The Supreme Court of Kosovo

Ap.-Kž. No. 344/2008
20 October 2009
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel constituted in compliance with 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 ("Law on Jurisdiction"), composed of: Maria Giuliana Civinini, EULEX Judge, as presiding and reporting judge, Guy Van Craen, EULEX Judge, as member of the panel and Fejzullah Hasani, Supreme Court Judge, as member of the panel;

In the case against the accused:

S I : nickname B Kosovar Albanian, born on 19 in village of B B , Municipality of Podujevo, father's name V , mother's maiden name M Z , residing in N , Fushe Kosove, married, three children, truck driver, attended high school, average economic status with an income depending on the work rate, no previous convictions, in detention on these charges since 29 August 2006, currently held at Dubrava Prison;

M I : nickname T , Kosovar Albanian, born on 19 in N , Fushe Kosove, father's name S mother's maiden name S B residing in N Fushe Kosove, taxi driver married, one child, attended elementary school, poor economic status, no previous conviction, in detention on these charges since 25 August 2006 , currently held at Dubrava Prison.

R I nickname D , Kosovar Albanian, born on 19 , in N F Kosove, father's name S , mother's maiden name S B , residing in N Fushe Kosove, auto mechanic, single, literate, attended elementary school, poor economic status, previously convicted, in detention on these charges since 25 August to 05 December 2007

O S no nickname, Kosovar Albanian, born on 19 in L , Fushe Kosove, father's name M mother's maiden name Gj : H residing in L B Fushe Kosove, unemployed, single, literate, attended elementary school, poor economic status, no previous conviction, in detention on remand from 25 August 2006 to 07 June 2007 and subjected to alternative measures as mentioned in Art. 268.1 PCPCK from 07 June 2007 to 20 December 2007.

G M no nickname, Kosovar Albanian, born on 19 or before in Fushe Kosova, father's name S mother's maiden name S Sh residing in Fushe Kosova, labourer, single, illiterate, did not attend school, poor economic status, no previous conviction, in detention on remand from 25 August 2006 to 07 June 2007 and subjected to alternative measures as mentioned in Article 268.1 PCPCK from 07 June 2007 to 20 December 2007

Deciding upon the appeals filed:

- on 08 April 2008 by **defence counsel Fadil I. Hoxha in favour of the defendant O S** against the verdict issued by the District Court of Prishtinë/Priština on the 25 January 2008 which finds the defendant guilty of: four counts of the offence A) Participation in a group that commits a criminal act (participating in a crowd committing a criminal offence, art.200 par.3 of the KCL committed in complicity with other individuals as defined under Art. 22 of the CCSFRY, equivalent to Art. 320 par.1 & 2 and Art. 23 of the PCCK); four counts of the offence B) Serious criminal acts against public security, Art. 164 par.1 of the KCL committed in complicity with others under Art. 22 of the CCSFRY equivalent to Art. 291 par.1, 3&5 and Art. 23 of the PCCK; the offence C) Inciting to national, racial, religious or ethnic hatred, discord or intolerance, Section 1 par.1.1 and 1.2 of UNMIK Reg. 2000/4 committed in complicity with other individuals under Art. 22 of the CCSFRY equivalent to Art.115 par.1&2 and Art. 23 of the PCCK) and imposes an aggregated punishment of **three years of imprisonment**.
- on 10 April 2008 by the **defence counsel Florije Drevinja in favour of the**

defendant G M against the mentioned verdict which finds the defendant guilty of: two counts of the offence A); two counts of the offence B); the offence C), and imposes an aggregated punishment of **two years imprisonment.**

- on 14 April 2008 **by defence counsel Mentor Neziri in favour of the defendant M I** against the mentioned verdict, which finds the defendant guilty of: six counts of the offence A); six counts of the offence B); the offence C), and imposes an aggregated punishment of **seven years of imprisonment**

- on 14 April 2008 by **defence counsel Ferki H. Xhaferi in favour of the defendant S I** against the mentioned verdict which finds the defendant guilty of: five counts of the offence A); five counts of the offence B); the offence C), and imposes an aggregated punishment of **eight years of imprisonment**

- on 17 April 2008 **defence counsel Shpend Krasniqi filed an appeal in favour of the defendant R I** against the mentioned verdict which finds the defendant guilty of: three counts of the offence A); three counts of the offence B); the offence C), and imposes an aggregated punishment of **three years of imprisonment.**

After having held the main trial hearings in public on 20 October 2009 in the presence of the accused, their defense counsels, the EULEX Public Prosecutor Anette Milk and the local Public Prosecutor Besim Kelmendi;

after the panel's deliberation and voting held on 20 June 2009;

pursuant to Article 426 (1) of the KCCP, the Supreme Court of Kosovo renders the following

JUDGEMENT

Partially granting the appeal of the defendant S I , finds him guilty of the crime foreseen by Art. 157 par.3, in connection to par. 1 of the KCL limited to the actions described in count 2.1 and to the count 2.4 absorbed in this the violation of Art. 200 par. of KCL and guilty of the crime foreseen in Section 1.1 and 1.2 of the UNMIK Reg. 2000/4;

Partially granting the appeal of the defendant R I , finds him guilty of the crime foreseen by Art. 200 of KCL and not guilty of the crime foreseen by Art. 157 par. 3 KCL and Section 1.1 and 1.2 of UNMIK Reg. 2000/4;

Partially granting the appeal of the defendant M I finds him guilty of the crime foreseen by Art. 200 of KCL and not guilty of the crime foreseen in Art. 157

and Section 1.1 and 1.2 of UNMIK Reg. 2000/4;

Granting the appeal of G M finds him not guilty, acquitting him of all the charges ascribed;

Partially granting the appeal of O S , finds him guilty of the crime foreseen by Art. 157 par. 3 of the KCL limited to the actions described in count 2.4 and 2.6 absorbed in this the violation of Art. 200 par.1 of KCL, and not guilty of the crime foreseen in Section 1.1 and 1.2 of the UNMIK Reg. 2000/4.

For S I . the court imposes the punishment of three (3) years of imprisonment for the crime foreseen by Art. 157 par.3 in connection to par.1, and a punishment of two (2) years for the crime foreseen in Section 1.1 and 1.2 of the UNMIK Reg. 2000/4. According to Article 48 par.1 and par.2 of the CCSFRY an aggregated punishment of three (3) years and six months is imposed on him. The time spent in detention on remand is included in the amount of punishment.

For M I the court imposes the punishment of one (1) year and six months for the crime foreseen by Art.200 of KCL and decides to include the time spent in detention on remand in the amount of punishment.

For R I the court imposes the punishment of one (1) year and six months for the crime foreseen by Art.200 of KCL and decides to include the time spent in detention on remand in the amount of punishment.

For O S the court imposes the punishment of two (2) years and six months of imprisonment for the crime foreseen by Art. 157 par.3 in connection to par.1 and decides to include the time spent in detention on remand in the amount of punishment.

The court decides that defendants S I M I R I O S must reimburse the costs of the proceedings jointly.

The court revokes the first instance decision on property claims and instructs the injured parties to pursue their property claims in civil litigation.

Order the immediate termination of detention and release of M I , if not in detention for other reason, as in the separate ruling.

REASONING

Procedural history

On 20 February 2007, the UNMIK Public Prosecutor filed an indictment against S I , M I , R I C S , and G M charging the defendants with the criminal offences of Participating in a crowd committing a criminal offence (Art. 200 par.3 of the KCL committed in complicity with other individuals as defined under Art. 22 of the CCSFRY, equivalent to Art. 320 par.1 & 2 and Art. 23 of the PCCK, Offence A, counts 1 to 8), Serious criminal acts against public security (Art. 164 par.1 of the KCL committed in complicity with others under Art. 22 of the CCSFRY equivalent to Art. 291 par.1, 3&5 and Art. 23 of the PCCK, Offence B, counts 1 to 8), Inciting to national, racial, religious or ethnic hatred, discord or intolerance (as defined in Section 1 par.1.1 and 1.2 of UNMIK Reg 2000/4 committed in complicity with other individuals under Art. 22 of the CCSFRY equivalent to Art.115 par.1&2 and Art. 23 of the PCCK, offence C/Count 9).

Based on the reconstitution of the facts made by the public prosecutor, during the riots of Fushe Kosovë/Kosovo Polje on March 17, 2004 S I M I R I G M and O S were identified as the most active protesters and leaders of the riots. S I was moving around with the motorcycle and was triggering and inciting the crowd. The rioters led by the defendants attacked, stoned and burned the house and the Zivin Gaj restaurant, both of which were owned by M V of Serbian ethnicity in B , Fushe Kosove/Kosovo Polje. After burning the Zivin Gaj restaurant, the rioters proceeded and burned the kiosk located in front of the Zivin Gaj restaurant, which was owned by Z S , and the Audi with registration plates KS- owned by S G both the damaged parties are of Serbian ethnicity. Then, the rioters, led by the defendants, looted and burned the Serbian Hospital in Bresje village, and afterwards the Health Center located in the same compound of the Hospital. On the same day, at about 16:00 hrs, the group of protesters, led by the above mentioned defendants, attacked the house of M. M dragged a car out of the garage where it was parked and, after pushing it against the post office building, burned it. While the vehicle was burning, it was rolled up to the PTT building which eventually caught fire and burned down. The rioters caused great damage also by stealing from the PTT building. Around 17:00 hrs., the rioters, still lead by the above mentioned defendants, entered the Sveti Sava school, which was destroyed and burned down. .

At the confirmation hearing, held on 6 June, a ruling to sever the proceedings against the two defendants O S and G M from the proceedings ongoing against the other three defendants, was issued by the Confirmation Judge, who also asked the Public Prosecutor to provide him with additional information on the age of the two defendants. The indictment against S I M I and R I was confirmed on 04 July 2007, after the public prosecutor orally amended the indictment withdrawing the charges of "leading a group that committed a criminal act"; the indictment against G M and O S was confirmed on 29 August 2007. On 24 September 2007, with a ruling issued by a three judges panel, the criminal proceedings against G M and O S was rejoined to the criminal proceedings against S I R Islami and Mustafa Islami; the joint proceedings is referred to as P.Nr. 75/07.

The main trial started on 22 October 2007 and continued on 15, 21, 22, 23, 29 November 2007, 03 December 2007, 15, 18, 21, 22, 23, 24 January 2008, and the verdict was announced on the 25 January 2008.

The District Court of Prishtinë/Priština found:

- S I **guilty** of: - 5 (five) counts of the offence A) (Burning of house and restaurant of V , Kiosk and goods of S , Burning of Audi of S , Burning and looting of Serbian Hospital an Burning of the Health Center) for which it imposed a punishment of 5 years imprisonment; - **5** (five) counts of offence B) (same facts of offence A) for which it imposed a punishment of 5 years imprisonment ; - the criminal offence C) for which it imposed a punishment of five years imprisonment. An aggregated punishment for the above mentioned acts was pronounced and the accused was convicted to **eight years of imprisonment.** The same verdict found the accused not guilty for three counts of the offence A) and three counts of the offence B) (Attack to the house and driving of of M , Burning of the Yugo and PTT building plus stealing money and other goods, Destruction and burning of Sveti Sava school) .

- M I **guilty** of: - 6 (six) counts of the offence A) (actually 7: Burning of house and restaurant of Velickovic, Attack to the house and driving of of M Burning of the Yugo and PTT building plus stealing money and other goods, Burning and looting of Serbian Hospital an Burning of the Health Center, Destruction and burning of Sveti Sava school) for which it imposed a punishment of 5

years; of six counts (same facts listed above) of offence B) fow which it imposed a punishment of five years imprisonment; - offence C) for which it imposed a punishment of five years of imprisonment. An aggregated punishment for the above mentioned acts was pronounced and the accused was convicted to **seven years of imprisonment**. The same verdict found the accused not guilty for one count of the offence A) and one count of the offence B) ((Burning of Audi 80 of Simic).

- **R** . **I** **guilty** of: - 3 (three) counts of offence A) (Burning of the and PTT building plus stealing money and other goods, Burning and looting of Serbian Hospital an Burning of the Health Center) for which it imposed a punishment of one year imprisonment, - 3 (three) counts (same facts listed above) on offence B) for which it imposed a punishment of one year; - offence C) for which it imposed a punishment of two years of imprisonment. An aggregated punishment for the above mentioned acts was pronounced and the accused was convicted to **three years of imprisonment**. The same verdict found the accused not guilty for two counts of offence A) (Burning of Audi of S , Destruction and burning of Sveti Sava school) and two counts (the same) of offence B).

- **O** **S** . **guilty** of: - four counts of the offence A) (Attack to the house and driving of Yugo of Mitrovic, Burning of the and PTT building plus stealing money and other goods, Burning and looting of Serbian Hospital, Destruction and burning of Sveti Sava school) for which it imposed a punishment of one year; - four counts of the offence B) (same facts) for which it imposed a punishment of two years; - offence C) for which it imposed a punishment of two years. An aggregated punishment for the above mentioned acts was pronounced and the accused was convicted to **three years of imprisonment**. The same verdict found the accused not guilty for one count for the offence A) and one count for the offence B) (Burning of the Health Center)

- **G** **M** **guilty** of: - two counts of the offence A) for which it imposed a punishment of one year imprisonment; - two counts on offence B) (same facts) for which it imposed a punishment of one year imprisonment; - offence C) for which it imposed a punishment of 1 year imprisonment. An aggregated punishment for the above mentioned acts was pronounced and the accused was convicted to **two years imprisonment**. The same verdict found the accused not guilty for four counts for the offence A) and four counts for the offence B) (Attack to the house and driving of of M Burning of the and PTT building plus stealing money and

other goods, Burning of the Health Center, Destruction and burning of Sveti Sava school) .

The defendants were condemned to pay the costs of the criminal proceedings. Detention on remand against the first two defendants was extended by the trial panel until the verdict becomes final, while the three other defendants were left free until the verdict becomes final.

Following the pronouncement of the verdict on 25 January 2008, the five defence counsels expressed their intention to file an appeal against the verdict, which they did as specified in the heading of this judgment.

Defence counsel Ferki Xhaferi in favour of defendant S I based his appeal on the grounds of *a) Substantial violation of the provisions of criminal procedure*, b*) Erroneous and incomplete determination of the factual situation, c) Violation of criminal law, d) decision on the punishment and on the expenses of the proceedings and paying the damage sustained to the injured party, e) decision on announcement of the verdict on media.* The counsel proposes to the SC to either return the case for retrial, or amend the first instance verdict and find the defendant not guilty.

Defence counsel Mentor Neziri in favour of defendant M I based his appeal on a*) Erroneous and incomplete determination of the factual situation, b) decision on the punishment and c) on the decision on property claims.* The counsel proposes to the Supreme Court to either release his client from all the charges, or to return the case for retrial, or to amend the verdict of the first instance for a more favorable and lenient punishment

Defence counsel Shpend Krasniqi in favour of defendant R I based his appeal on the grounds of *a) erroneous and incomplete determination of the factual situation, b) decision on the punishment and c) decision on paying the damage sustained to the injured party.* The counsel proposes to the SC to amend the verdict and release his client of all the charges or to return the case for retrial or pronounce a more lenient sentence.

Defence Fadil Hoxha, in favour of defendant O S based his appeal on the grounds of *a) Substantial violation of the provisions of criminal procedure*, b*) Erroneous and incomplete determination of the factual situation, c) Violation of criminal law, d) decision on the punishment and on the expenses of the proceedings and paying the damage sustained to the injured party.* The counsel proposes to grant

his appeal and modify the judgment of the first instance court and send the case for retrial and a new decision, or to acquit his client from all charges, or impose a conditional release including the time spent in detention on remand.

Defence Counsels Florije Drevinja, in favour of defendant G M based her appeal on the fact that the verdict does not fit her clients' mental state, as he is a person with weak mental development, claiming that her client could not understand the matter nor was able to understand the relation with the acts he was being sentenced. The counsel proposes to the Supreme Court to free her client from the imprisonment or issue a judgment with conditional release.

The case was transferred from UNMIK to EULEX Judges on 20 January 2009.

At the hearing of the 20 October 2009, after having heard the arguments of the defence counsels, the defendants and the Public Prosecutor, the Court decided and announced publicly the judgment.

1. Reasons

A preliminary remark.

The defence counsels and the defendants do not contest that on the 17th of March in Fushe Kosovë/Kosovo Polje a series of violent events occurred.

A crowd composed of thousands of people gathered in the streets since the first hours of the afternoon becoming more and more aggressive. Groups of Albanian and Serbs started facing and clashing; car, house, private and public buildings owned by Serbs were assaulted and burned by a crowd acting as a cohesive group. It was impossible for the Police to stop the riot or prevent the commission of grave criminal offences; actually, only the 7 Police officers of the KP Station of Fushe Kosovë/Kosovo Polje were present during the crucial hours in which the gravest crimes were committed and the biggest damages caused; UNMIK Police reached the crime scene only later around 17:00 hrs.

Focusing on the facts considered in the present proceeding, it is not contested that the 17th of March 2004: the house and the Zivin Gaj restaurant owned by Miroslav Velickovic were attacked, stoned and burned; the kiosk located in front of the Zivin Gaj restaurant owned by Z S was burned with all goods inside; the car Audi registration plate -ks owned by S G was burned; the

Russian Hospital was stoned, invaded and burned, destroying all the equipment of internal, neurological and physiotherapeutic department; the Health Center located in the same compound with the Hospital was burned; the Svete Sava School was destroyed and burned; the house of M M was attacked and his car registration plate KS- was dragged, pushed toward the Post Office and burned causing the PTT building to burn; goods that were inside the PTT building were stolen or destroyed.

What is contested, is the participation of the defendants to the riot and the participants liability for the listed criminal actions.

2. ***The reconstitution of the facts based on the statements of juvenile suspects to the Police***

In their Appeals, the defence counsels claim that the first instance Court based its decision convicting the defendants, on inadmissible evidence gathered in violation of art. 152, 153, 154, 356, 364, 368, 371, 387 KCCP.

The decision of the District Court of Prishtinë/Priština, dated 25 January 2008, reconstructs the facts on the basis of: - the testimonies of the Police Officers present in Fushe Kosovë/Kosovo Polje during the riot, or during the interviews of the suspects; - the testimonies of a group of young people present in Fushe Kosovë/Kosovo Polje during the riot. Every witness from this second group (with the exception of Sh H , had been interviewed (in the most part of the cases, for two or three times) as "suspects" by the Police (in the minutes of the declarations, the box "suspect" is marked; the template on the rights of the suspect/defendant including the waver of the right to be assisted by a lawyer, is attached to the minutes signed by the interviewed and by the KP officer).

During the main trial the minutes of these interviews were used (normally in a very generic way and without drawing the attention of the witnesses on specific previous statements) for challenging the witnesses' declarations at the hearing. Each witness (N J - trial minutes 22 November 2007 -, A J - trial minutes 22 November 2007 -, F Z - trial minutes 22 November 2007 -, Y D - trial minutes 21 November 2007 -, M Z - trial minutes 21 November 2007 -, G H - trial minutes 15 November 2007 -, L A - trial minutes 15 November 2007 -, Sh R - trial minutes 15 November 2007 -, Sh

H. - trial minutes 21 November 2007) has recognized his/her signature in the minutes, but has retracted the (whole) content of the declarations (J and J had retracted already in front of the prosecutor on 12 and 25 October 2006) claiming that s/he did not have the opportunity to read them, as s/he was very scared and was obliged by the Police to sign under threat or after they were beaten. In particular, all of them denied having recognized the defendants in the crowd and/or having seen them committing one of the relevant actions. The minutes of the interviews of the above mentioned witnesses before the Police (and the one of V Z who is living abroad and did not appear before the Court) were accepted as evidence by the first instance Court, upon request of the public prosecutor.

The defence counsels, at the main trial (see minutes of the hearing of the 22nd of November 2007, page 49) in the closing arguments (see minutes of the hearing of the 23rd of January 2008, page 7 and 10) and in the appeals, have raised the exception of inadmissibility of the statements gathered by the Police without the mandatory assistance of a layer and without giving to the persons interviewed in the quality of "suspect", a correct information on their rights.

The verdict of the first instance Court rejected the exception affirming that: there is no legal restriction to using a statement given by a suspect as an evidence; the suspects were informed of their rights; the defendants have been given the opportunity to challenge the statements by asking questions to the witnesses; "when it comes to use the statements as evidence against others, the absence of information about the crime the interrogated persons were suspected of and the waiver of the assistance of a lawyer do not affect the statements given to the police. These rights are rights of the defence - not rights of a witness - and in this case the statements are not used against the persons who made them." (page 15).

The Supreme Court observes that:

1. at the time of the investigation the witnesses J , V. and E. Z Z , H A , J D , R were minor; they were examined in quality of suspects with the assistance of, alternatively, one of their relatives or a social worker; none of them was assisted by a lawyer having the minor -without the consent of the parent exercising the parental authority and with a cross in a box- waived the right to be assisted.
2. the assistance of a lawyer is mandatory when the suspect or the defendant is juvenile; art. 40 of the Juvenile Code (entered in force the 20th of April 2004)

states that the presence of the defence counsel is mandatory since the first examination (including the examination in front of Police); for the period prior to the entry into force of that Code, the presence of the lawyer is imposed (for the examinations carried out between the 1st and the 5th of April) by art. 71 of the YCPC and (for the examinations carried out between the 6th and the 20th of April) by art. 69 par. 3 and art. 73 par. 1 point 1 (first examination of suspect/defendant "incapable of effectively defending himself or herself")

3. the examination of a suspect/defendant without the assistance of a lawyer in case of mandatory defense is illegal and "the statements of the defendant shall be inadmissible" (art, 235 KCCP)
4. once established that certain statements are inadmissible, they may not be used as evidence, nor in a criminal proceedings against the same defendants nor in a criminal proceedings against somebody else
5. the reasoning of the first instance Court (that the illegality of a statement is not relevant if this is not used against the person who gave it) is erroneous; when a piece of evidence is gathered in disregard of rules whose violation is sanctioned with inadmissibility, such evidence may not be presented at the main trial or otherwise included in the case file (see art. 153 and 154 KCCP)
6. consequently the first instance Court violated the law when it allowed the public prosecutor to use the witnesses' statements given before the Police, to challenge the evidence of the same witnesses given at the main trial; the first instance Court also violated the law when it admitted these statements into evidence and used them to reconstruct the facts

Taking in consideration that the material facts (objective elements of the crimes) have been properly determined and that the above mentioned violation only affects the determination of the individual criminal liability, there is no need to return the case for retrial. This Court may assess the liability of the defendants on the basis of the valid evidence, after excluding the statements given by the suspects to the police, and the declarations of the witnesses given at the main trial after the prosecutor confronted them with the previous statements they had previously given as suspects.

The criminal liability of the defendants

In a factual point of view the evidences to be taken in consideration are only the

statements of the Police officers and of Sh H (during the investigation and at the main trial) and the declarations of O S .

The declarations of the social workers on possible violence or threats during the examinations of the minors before Police are not relevant, because the statements of the minors are declared as inadmissible evidence.

The declarations of the witnesses J , E. Z , Z , H A J , D R during the main trials do not contain any element referring to the participation of the defendants to the crimes alleged.

It is worth stressing that this Court is not aware of how the proceedings against the juvenile suspects was concluded, with the exception of the one against A J and E Z they were informed by the Presiding Judge in first instance that the charges against them had been dropped.

Before examining the individual positions of the defendants, it is useful to highlight how the investigation was conducted.

During the riots only KPS were present trying to keep the public order and to help and save the population under attack (S H 22 November 2007: "On that day, the international police officers did not respond to our calls ... I was the only police officer with a rank ...At the beginning we were four police officers and then three other joined us so we became seven .... the others to support us came later, that is, they did not arrive there in due time. I assume you understand my answer because when they arrived there at last houses were already destroyed and there was fire..").

The situation was so grave that it was absolutely impossible for the seven Police officers to investigate or identify the participants (see statements of: Ismet Ahmatovic, 15 November 2007: "all the inhabitants of Fushe Kosove, about 4000 to 5000 people were out in the street ... The whole city was part of the protesters ... I have to tell you that I was in a very bad position. We were caught in the middle of two crowds. There were shouts and yelling from both sides. The only things we were thinking of was our safety"; S P 21 November 2007: "The crowd was everywhere"; S H 22 November 2007)

Afterwards, the international police arrived, investigations started and the operation "Thor" was launched. Two teams were organized, one composed by internationals dealing with investigations *strictu sensu*, one composed by KPS with functions of logistic support: summons, minutes, reading of rights to suspects, asking questions suggested and proposed by the investigators to albanian suspects (see statements of

A T 29 November 2007; S : J 21 January 2008; B . Z 3 December 2007; Q. I 3 December 2007).

As far the Supreme Court can evaluate on the base of the case files and the main trial inquiry, only juvenile suspects and KPS officers were interviewed; the investigators were focused on specific individuals, whose names were reiteratively mentioned during the interviews in order to ascertain their presence at the riot and whose pictures (gathered in an album containing few pictures) were showed to all those interviewed (see statements: Jakupi, 22 November 2007; Shaip Nura, 21 November 2007).

In order to be relevant, the position of each defendant has to be examined separately.

A) S I : he was well known to Fushe Kosove Police officers and inhabitants because of his activity of taxi-driver, and he was noticed in the crowd because of his original headdress (a scarf tied on the head), because of his eye glasses, because of the motorbike he was using to go back and forth trough the crowd. The photographic recognition of him made by Police (S H statement 13 April 2004 and 15 March 2005, hearing 22 November 2007; B H 21 May 2004, hearing 15 November 2007; I A , 15 May 2004, hearing 15 November 2007; Sh N , 14 May 2004, hearing 21 November 2007) and by Sh H (statement 17 May 2004 and 6 April 2005 and hearing 21 November 2007: "During the time one person passed by with a motorbike who had black clothes, black sunglasses who is in photograph no. 21, they were calling him S in Kruschevc road and has a house in N and all persons that were around the car applauded him and his raised his hand up and continued in the direction of the railway station") does not leave space to doubt .

From the testimonies of the Police officers the active role of S I raised very clearly: he was in the first rang of the Albanian crowd facing the Serbian one (B H 15 November 2007); he has been seen to throw a *molotov cocktail* on the roof of the restaurant (Sh N 14 May 2004; 21 November 2007), in the yard of the Russian Hospital turning over and burning a car and (S H 13 April 2004 and 15 March 2005, hearing 22 November 2007) in this way participating to the action that resulted in the burning and looting of the Hospital. There is no evidence he took part other actions.

B) R I . The defendant was seen by Police Officers active in the crowd, going around, mostly in company of his uncle S I . and the brother M

(S H 13 April 2004 and 15 March 2005, hearing 22 November 2007, he refers to R .. and M . as members of S , group in the Hospital's yard; I A 15 November 2007;)

C) M I The defendant was seen by Police Officers active in the crowd, mostly in company of his uncle S I and the brother R (S H 13 April 2004 and 15 March 2005, hearing 22 November 2007, he refers to R . and M as members of S .s group in the Hospital's yard; B H .5 November 2007; I A 15 November 2007).

D) G M None of the Police Officers saw him during the riot.

E) O S The defence counsel raised a specific point submitting in his appeal that, at the time of alleged commission of the offence, this defendant was a minor. The same question had been correctly solved by the first instance Court at the end of an accurate assessment of evidence permitting to establish that O S was born on 14 January 1985, therefore he was not any longer a minor on the 17th of March 2004. This Court shared that conclusion on the base of the birth certificate no. 11-324/85 issued by the Civil Registry of Kosovo Polje on 7 February 1985, the UNMIK birth certificate issued on 3 July 2006, the personal data given by the defendant to Police on 23rd of August 2006.

None of the Police Officers recognized this accused during the riot. He rendered self-incriminating declarations to the Police (23 August 2006) but retracted in front of the public prosecutors (11 September 2006). He declared to the Police that he was in the crowd that joined the Hospital where an unknown person gave him a lighter pushing him to burn the curtains of the Hospital, which he did, although immediately after he tried to extinguish the fire. He declared also to have helped a group of protestors to push and destroy a car close to the Post Office. Before the prosecutor, he retracted these declarations admitting that he was in the compound of the Hospital but without participating to the action but on the contrary, he was trying to put out the fire. At the main trial (21 January 2008) he denied any active participation but admitted going to the Hospital, passing through the crowd and extinguishing the fire of a burning curtain flying out of a window.

The statements given before Police has been used by the prosecutor during the main trial to challenge the declaration of the defendant and then accepted as evidence by the Court. The defense counsel contests the admissibility of these statements since they were gathered without the assistance of a lawyer. In the minutes of the interview

it is clearly noted that the defendant was informed about his rights and he refused the presence of a lawyer. Not being a case of mandatory defense, these statements are admissible and may be used as evidence.

The Supreme Court considers that the self-incriminatory statements given by the defendant, with which he was confronted during the main trial, is valid evidence of his participation in the riot. This conclusion is strengthened by the declarations given before the prosecutor and during the main trial, where the accused admitted to be part of the crowd in the yard of the Hospital (it has to be stressed that is not plausible that in that situation and in the middle of a violent crowd he was there only to extinguish the fire given to a curtain).

Finally it is worth remembering that the defendant was subjected to a psychiatric expertise which defined him as a person without illness or mental disorder, acute or chronic.

On the basis of the above mentioned elements, the Court concludes that G M has to be acquitted of all the charges raised against him.

As to the criminal offences of Inciting to national, racial, religious or ethnic hatred, discord or intolerance (Section 1 par.1.1 and 1.2 of UNMIK Reg 2000/4 committed in complicity with other individuals), the Supreme Court considers that evidence of the commission of this crime exist only for S I .

The riot of March 2004 had an ethnic connotation. It emerges clearly from the Police officers' testimonies (among them: B H 15 November 2007: "I remember the crowd was singing Albanian patriotic songs. There were calls to release the road and also calls about the children that drowned in the Ibar river"; I A , 15 November 2007: two crowds, one of Serbs and the other of Albanian, were facing each other; S H , 22 November 2007: most of the protesters were Albanian; the crowd attacked Serbian houses; see also S . statements, 21 January 2008) and from the targets of the crowd, Serbian houses and goods, the Russian Hospital, the Post Office.

S I was described by all the witnesses as one of the most active in the crowd, he was seen in different point of the area interested by the riot, taking with him a group of people including his two nephews, going around on his motorbike among the ovations of the crowd, inciting to national discord and ethnic hatred. His actions demonstrate that he was well conscious of his role.

R M . and O were active in the crowd but no inciting attitude or behavior on their side was reported by the witnesses. Consequently they have to be acquitted of charge C).

As to the criminal offences of participating in a crowd committing a criminal offence and Serious criminal acts against public security, the Supreme Court considers that the two equal crimes may not be committed at the same time by the same actions.

Art. 200 CLK punishes for mere participation "whoever participates in a group that through joint action takes another person's life or inflicts serious bodily injury on that person, commit arson, considerably damages property, or commits other grave violence, or who attempts to commit such acts"; art. 157 par 1 CLK punishes "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 of the sizeable property" and par. 3 specifies imposes a higher penalty "If the acts from paragraph 1 ... are committed at a place where a large number of persons is gathered...". Art 157, par. 1 and 2 punishes who, being part of a group/crowd, commits criminal acts endangering the public security while art. 200 punishes the simple active (id est, conscious and willful) presence in a group/crowd whose action leads to criminal act.

When the participant to a crowd commits - as it is the case of S . I and O S - arsons and endangers human life or the sizeable property, the criminal offence of participation in a group that commits a criminal offence is consumed by the criminal offence of causing general danger.

Specified (as already in the first instance judgment, page 12) that the complex of actions charged to the defendants in single counts (1 to 8) are not autonomous crimes but a unique complex criminal offence, Skender Islami is found guilty with regard to the crime of serious criminal acts against public security limited to the actions described in count 2.1 and the count 2.4 absorbed in this the violation of criminal offence of participation in a group that commits a criminal act; O S is found guilty with regard to the crime of serious criminal acts against public security limited to the actions described in count 2.4 and the count 2.6 absorbed in this the violation of criminal offence of participation in a group that commits a criminal act.

R and M have simply participated to the crowd, in an active way, following its "movements" and their uncle S . They are both guilty with regard to the crime of participation in a group that commits a criminal act and not guilty with

regard to the crime of serious criminal act against public security.

The penalties as specified in the enacting close are determined taking in consideration: on one side that the defendants were never condemned before and that they have not committed any new offences after the 17th of March 2004; on the other side the objective graveness of the contest of their actions and the degree of their contribution.

S. I ., M I R .I , O S : must reimburse the costs of the proceedings jointly.

Not having enough evidences on the amounts of the damages provoked by the defendants, the first instance decisions on property claims have to be revoked and the injured parties to be instructed to pursue their property claims in civil litigation.

Dated 20th of October 2009

Ap-Kz. No. 344/2008

Prepared in English, an authorized language

Presiding Judge

Maria Giuliana Civinini,

Panel member

Fejzullah Hasani

Panel member

Guy Van Craen

Recording clerk

Edita Kusari

Legal remedy: No appeal is possible against this Judgment. (Art. 430 CPCK). 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 CPCK).