

Supreme Court of Kosovo
AP - K 191/2009
December 8, 2009

IN THE NAME OF THE PEOPLE

Kosovo Supreme Court, the panel consisted under Article 26 paragraph (1) of the Criminal Procedure Code of Kosovo (“CPC”) and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of Judges Case and EULEX Prosecutors in Kosovo (“Law on Jurisdiction”) consisting of:

1. Guy Van Craen, Presiding and Reporting Judge
2. Emilio Gatti, EULEX Judge
3. Gerrit-Marc Sprenger, EULEX judge, member of the panel
4. Zait Gjemajli, Judge of the Supreme Court, member of the panel
5. Avni Dinaj, Judge of the Supreme Court, member of the panel

Assisted by Driton Musliu, EULEX Legal Assistant, Stephen Parkinson - court recorder, Arlinda Gjebrea and Leke Nimani, as EULEX translators;

In the presence of the public prosecutor, Anette Milk - EULEX from the Public State Prosecutor's Office, defense counsels T.G. and F.B., and accused G.G.;

In the criminal case against defendant G.G., father's name H., Date of birth..., in the village Place of birth..., married, Kosovo Albanian, with no previous convictions,

In detention on remand from August 16, 2007 up to November 16, 2007, and in house detention since November 16, 2007 up to March 2, 2009, in detention on remand pending an appeal from March 2, 2009,

Accused of:

- a. intentional murder of I.O., civilian, on July 12, 1998, by shooting him in the back with a firearm, while I.O. was sitting in vehicle make Fiat, on the road between villages Komoran and Kishnareke in the municipality of Glogovac, Kosovo, and as a result of shooting I.O. deceased;
- b. intentional attempted murder of S.O.1; civilian, on July 12, 1998, by shooting him in the head with a firearm, while S.O.1; was sitting in vehicle make Fiat, on the

road between villages Komoran and Kishnareke in the municipality of Glogovac, Kosovo;

c. violation of bodily integrity and health of H.O. and S.O.2, civilians, on July 12, 1998, by shooting them with a firearm, while H.O. and S.O.2, were sitting in vehicle model Fiat, on the road between villages Komoran and Kishnareke in the municipality of Glogovac, Kosovo.

By these actions, G.G. committed the criminal offense of war crimes against the civilian population, in violation of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) Article 142, ref. to Article 19 with regard to item b, ref. UNMIK Regulation No. 2000/59, related to the rules of international law applicable in times of war, armed conflict or occupation, or the Geneva Convention on Protection of Civilians in Time of War (hereinafter Geneva Convention IV) Articles 3 and 147, and in violation of the Second Protocol to the Geneva Conventions, Article 4.

Ruling on the appeal filed by his defense counsels F.B. and T.G. against judgment P.No.23/200 8, issued by the District Court of Pristina on March 3, 2009,

During the session held on 8 December, 2009, after deliberation and voting, renders the following;

JUDGMENT

The judgment issued by Pristina District Court is amended and the appeal of defense counsel is partially granted, in particular as regards to the imposed sentence.

The decision of Pristina District Court is confirmed, except for:

1. The reference to Article 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, **has been eliminated**;
2. The elements of the criminal offense must be specified, namely that the offense was committed during an armed conflict, that the defendant was a KLA soldier at a checkpoint, armed with AK 47 (Kalashnikov).
3. The sentence is amended by imposing a sentence of 15 (fifteen) years of imprisonment, thus reducing the sentence of the District Court in Pristina.
4. The judgment is also amended with regard to the calculation of the time spent in detention on remand, therefore, the time spent in detention on remand from 16 August 2007 to 16 November 2007, and house detention from 16 November 2007 to 2 March 2009 will be calculated as part of the sentence.

G.G. Reasoning

1) History of the proceedings

First Instance Court, the District Court of Pristina sentenced the defendant G.G. on March 3, 2009.

Appeals of the defendant filed timely by his lawyers F.B. and T.G., respectively on April 28, 2009 and May 7, 2009, are admissible.

The Supreme Court, as the appellate instance, decided to hold a hearing on December 8, 2009, and heard all involved parties, including the injured party.

After deliberation, the panel on December 8, 2009 publicly announced the Supreme Court judgment by reading the enacting clause. A separate ruling was issued on the same day on the detention on remand of the defendant.

2) The court's assessment on appeals.

Appeals of the defendant raised several issues of interest regarding erroneous and incomplete factual situation by the first instance court with regard to substantial violation of the CPCK and CCK and with respect to the sentencing.

2.1. Establishment of the factual situation:

The Supreme Court in its analysis of the impugned judgment finds that the First Instance Court has accurately and precisely established the factual situation in accordance with legal methods of finding the facts based on the assessment of the evidences submitted before the Court as described in the Court's reasoning. Opposed to the appeals, first instance court established the circumstances of criminal offenses namely: present persons, victims and their wounds, movements and actions of the defendant and the weapon used, the trajectory of the projectile (bullet), approximate time, the darkness at the time of the crime, the road, the checkpoint and the presence of KLA soldiers in their military duty. First Instance Court clearly stated that "there is no evidence - that has proven beyond a reasonable doubt - that there was more than one shot fired." With these evidence presented, First Instance Court reconstructed exactly the movements and actions of all persons involved in this event, i.e. before, during and after the shot was fired and the precise consequences of the shooting. The fact that S.O.2; was injured later at a different event (by a hand grenade) is not, unless proven, evidence *a contrario*.

It was unquestionably established that S.O.2; was wounded with the bullet shot by the defendant in the vehicle.

First instance court has determined in a proper and complete manner the factual situation. The determination and description on the motivation of the first instance court is confirmed by the Supreme Court and is considered to be its own.

2.2 Substantial violation of the CPCK and violation of the CCK.

The Supreme Court notes that in fact the enacting clause of the first instance court judgment contains several deficiencies:

- Reference to Article 147 of the Geneva Convention IV
- The lack of precision of elements in qualification of war crimes
- The lack of a legal quoting which describes that the sentence should be reduced by the time spent in detention on remand and / or house detention.
- Punishment is not correctly defined.

These deficiencies, although in violation of the applicable law, do NOT constitute substantial violations of the CPCK and do not make it necessary for the Supreme Court to annul the appealed judgment (Article 424 (1) CPCK).

The Supreme Court decides in accordance with Article 426 (1) of the CPCK, having in mind that the factual situation (see above) was properly determined.

a) The enacting clause must be read together (as a whole) with the reasoning and clear establishment of the factual situation made by the (first instance court).

The findings and motivation of first instance court clearly shows:

- the elements of war crimes because the defendant acted during the internal armed conflict (not an international armed conflict as described in the Geneva Convention 147) as KLA soldier, armed with combat weapon (AK 47) on duty as KLA soldier at a checkpoint installed by the KLA against civilians (victims); the court referred to the situation at that time in Kosovo and although there was no fighting at that time in the country, it was correctly established by international and local jurisprudence that at that time there was an armed conflict in Kosovo and particularly in that area (crime scene) as well. The first instance court found, without any doubt, that the criminal offense of the defendant should qualify as a war crime. Furthermore, it is implied that the factual situation as described by the first instance court *inter alia*: the actions of KLA soldiers armed with semi-automatic weapons, checkpoints and digging and organization of safe shelters and all traffic control at the crime scene, are at least evidence in support of the armed conflict. The Supreme Court upholds the reasoning of the first instance court.

- In its response to the appeal, the Supreme Court highlights that a qualified war crime does not require unlawful acts to be conducted against a group of people (who support the enemy) and does not require (effective) battle and / or combat between the armed forces at the crime scene. In this case, it has been proven that armed conflict was taking place in that area and its surroundings where the defendant deliberately murdered I.O., attempted deliberate murder on S.O.3; and deliberately violated the bodily integrity and health of H.O. and S.O.2;.

- For the sake of clarity: according to the abovementioned Geneva IV Convention:

1. Provision pertaining to PROTECTED civilians (as in this case) finds application throughout the territory of the parties in the war regardless of whether the fighting takes place in each region or not;
2. The conditions to be further applicable “organization, responsible command, control over a part of the territory, extensive military operations and the ability to implement International Humanitarian Law” (Additional Protocol II)

As noted above, these substantive elements have been met in this case.

- Therefore, the Supreme Court in the enacting clause has clarified the qualification of all constitutive elements of the war crimes and deletes references made to the international armed conflict (Article 147 of the Geneva Convention IV) on the qualification of war crimes.

b) The Supreme Court does not agree with the finding in the appeal that the defendant did not intend to commit murder, no motivation and / or acted in negligence. The Supreme Court, after assessing the evidences, legally presented to the first instance court, notes that the intention to commit murder was proven by the fact that the defendant without any warning fired shots from his AK47 weapon (combat weapon) in direction of the vehicle, completely aware that the vehicle was full of people (including a 6 year old child who was sitting on the deceased's lap) and doing so he knew very well, because he saw persons sitting in the vehicle one minute earlier, that he would murder and injure the driver and / or the passengers. The claim of the defense stating this was an accident and that the defendant wanted to shoot in the air does not stand, because of the aforementioned facts, road conditions and geographical indications. The trajectory of the bullet (top down) clearly shows that the defendant aimed at vehicle's rear windshield, knowing for sure that the bullet will penetrate into the passenger area inside the car. The motive of this crime is (indeed) unknown; however, as such this circumstance does not matter (in this case) in determining the purpose (elements of morality) of the crime.

c) The applicable criminal law by which the punishment must be determined is the most favorable law for the defendant. Taking into account the date of the criminal facts, the most favorable law is the CC of SFRY, Article 142 (1) of 1977/1993, having regard to UNMIK Regulation 2000/59 (abolition of death penalty). The first instance court sentenced the defendant to an (unlawful) punishment of 17 years instead of a sentence of 20 years of imprisonment or a prison sentence of up to 15 years. The first instance court decided for the 17 years of imprisonment, which is not legally envisaged.

In this case, given that the appeal cannot harm the appellant (the defendant), the maximum punishment for the crime (war crimes - intentional murder) is years of imprisonment. The Supreme Court agrees with the opinion of the Public Prosecutor. Therefore, the Supreme Court decided to punish the defendant with 15 year prison sentence because:

- The crime itself shows the manifestation of dangerous criminal conduct of the defendant;
- Victims (injured parties) are still suffering from immense damage to morale;
- The defendant does not show affection towards the victims;
- Serious social consequences to the public caused by his acts.

Therefore, this imposed imprisonment is necessary to bring an indispensable insight, perception and understanding of his criminal conduct so that he would be able to function as honest and peaceful citizen and harmless to people around him. A lesser sentence, given the defendant's personality, the major criminal offenses he has committed against completely innocent civilians (including a child) cannot be taken into consideration even though the Supreme Court is aware of the fact that the defendant is married and is a father, that there are no previous criminal records and that the criminal facts were committed on 12 June 1998.

The Supreme Court underlines that the time spent in detention on remand and house detention should be subtracted from the duration of the abovementioned imprisonment.

For the reasons outlined above, the Supreme Court, as a panel of appeals, has decided in accordance with Article 426 (1) of the CPCK - that the first instance judgment must be confirmed, apart from the amendment set forth in the enacting clause. The decision on further detention on remand of the convicted person was issued with a separate and specific ruling.

SUPREME COURT OF KOSOVO IN PRISTINA
AP-K No. 191/2009
December 8, 2009

Presiding Judge
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