2nd June 2009
Prishtinë/Priština
Ap.-Kz No. 465/2008

THE SUPREME COURT OF KOSOVO

Composed by the following Judges

MARIA GIULIANA CIVININI	**Presiding Judge, SC EULEX Judge**
EMILIO GATTI	**Member, SC EULEX Judge**
FEJZULLAH HASANI	**Member, SC Judge**
ZAIT XHEMAJLI	**Member, SC Judge**
AVDI DINAJ	**Member, SC Judge**

In the case against the accused:

I G also known as G born on in Kosovo Albanian, father's name B , mother's name , last residence in economic consultant, married, children, in detention since 12 October 2006, currently housed in Dubrava Detention Centre, charged with committing War Crimes Against the Civilian Population, as defined in article 142 of the Criminal Code of Socialist Federal Republic Yugoslavia (hereinafter referred to as "CC SFRY"),

Deciding upon the appeals filed by the defense counsels T , V G and Z B against the Verdict of the District Court of Pejë/Peć dated 22 June 2007, P. No. 537/2007, finding the defendant guilty of having committed the criminal offence of war crimes in violation of Article 142 of the CC SFRY, for which he was convicted to a punishment of 15 years of imprisonment,

after having held a public hearing on 2 June 2009 at the presence of the accused, his defense counsels, the EULEX Public Prosecutor Anette Milk and the local Public Prosecutor Zyhra Ademi;

after the panel's deliberation and voting held on 2 June 2009;

issues the following

RULING

The appeals filed in the interest of the defendant I G are partially GRANTED.

The Verdict of the District Court of Pejë/Peć dated 22 June 2007, P. No. 537/2007, is annulled and the case shall be referred to the same District Court for re-trial.

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

This decision may be reported in the media pursuant to article 391 paragraph 6 of the Kosovo Code of Criminal Procedure (hereinafter referred to as "KCCP").

With a separate ruling is decided about the detention on remand for the defendant, according to articles 393, par. 1, and 278 of the KCCP.

REASONING

Procedural history

On 30.09.2005 an investigation was initiated against the defendant I G

On 03.05.2006 the defendant was apprehended by the Swedish authorities in Sweden, pursuant to the international wanted notice issued

by UNMIK Judges; on 2.10.2006, I. G. was transferred to Kosovo by the authorities, where he was placed in detention on 10.12.2006.

On 08.02.2007 an indictment against the defendant was filed in the District Court of Pejë/Peć, charging him with War Crimes against the Civilian Population, as defined in article 142 of the CC SFRY, and Aggravated Murder as per article 30, par. 2, items 1, 3 and 5 of the Criminal Code of Kosovo.

On 23.03.2007 the indictment against the defendant was confirmed for the first count and not confirmed for the second one.

On 22.06.2007 the defendant was found guilty by the District Court of Pejë/Peć and convicted to a prison term of 15 years.

An appeal against this judgment was filed on 19.08.2007 by defense counsel T G and on 22.08.2007 by defense counsel Z B on the grounds of: essential violation of the criminal procedure; violation of the criminal law; erroneous verification or incomplete factual status, and decision regarding the criminal sanctions.

On 16.01.2009 the Office of the Public Prosecutor of Kosovo filed its opinion and motion in response to the appeals, moving "the Supreme Court to find that the defendant's appeal is meritorious and founded and to return the proceeding for retrial". During the session of 2 June 2009 the Public Prosecutor modified the conclusion asking the Supreme Court to reject the appeals and to confirm the verdict of the District Court of Pejë/Peć dated 22 June 2007, P. No. 537/2007.

Motivation

Lawful composition of the first instance panel under article 403 paragraphs 1 and 2 KCCP

In the appeal, the defense counsel claims that one of the members of the District Court trial panel, Judge Sudan Gorani, has suffered from a psychic disorder which prevented him from properly performing in his capacity of Judge during the court proceedings.

The inability of a judge to duly perform his function (due to bias, conflict of interest, psychic disorder ...) makes him ineligible and prevents him from impartially hearing a

case The procedure for seeking the disqualification of a judge is set forth by article 40, par. 3 KCCP, pursuant to which the party is bound. The request for the disqualification of the abovementioned judge should have been submitted "before the commencement of the main trial" (article 42, par. 2); having failed to submit such request within the legal deadline, the defendant has waived his right to seek the disqualification of the first instance panel's judge. This conclusion is confirmed by the provisions of article 403, par. 1, no. 2) which states that: there is a substantial violation of the provisions of criminal procedure (on the base of which a judgment may be challenged) if "a judge ... who should be excluded from participation in the main trial participated therein (article 40, paras 1 and 2 of the present Code)"; excluding the hypothesis foreseen by par. 3 of the same article, to which the counsel refer in the appeal.

Unlawfulness of the testimony of witness A K

It is stated in the appeals that the verdict was brought in violation of article 403, par. 1, item 8 of the KCCP in relation to the testimony of the witness A K

The defense counsels are mainly stating that the testimony of this witness should have been considered inadmissible by the trial panel because he was initially interrogated by the Public Prosecutor as a suspect and, furthermore, because he is the brother of the late M K , who, in view of the defense, is the person who killed the victim S B

The exception was raised during the main trial in first instance (see minutes of the hearing 16.05.2007, page 3/1572 of the case file) and was decided by the panel with the following ruling: "After having heard the observations of the Defense Counsel and the Public Prosecutor, the factual situation is as follows: there was an investigation initiated against A K in January 2006. According to the procedural code, an investigation lapses after six months if no motion is presented for extension. In the present case, there was no such motion for extension and therefore the Panel concludes that at present there is no ongoing investigation for any offence against A K Under the PCPCK, a cooperative witness is somebody against whom there might be a criminal proceeding. Such is not the case here. Therefore the Panel rules that Avni Krasniqi is not in the position of a cooperative witness or protected witness".

The Supreme Court observes:

a) It is a fact that on 13 January 2006 a ruling initiating an investigation against A K was filed (he was interviewed and questioned as a suspect on 30 January; see records of suspect examination, page 128) and that after the six months term established by the code for completing the investigation had lapsed, the Prosecution Office did not undertake any of the alternative actions which, according to the law, should follow (*i.e.* no request for extension of investigation nor for confirmation of indictment was filed; the termination of the investigation has never been notified to the injured party nor the pre-trial judge has been informed *ex* article 224, par. 2 of the KCCP).

b) The KCCP sets up a clear and detailed discipline for the duration and termination of an investigation: *b1)* "If the investigation is not completed within a period of six months, the public prosecutor shall submit to the pre-trial judge a written application ... for an extension of the investigation." (article 225, par. 1); *b2)* if the public prosecutor terminates the investigation based on article 224, par. 1, he "shall within eight days ... notify the injured party of this fact and the reasons for this ..." and "shall immediately inform the pre-trial judge about the termination of the investigation" (article 224 par. 2); *b3)* if the investigation has been completed, the public prosecutor shall file an indictment (art. 304); no final term (but the period of statutory limitation) is established for the accomplishment of this due activity.

c) The assumption that an investigation is implicitly terminated after the 6-months term has expired (as submitted by the Prosecutor and accepted by the first instance Court) is without legal basis. It may be discussed (and actually conflicting decision are issued on the point by pretrial judges and District Courts; see DC of Prishtina, Kp. N. 81/2009, 12.03.2009 and Kp. N. 196/2009, 06.06.2009, DC of Mitrovica, Kp. N. 116/2009, 01.06.2009) if, based on article 225 of the KCCP, the application to extend an investigation must be filed while the investigation is still active and not after its termination, following the general principles of articles 94 and 95 of the KCCP; what is sure is that the expiring of the 6-months term does not mark the termination of the investigation, which

rather calls for the positive action of the Prosecutor pursuant to article 224, but the case remains pending and the Public Prosecutor may file an indictment at any time (with the only limit of the statutory limitation)

d) It's true that article 299 of the KCCP states that "the Public Prosecutor MAY make a written application to a court for an order declaring a person to be a cooperative witness..." but it is evident that, if he wants to present such a witness in the Court, he has to follow the legal procedure.

e) Therefore, the District Court of Pejë/Peć incurred in a substantial violation of the provisions of criminal procedure when it declared that there was "no ongoing investigation" and that A K was not "somebody against whom there might be a criminal proceeding". A K still had the status of suspect as possible co-perpetrator or for giving assistance to the crime allegedly committed by I G , even if he had not been formally declared "cooperative witness", he should not have given evidence as an "ordinary witness".

Usability of the testimony/statement of A K

The KCCP leaves to the Judge the duty to evaluate the admissibility and probabative value of the evidence. The general rule under the KCCP is that the Court *shall* have the authority to assess freely all evidence submitted in order to determine its relevance and admissibility (article 152, par. 2 of the KCCP). According to article 153, "Evidence obtained in violation of the provisions of criminal procedure shall be inadmissible when the present Code or other provisions of the law expressly so prescribe.".

The Code doesn't prescribe the sanction of inadmissibility for the violation of the rules on cooperative witnesses. Therefore the testimony is admissible and the statements of witness K . may be used as evidence. This does not mean that the abovementioned violation is without legal consequences.

Article 157, par. 4 of the KCCP states that "The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness."

The Supreme Court considers that the testimony given by somebody (suspect or defendant) who should be heard under the formalities provided for the cooperative witness (and was not in violation of the Code) cannot have more probative value than the

testimony given by somebody (suspect or defendant) declared cooperative witness by the court (article 298 and followings).

On the point the Court observs:

1) The testimony of a co-perpetrator presents two problematic profiles: *1a)* the duty to tell the truth conflicting with the self incriminatory statements which may be given during the testimony; subordinately the possibility to use the self-incriminatory statements against; *1b)* the credibility of the witness who, being interested in avoiding responsibility, may take the opportunity to exaggerate the responsibility of the co-perpetrator in order to obliterate his own contribution to the criminal offence.
2) The rule of judgment stated by article 157, par. 4 is aimed to minimize the two underlined problems, protecting at the same time the right to a fair trial for the co-perpetrator (article 6 European Court of Human Rights) and the correct logical proceeding followed by the court.
3) The principle of not contradiction and the interpretative rule based on the *a fortiori reasoning* impose the application of this rule of judgment to the case of the suspected/defendant heard as "normal witness"; if the Court shall apply article 157, par. 4 to the hypothesis of a witness formally declared "cooperative", pursuant to a correct application of articles 298 through 303 of the KCCP, with stronger reasons (*a fortiori*), it shall apply the same rule in the case of violation of the discipline on cooperative witness.

Determination of material facts and evaluation of A K testimony in the first instance decision

I G is accused of having committed the criminal offence of war crimes against the civilian population (article 142 of the CC SFRY) in August 1998, during the period of the internal armed conflict in Kosovo, as described in the Public Prosecutor's request for confirmation of the indictment dated 08.02.2007 (see Court file vol. 3, 001239): «on the morning of 12 August 1998, S B , a Kosovar-Albanian woman, was questioned by members of the Kosovo Liberation Army (KLA) controlling the Barane Village Area.

She was then taken by I G … and A K to a wooded area known locally as "Lugu I Isufit" where the defendant G then shot her to death. I G accused S B of being in complicity with the enemy Serbian forces».

The material facts have been determined by the judgment of the District Court of Peja/Peč as following.

In the morning of 12 August 1998 the victim S B a Kosovar Albanian female, was traveling on her way to Pejë/Peć, accompanied by her cousins H B , H B and the child D B The car was driven by one of the males when it was stopped at a KLA check-point in the village of Baran. The victim was brought to the nearby KLA headquarters. After being briefly questioned by the KLA operations commander C K , she was released. Immediately after, she was interviewed by the defendant I G , who was a KLA officer at that time. The defendant searched through the belongings of the victim and found in her handbag an address book containing, among others, the name of a Serbian person. The defendant then claimed that the victim S B was a Serb collaborator and ordered the KLA military police officer A K to take her to the headquarters in Gllogjan. Thereafter the victim S B together with A K and I G left in a car driven by A K . When they reached the wooded area known as "Lugu I Isufit" located near the village of Vranoc, I G instructed A K to stop the car. The defendant directed the victim into the wood and shot her to death. Afterwards the defendant returned to the car and ordered A K to drive him back to Baran and threatened him to remain silent about what had just occurred. Later that day the defendant ordered A K to return with him to the same spot where the killing occurred, in order to bury the corpse of the victim. At that time a group of people, including A U H U , S T , Z H and the child D H went to "Lugu I Isufit" to find out what happened. I G , armed with an AK 47 weapon, ordered A Ukaj, a military policeman, to assist A K in the burial of the dead body. The defendant explained to A U that he killed the girl because she was spying for the Serbs and told him about a notebook of hers which contained Serb names. Three days later the defendant instructed A K to assist a KLA soldier I "Toger" B and two other individuals in locating the body of the victim in order to remove it from its

location in "Lugu I Isufit". The remains of the body were recovered in Gllogjan, where the corpse was dumped into a nearby canal, together with 39 other bodies the following month, but not ultimately indentified until May 2007.

This reconstitution of material facts – particularly the crucial ones, from the moment the two leave with the victim to the return to the crime place for burying her - is mostly based on A K statements (see minutes of the main trial, 16.05.2007, page 1572 following).

The Court has broached the argument of the credibility of the witness giving a tautological answer to the question. After having stressed that the possibility the witness was lying to minimize his own role in the crime, it stated that this "does not destroy the general credibility of the witness", the first instance judge simply affirms: "After analyzing the totality of the evidence of A. K , the Trial Panel concluded that his evidence, as it relates to the actions attributable to the defendant, was credible and the Panel acted on it as it considered that evidence commands complete trust and confidence and the Trial Panel was satisfied that the witness was speaking the truth.".

To corroborate Krasniqi's evidence, the first instance Court mentions: A) the defendant's own admission, B) the statements of D H , C) the lack of any alibi to the contrary.

As for evidence A), it has to be noticed that the defendant never admitted to have taken part in the murder. The witnesses Z H and H U have declared (see minutes of the main trial, 17.05.2007) that a man who declared to be G said "I have killed". The statement cannot be considered a conclusive evidence taking in consideration that the identification of the defendant as the man who spoke them in the dusk is at least doubtful (see *inter alia*: A : U page 1652: answering to a defendant's question "Actually I don't remember having identified you as the person you are today but I remember that person was having a beard."; H U page 1641: "You had a beard but I don't recognize you").

As for evidence B), the testimony of D H (a 8 years old child at that time, that was in the area tending cattle. and saw the victim being forced by two men into the woods and soon after heard one or two gunshots) has been used for supporting K statements in a contradictory way. On one side the conflict between K (affirming

he remained in the car waiting for G . return) and H , statements has not been explained; on the other side, it has not been evaluated the fact that the young boy didn't recognize the defendant as one of the two men he saw drawing the woman in the forest. The consequence is that only K 's statement remains to support the conclusion that the other man was really I G

As for evidence C), it is related to a secondary factual element upon which a presumption may be base in presence of other evidence (of primary or secondary facts) converging towards the same evidentiary result.

Based on article 427, par. 2 to be read in connection with article 403, par. 2 of the KCCP, it can be concluded that the first instance Court committed a substantial violation of the procedural rules by accepting the testimony of a suspect without the formality set forth for cooperative witnesses and leaving aside the rule of judgment established by article 157, par. 4 of the KCCP. The result is also an incomplete determination of the factual situation.

For these reasons, based on article 25, par. 1, sub-par. 1; article 26, par. 1; article 420, par. 1, sub-par. 3; article 424, par. 1 of the KCCP this Supreme Court decides that the Verdict of the District Court of Pejë/Peć dated 22 June 2007 (P. No. 537/2007) is **annulled** and the case shall be referred to the same District Court for re-trial (in compliance with articles 428 and 429 of the KCCP).

The costs of the second instance proceeding will remain in charge of the State Budget, pursuant to articles 99 and following of the KCCP.

With a separate ruling a decision on the status of the defendant has been adopted, putting him in house detention in order to ensure his presence to attend the re-trial.

This Decision is rendered by the Supreme Court of Kosovo
on the 2nd June 2009 in Prishtinë/Priština

MARIA GIULIANA CIVININI

Presiding Judge, SC EULEX Judge

EMILIO GATTI

Member, SC EULEX Judge

FEJZULLAH HASANI

Member, SC Judge

ZAIT XHEMAJLI

Member SC Judge

AVDI DINAJ

Member, SC Judge