the witnesses Z[redacted] and G[redacted] S[redacted] stated positively that B[redacted] K[redacted] sometimes was driving an Audi 80 of dark blue color. However, the First Instance Court found the statement of I[redacted] K[redacted] implausible in terms of material facts and the one of I[redacted] G[redacted] additionally internally inconsistent. The Court also found that the testimony of M[redacted] B[redacted] contradicted to some extent with the one of I[redacted] K[redacted] whilst the statements of Z[redacted] and G[redacted] S[redacted] would not preclude the fact that the defendant drove a white Audi as testified by other witnesses.

41. **The ballistic expertise:** Finally, the First Instance Court found that according to the Forensic Case File No. 03-369 (2003-DA-3581) shell cartride cases of 7.62 mm caliber found at the scene of the abandoned Audi were similar to shell cartridge cases of 7.62 mm caliber found at the scene of the murders and that it had been determined that the victims died of gunshot wounds caused by 7.62 x 39 mm caliber weapons.

42. Anyway, the Supreme Court of Kosovo finds that it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again. In the case *Runjeva, Axgami and Dema (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, the Supreme Court of Kosovo in this context has pointed out that *"appellate proceedings in the PCPCK rest on principles that is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact where its evaluation has been 'wholly erroneous' "*. This judication was set forth as well in the case of *Jeton Kiqina (Supreme Court of Kosovo, Ap.-Kz. No. 84/2009 dated 03 December 2009, p. 19).* Therefore, the Supreme Court of Kosovo for the details of the evidence taken and the evaluation of evidence as conducted by the First Instance Court referres to the reasoning of the First Instance Judgment.

II. FAILOR OF THE FIRST INSTANCE COURT TO ESTABLISH THE FACTS COMPLETELY BY NOT SUMMONING AND INTERROGATING ELEVEN WITNESSES PROPOSED BY THE DEFENSE

43. The Defense Counsel also stresses in the appeal that at least eleven witnesses proposed by the Defense had not been taken into consideration by the First Instance Court, but had been refused only once by written memorandum (P.Nr. 171/07, dated 26 March 2007). The list of witnesses the Defense referres to is as follows:

1. *N[redacted] L[redacted], village [redacted], date: 24/11/2003;*
2. *S[redacted] Z[redacted], village of [redacted], date: 24/11/2003;*
3. *B[redacted] F[redacted], village of [redacted], date: 24/11/2003;*
4. *V[redacted] B[redacted], village of [redacted] date: 24/11/2003;*
5. *I[redacted] B[redacted], village of [redacted] date: 24/11/2003;*
6. *B[redacted] B[redacted], village of [redacted], date: 24/11/2003;*
7. *R[redacted] Z[redacted], Police Officer to the prosecution of the suspected persons on 24/11/2003;*
8. *F[redacted] H[redacted], nurse in the village of Pobwrgjw, Decan/Decane, for the cars that were seen by her in the road segment Pobwrgjw-Carabreg during the week before the criminal act;*
9. *G[redacted] K[redacted], Police Officer, for (not-)intervening by Ragio Bytyci, in relation with the return of the documents of an AUDI car;*
10. *B[redacted] A[redacted], Police Officer, together with*
11. *M[redacted] B[redacted], Police Officer in relation with the stopping of an AUDI on 18/11/2003*

44. The Supreme Court has checked the relevant documents of the case file and especially the one on request for evidence dated 26 March 2007 (P. no. 171/07) the Defense Counsel referred to as well as the minutes of the First Instance Main Trial sessions on the proposals of the Defense Counsel to consider certain witness statements. Thus, it was found that out of the list, which was presented by the Defense Counsel's appeal all witnesses have been considered during the course of the Main Trial procedures, except from the proposed witnesses I[redacted], V[redacted] and B[redacted] B[redacted]. The witnesses G[redacted] S[redacted] and Z[redacted] S[redacted], who are not part of the questionable list but of the evidence request dated 26 March 2007, thus being proposed for the history of ownwership of the white Audi, have been heard in the Court on 27 June 2007. From the list, thus being point II. of the evidence proposal, the witness R[redacted] B[redacted] stated in front of the Court on 22 May 2007 and the witness J[redacted] F[redacted] was interrogated by the Court during the session on 23 May 2007. The personal interrogation of the other witnesses from the list or as an alternative the reading out into the minutes of their police statements was discussed on 03 July 2007, when the Defense Counsel had asked for the police statements of 15 witnesses to be read out into the minutes. Insofar, reference is made to the elaborations of the panel under point A. I. (p.8-9, items 16. and 17.) of this reasoning. Already in this context it was established that the Defense on request of the Presiding Judge declared that only five witness statements would be "essential", as pointed out above. These five witness statements were read out into the minutes, which the Prosecutor as well as the Defense Counsel agreed to.

45. The latter also sheds light on the fact that the witnesses I[redacted], V[redacted] and B[redacted] B[redacted] have not been considered by the First Instance Court. They have not even been proposed by the Defense Counsel, when he on 03 July 2007 was asked to point out the essential defense witnesses to the Court in order to be considered.

46. It moreover is not quite clear what the Defense Counsel refers to in the very context. Although the two provided witness lists (the one which was discussed on 03 July 2007 and the one which was submitted to the Court within the evidence request dated 26 March 2007) differ from each other, both of them identically refer to eight witnesses, as there are R[redacted] Z[redacted], G[redacted] K[redacted], M[redacted] B[redacted] B[redacted] A[redacted], S[redacted] Z[redacted], B[redacted] F[redacted], N[redacted] L[redacted] and I[redacted] B[redacted], but which most of them the Defense on 03 July 2007 has declared not to be essential.

47. As far as the second witness list now refers to witnesses, the Defense so far never had asked for during the First Instance Main Trial, as there besides the three witnesses from the B[redacted] family is namely F[redacted] H[redacted], the Supreme Court understands that the Defense now intends to introduce these witnesses into the procedure and to have them interrogated or at least their police statements read out into the minutes by the appeal panel. However,

since the appeal panel does not take new evidence as pointed out also during the opening of the session on 12 January 2010, there is no way to consider these newly proposed witnesses now.

C. Substantial violation of the Criminal Law

I. ON THE LEGAL CONDITIONS OF CO-PERPETRATION AND COMPLICITY

48. The Defense Counsel in his appeal also has stressed that the First Instance Court had wrongly qualified the criminal acts as committed in complicity, although the identity of the alleged co-perpetrators was not established. According to Article 22 and 23 of the CC SAPK, there won't be any neither co-perpetration nor assistance with unknown perpetrators.

49. The Defense does not cite any authority for his proposition that it is necessary to identify co-perpetrators in order to qualify an act as being committed in complicity under Article 22 of the CC SFRY.

The relevant Article 22 of the CC SFRY stipulates as follows:

If several people participate in a criminal act or in any way become associated as accomplicies, each of them will be punished according to the prescribed punishment.

Although there is not much more than this very poor legal definition, literature defines complicity under the CC SFRY as *"a conscious and willing act of associating with other participants, with intent of jointly accomplishing a certain deed"* (Ljubisha Lazarevic, Commentary of the Criminal Code of FRY 1995, 5th edition, "Savremena Administracija" Belgrade, p. 66, item (1) on Article 22 SFRY).

50. Without discussion, this definition requires a group of people, willingly co-operating with eachother in order to commit a crime. Of course, since criminal responsibility always necessarily is a personal one, all formal-objective as well as subjective theories on complicity, thus having impact on the quality of participation in a crime as a main perpetrator or just as an aider, also require a clearly defined person as an accomplice. The principle of individualization includes the person of a participant as well as the very act itself. Every other understanding easily could lead to a situation of criminal non-responsibility.

However, even considering the objective as well as subjective component of complicity as an act, being based on the will of the acting person (which the latter also requires a person behind the action), there at the

other side is no need for the investigating authorities or for the judge to know all perpetrators of a crime by personal data, if it can be established, in which way a crime was committed and if at least one out of a group of alleged perpetrators including his or her involvement into the crime can be defined. It goes without saying that the lack of information on other co-perpetrators cannot lead to the result that a person under reasonable suspicion of having committed a crime will not be prosecuted and/or sentenced according to the law.

51. In the case at hand there is no question that the crime was committeted not only by one but by at least two and maybe even three perpetrators. All witnesses, who have stated on the alleged perpetrators vehicle, have seen at least three persons inside the car. It is also without any serious doubts that necessarily there was close co-operation and sharing of the tasks between the different perpetrators. The First Instance Court suggests that – whilst one of the inmates of the vehicle was the driver, one or two other occupants of the car must have fired the weapon(s), whereas the driver was to bring the vehicle up to its target and made its getaway (First Instance Judgment dated 19 September 2007, p. 38). Based on those factual findings, the First Instance Court correctly evaluated that the criminal act was jointly committed by more than one person, but including the defendant B[redacted] K[redacted]. Even if the defendant was not the actual shooter, his participation in the act of commission – by positioning the vehicle in a way that the shooters could fire and then speeding away – demonstrated his liability as an accomplice under Article 22 of the CC SFRY. There is no legal requirement that the identity of other accomplicies be established in order to find a single defendant guilty of a criminal act as an accomplice, as long as the facts in the record support a finding that the criminal act was committed jointly.

52. The same would apply to the criminal act of aiding somebody elses deed, according to Article 24 of the CC SAPK, since aiding is recognized as another possible form of complicity (Ljubisha Lazarevic, Commentary of the Criminal Code of FRY 1995, 5th edition, "Savremena Administracija" Belgrade, p. 76, item (1) on Article 24 CC SFRY). Although the question of assistance also was addressed by the Defense Counsel within the appeal, there is no need to go deeper into the details, since the defendant was neither accused nor sentenced for assistance and the First Instance Judgment was not challenged insofar.

II. ON UNAUTHORIZED POSSESSION AND/OR USE OF WEAPONS

53. The Supreme Court moreover understands that the defendant according to the findings of the First Instance Court has not used any weapon, when he was driving the shooters up to the car of the victims and

therefore wrongfully was convicted according to UNMIK Regulation 2001/7, Section 8.3, which still conducts punishable according to Articles 328, paragraph 1, 23 of the CCK. It in the case at hand can be left open in this context, whether or not the use of a car with the intention that somebody else will kill a person by shooting several bursts of ammunition out of the window can be considered as unauthorized use of weapons under the law in co-perpetration as well.

54. Anyway, it needs to be considered that the use of a weapon in order to commit a murder would have to be seen as a case of ideal conjunction between both relevant criminal offenses. Already in the case of *O[redacted] Z[redacted] et al., dated 21 July 2009 (Ap-Kz 481/2008)*, the Supreme Court has decided that in case of other criminal offenses, being committed as part of the murder, as i.e. *unauthorized use of a weapon to commit a murder the perpetrator can not be convicted for the crime of unauthorized use of a weapon because this is a part of the charged murder, here must find application the criminal offence of unauthorized possession of a weapon pursuant to article 328 paragraph 2 PCCK.*

55. However, the defendant knew that at least one of the other inmates of the Audi car, which he was driving, had a weapon, allegedly an AK-47 machine gun with him in order to kill the three KP Officers, while travelling in their car. For this purpose the defendant drove up to the car of the victims and made the shooting at them and thus killing of two of them and the injuries of the third one possible. Therefore, there is no question that he willingly had the machine gun(s) in his sphere of influence, which was the Audi car and thus has committed the criminal act of unlawful possession of weapons in co-perpetration with the shooter, as required by UNMIK Regulation 2001/7, Section 8.2, still punishable according to Articles 328, parapgraph 2 and 23 of the CCK.

III. ON CAUSING GENERAL DANGER

56. Finally, as to the conviction of the defendant for Causing General Danger contrary to Article 157, paragraph 1 of the CC SAPK, now punishable under Aticles 23 and 291 of the CCK, the Supreme Court finds that this part of the deed is absorbed under count 1 of the Judgment, which is the Murder contrary to Article 30, paragraphs 2 and 3 of the CC SAPK, now punishable under 23 and 147, paragraph 11 of the CCK.

Article 157, paragraph 1 of the CC SAPK stipulates as follows:

(1) Whoever by arson, flood, explosion, poison, or poisonous gas, ionizing radiation, motor power or by electrical or by any other generally

dangerous act or a generally dangerous means, endangers human life or body or the sizable property, shall be punished with six months to five years of imprisonment.

57. There cannot be any serious doubt that the requirements of the provision were given, also in terms of a concrete danger. It can be read from the relevant witness statements that the shooting happened on a highly frequented street and that at least three persons were walking alongside MOLIKA Company, which is the place of the crime scene, when the shooting started. Moreover, the danger was materialized in the person of KP Officer H[redacted] L[redacted] who was seriously injured during the shooting.

58. However, it can be read from the comments on Article 187 of the CC SFRY, which in terms of the case at hand stipulated identical with Article 157, paragraph 1 of the CC SAPK, that *as a rule it shall be considered concurrence of the criminal act of causing general danger with the criminal act of serious bodily injury ... or light bodily injury ...* , but that , if a *premeditated murder is committed in the manner by which the perpetrator, with premeditation endangers the life of another person, there shall exist only the qualified case of murder from Article 47, paragraph 2, item 3.* (Srentic Nikola/Ljubisa Lazarevic; Commentary of the Criminal Code of Serbia 1995, 5th Edition, "Srevremena Administracija", Belgrade; Article 187 CC SFRY, paragraph 34 and 35). Therefore, in the case at hand the constellation of ideal conjunction between the criminal offences of Murder contrary to Article 30, parapgraph 2 of the CC SAPK and Causing General Danger contrary to Article 157, paragraph 1 of the CC SAPK is given. As a consequence – notwithstanding the question of guilt for both acts, which of course is given – the relevant criminal behavior is punishable only once.

D. Decision on the punishment

59. Finally, according to the appeal, the First Instance Court has erred in imposing a punishment of imprisonment on the defendant at all, since there was no legal basis for having found him guilty.

60. This assertion of the Defense Counsel is no more that a tautology. No arguments on legal grounds for challenging the decision on punishment are presented except from the fact that according to the view on the case and the legal opinion as taken by the Defense, the evaluation of facts as well as the application of relevant criminal law provisions should have led to an acquittal *in dubio pro reo* for the defendant.

61. Moreover, the punishment is correct and fair.

The First Instance Court found the defendant seperatly guilty of all five counts he was accused of, but **correctly established a punishment of longterm imprisonment only for the murder**, which according to Article 147, item 11 of the CCK in this case is the only relevant qualification to be considered. Notwithstanding the fact that the First Instance Court has found the defendant seperatly guilty for the criminal act of Causing General Danger, whilst this count already was absorbed by the count of Murder, this consideration does not have any impact on the correctness of the punishment found. Because of Article 147, item 11 of the CCK, especially an aggregate sentence cannot be brought in cases, when somebody commits two or more murders as the most impacting crime the law knows (as well as other criminal act, which in terms of their criminal importance might range below Murder). Already in the case of *O[redacted] Z[redacted] et al., dated 21 July 2009 (Ap-Kz 481/2008)*, the Supreme Court of Kosovo has decided that *in case of a murder and of an attempted murder committed intentionally in the same context of time and space the Court must make use of the aggravating circumstance envisaged by art. 147 item 11 PCCK and consider the two facts as a unique criminal offence. This aggravating circumstance finds application even though the second murder remains an attempt according to the legal provision of article 20 PCCK.*

As of the fairness of the challenged decision, the First Instance Court in accordance with the framework of possible punishments given by the relevant laws, which refer to the different criminal acts committed , has imposed a single long term imprisonment of 27 (twenty-seven) years for the Murder of two KP Officers (Article 30, paragraph 2, of the CC SAPK, as read with Articles 22 and 24 of the CC SFRY) and thus completely complies with the provision of Article 147, paragraph 11 of the CCK.

The Supreme Court of Kosovo considers that the First Instance Court correctly and completely has taken into consideration all the circumstances that influence in severity of punishment and has fairly evaluated those circumstances. Therefore, no reason can be seen to lower the punishment.

Taking also into consideration the level of social risk of the commission of criminal offenses as well as the level of responsibility of the accused, the latter is very well served with the aggregate sentence as imposed.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Panel Member

Maria Giuliana Civinini

Presiding Judge

Gerrit-Marc Sprenger

Panel Member

Emilio Gatti

Panel Member

Fejsullah Hasani

Panel Member

Tahir Rreci