Supreme Court of Kosovo
AP – Kž. No. 368/2009
6 April 2010

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judge Gerrit-Marc Sprenger and Supreme Court Judges Avdi Dinaj, Valdete Daka and Emine Mustafa as members of the panel, assisted by Eriona Bitri Brading as recording clerk,

in the criminal case against the defendant D. , father's name , mothers maiden name born on in the village of last residence in

without previous convictions,

held in pre-trial detention since 29 May 2008,

charged with the criminal act of murder out of blood feud and in a brutal or insidious manner contrary to Article 30 Paragraph 2 item 1 and 4 of the Criminal Law of the Autonomous Province of Kosovo (CLK) as read in conjunction with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY),

deciding upon the appeals filed by Defence Counsels Fazli Balaj (dated 26 August 2009) and Zenel Mekaj (dated 25 August 2009) on behalf of the defendant and by Lawyer Haxhi Millaku (dated 12 August 2009) on behalf of the injured party against the Judgment P. No. 178/2008, rendered by the District Court of Pejë/Peć on 11 June 2009,

in a session, held on 06 April 2010, after a deliberation and voting renders this

RULING

The appeals filed by Defence Counsels Fazli Balaj and Zenel Mekaj are **GRANTED**. The Judgment of the District Court of Pejë/Peć, dated 11 June 2009, is **ANNULLED** and the case is **RETURNED** to the court of first instance for retrial.

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The appeal filed by Lawyer Haxhi Millaku on behalf of the injured party does at the moment not fall into the subject matter of the case.

Detention on remand against the accused is extended for **two (2) months until 5 June 2010** pursuant to Articles 281 and 424 Paragraph 6 of the Kosovo Code of Criminal Procedure (KCCP). The decision on further extension of detention on remand falls under the competence of the first instance court pursuant to Article 429 Paragraph 5 of the KCCP.

Reasoning:

I. Procedural History

On 19 March 2004, at about 10.30 hrs in , the victims D. and T. A. were shot dead.

The criminal investigation against the accused was initiated on 28 July 2005. With indictment, dated 25 August 2005, the District Public Prosecutor in Pejë/Peć charged the defendant with two counts of Murder in violation of Article 30 Paragraph 2 items 1 and 4 of the Criminal Law of Kosovo (CLK) in conjunction with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY). The indictment was confirmed by the District Court of Pejë/Peć with Ruling, dated 17 October 2008.

On 26 January 2009 the President of the Assembly of EULEX Judges based upon a request filed by Defence Counsel Fazli Balaj issued a decision that the panel be composed of two (2) EULEX Judges and one (1) local Judge.

The main trial was held between 21 April 2009 and 11 June 2009. The panel on 11 June 2009 found the defendant guilty of two (2) criminal offences of Murder "committed out of blood feud and in a brutal or insidious manner" contrary to Article 30 Paragraph 2 items 1 and 4 of the CLK in conjunction with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY), and imposed single sentences of twenty (20) years of imprisonment for each case of Murder onto him, resulting in an aggregated sentence of thirty-three (33) years imprisonment. The written judgment was served on the parties between 11 and 16 August 2009.

On 24 August 2009 lawyer Isa Osdautaj on behalf of the accused filed an appeal against the judgment. This appeal was dismissed as impermissible by the Court of first instance on the ground that the lawyer had failed to submit to the court a power of attorney. An appeal against this Ruling of the District Court was not filed. Also on 24 August lawyer Haxhi Millaku as representative of the injured party filed an appeal against the judgment.

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On 26 August 2009 Defence Counsels Fazli Balaj and Zenel Mekaj on behalf of the accused filed appeals against the judgment.

II. Issues raised in the appeals:

Defence Counsel Fazli Balaj proposes to render a decision annulling the Judgment of the District Court of Pejë/Peć and to return the case to the court of first instance for retrial.

He claims essential breach of the provisions of the criminal procedure and the criminal code.

In particular Defence Counsel Fazli Balaj contends:

1. Violations of the provisions of criminal procedure:

   a. The Judgment of the District Court is in essential breach of Article 403 Paragraph 1 and Article 391 Paragraph 2 items 1, 2 and 5 of the Kosovo Code of Criminal Procedure (KCCP), because the enacting clause is unclear. The appealed verdict lacks a factual description as the crucial facts are neither mentioned in the enacting clause nor in the reasoning. Hence the verdict should be annulled.

   b. Although the accused was found guilty only for one (1) count of murder – killing of D. A. – he was punished for two (2) counts of murder.

   c. The court of first instance failed to establish the facts fairly and completely. The sketch attached to the verdict does not reflect the reality of the crime scene. Requests of the defence to conduct a crime scene inspection in order to allow a fair assessment of the witness statements were rejected by the court. In particular the statements of witness M. B. should have been assessed under the aspect that from his point of observation he was physically not able to see what he reported as having seen.

   d. The main witness – L. A. – cannot be given credibility. The same applies to witnesses G. N. , A. N. and V. N. .

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2. Violations of the criminal code

   a. Pursuant to Article 30 Paragraph 3 of the CLK the court of first instance should have imposed one (1) sentence for the murder of two (2) persons instead of an aggregate sentence for two counts of murder.

   b. In legal terms murder out of blood feud and murder committed in a brutal or insidious manner exclude each other.

Defence Counsel Zenel Mekaj proposes to render a decision annulling the Judgment of the District Court of Pejë/Peć and to return the case to the court of first instance for retrial.

He claims essential breach of the provisions of the criminal procedure and the criminal code.

In particular he contends:

1. Violations of the provisions of criminal procedure:

   a. The verdict violates Article 403 Paragraph 1 item 12 of the KCCP, because according to what is stated as facts in the verdict the accused shot from the front of the car whereas D. A. was hit by eight (8) bullets which were fired from the back and T. A. was hit by six (6) bullets which were fired from the right side.

   b. The factual state was not fully and correctly established. The way the collection of material evidence at the crime scene was done is not sufficient for a balanced and final decision. However, it is clear that the accused could not have shot at the car from the front, as stated by witness L. A. . The court of first instance failed to conduct a crime scene inspection which would have revealed that some of the witnesses reported observations which they had not been able to make.

2. Violations of the criminal code:

   a. Murder out of revenge cannot be considered as insidious as the victim is aware of a possible attack. In addition it is a contradiction to conclude that the accused shot at the car from the front in a visible position and at the

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same time acted in an insidious manner.

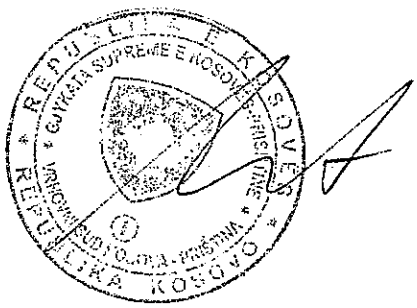
b. The court of first instance committed an elementary mistake by imposing "imprisonment" instead of "long-term imprisonment" onto the accused. Moreover, the calculation of punishment takes into account as aggravating factor the "important role of D. ", who was supposedly in front of the car, without specifying his action.

The representative of the injured party, lawyer Haxhi Millaku, proposes to amend the judgment of the first instance court and to impose a more severe sentence onto the accused. He contends that the thirty-three (33) years of imprisonment is not in proportion with the level of criminal responsibility of the accused. It should be taken into account that crimes committed out of blood feud should be treated as relicts of the past which do not have a place in a modern society.

The Office of the State Prosecutor of Kosovo (OSPK) with opinion, dated 16 November 2009, submits that the appeals filed by the Defence Counsels are grounded regarding the appellate grounds of the essential violation of the provisions of criminal procedure pursuant to Article 403 Paragraph 1 item 12 of the KCCP. The enacting clause of the appealed judgment fails to list the personal data of the accused. In addition the enacting clause is not clear and incomprehensible because it does not give reasons on decisive facts. Therefore the appealed judgment is not in compliance with the provisions of Articles 391 and 396 Paragraph 1 of the KCCP and as a consequence has to be annulled even *ex officio* pursuant to Article 415 Paragraph 1 item 1 of the KCCP.

Furthermore the OSPK opines that the appealed judgment violates the provisions of criminal law because two (2) sentences for two (2) murders were imposed onto the accused although he was found guilty of murder relating to one (1) victim only.

For these reasons the OSPK refrained from reviewing and assessing the other grounds for the appeals raised by the parties and proposes to approve the appeals of the defence counsels and to annul the appealed judgment and to return the case to the court of first instance for retrial.



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III. Findings of the Supreme Court

1.

The appeals of defence counsels Fazli Balaj and Zenel Mekaj are timely filed and admissible.

They are also grounded. The Supreme Court of Kosovo finds that the first instance judgment shows a substantial violation of provisions of criminal procedure pursuant to Article 403 Paragraph 1 item 12 of the KCCP. The enacting clause of the first instance judgment is incomprehensible.

The elements of a judgment are clearly defined by Article 396 Paragraph 1 of the KCCP, according to which a judgment shall have an introduction, the enacting clause and a statement of grounds. The obligatory content of the enacting clause as the *tenor sententiae* is specified in Paragraphs 3 and 4 of Article 396 of the KCCP. Paragraph 4 of Article 396 of the KCCP provides that the enacting in case of a conviction shall contain the necessary data specified in Article 391 of the KCCP.

Article 391 of the KCCP in the respective part reads as follows:

> *(1) In a judgment pronouncing the accused guilty the court shall state:*
>
> > *1) The act of which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends;*
> >
> > *2) The legal designation of the act and the provisions of the criminal law applied in passing the judgment;*
> >
> > *3) ……..*

Thus the enacting clause as the very essential part of the judgment has to contain not only the legal qualification of the act but also a precise and detailed description of all facts and circumstances which are the basis for the application of the legal provisions. Any kind of ambiguity or contradiction renders the enacting clause incomprehensive.

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In the case in question the enacting clause of the first instance judgment does not reflect these legal requirements. The accused was found guilty

> *"Of the criminal offence of* ***Murder, committed out of blood feud and in a brutal or insidious manner*** *of T. A. , pursuant to Article 30, par. 2, items 1 and 4 of the Criminal Law of Kosovo of 1977, in conjuction with art. 22 of the Yugoslavian Criminal Law, committed at*
>
> *on the 19th of March 2004*
>
> ***And***
>
> *Of the criminal offence of* ***Murder, committed out of blood feud and in a brutal or insidious manner*** *of D. A. , pursuant to Article 30, par. 2, items 1 and 4 of the Criminal Law of Kosovo of 1977, in conjuction with art. 22 of the Yugoslavian Criminal Law, committed at*
>
> *on the 19th of March 2004;"*

Only a small number of facts is mentioned in this enacting clause, namely the names of the victims as well as date and place of the crime. This is, as the OSPK correctly pointed out in its opinion, not sufficient. The required factual description of the concrete acts committed by the accused, i.e. the way in which he deprived the victims of their lives, is entirely missing. The same applies to his premeditation which is a necessary precondition for murder, however not mentioned in the enacting clause at all. Just these omissions render the enacting clause incomprehensible[1].

Furthermore, the enacting clause is unclear when referring to the aggravating circumstances "in a brutal or insidious manner". The enacting clause must not offer options, i.e. either brutal **or** insidious, in doing so not specifying which of the two options was in fact applied by the court. On the contrary the criteria and elements of the crime that were established by the court have to be identified in the enacting clause clearly and without any ambiguity. In addition also the facts regarding these specific elements of the crime - i.e. killing in a brutal or in an insidious manner – have to be described in the enacting clause in order to justify the conclusion regarding the legal qualification.

Moreover, the reference in the enacting clause to Article 22 of the Criminal Law of the

[1] For the omission regarding the premeditation see also Momcillo Grubac and Tihomir Vassiljevic, Commentary on the (until April 2004 applicable) Law on Criminal Proceedings, 2nd edition 1982, Paragraph 52 to Article 364 item 11

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Socialist Federal Republic of Yugoslavia (CLSFRY)[2] indicates that the accused was found guilty for acting as co-perpetrator in concert with other perpetrators. The enacting clause, however, does not specify this and fails to describe any facts regarding this co-perpetration.

As a result the enacting clause leaves it completely open in which way the victims were killed and in which manner exactly the accused contributed to that killing.

Pursuant to Article 403 Paragraph 1 item 12 of the KCCP it is an absolute substantial violation of the provisions of criminal procedure if the enacting clause of the judgment was incomprehensible. Pursuant to Article 424 Paragraph 1 of the KCCP this violation does not allow any other options for the court of appeal than annulling the judgment and returning the case for retrial. The possible exceptions – see Articles 424 Paragraph 2 and 426 Paragraph 1 of the KCCP – do not apply as they refer to violations of the provisions on criminal procedure governed by items 5, 8, 10 and 11 of Article 403 Paragraph 1 of the KCCP.

It might be argued that the only solution foreseen by the law – annulment of the judgment and retrial just for formal reasons – is too strict and needs a corrective interpretation of the law in order to avoid retrials. The case in question, however, is not suitable to start discussing whether, under which circumstances and how a corrective interpretation of the law with the aim to amend the first instance judgment would be legally justifiable. For, the minimum requirement to start such legal discussion would be a precise and accurate statement of facts in the grounds of the first instance judgment. Only under this precondition the court of appeal would be enabled to amend the enacting clause by supplementing it with facts listed in the grounds of the judgment. However, the judgment of the District Court of Pejë/Pec, dated 11 June 2009, does not provide the required statement of facts in the grounds either. On the contrary the lack of factual description in the enacting clause finds its correspondence also in the reasoning of the judgment which is not in compliance with the provisions of the law either. Article 396 Paragraph 7 of the KCCP provides that the court in the statement of grounds shall state

"clearly and exhaustively which facts it considers proven or not proven".

Such statement, which has to be a precise, accurate and comprehensive factual description of the events, cannot be found in the first instance judgment. Only towards the end of the judgment, under the headline "4.7. Joint evaluation of the elements against the defendant"[3] a small number of facts are listed. The reliability of this list, however, is for various reasons arguable.

It is, to begin with, not quite clear if the listed facts are those established by the first instance court. On the one hand the list is introduced with the remark that "these facts are

[2] The term "*Yugoslavian Criminal Law*", as used in the enacting clause, is not the official title of this law

[3] A more specific reference is not possible as the judgment lacks pagination

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deemed to be established beyond reasonable doubt". On the other hand the assessment of the evidence presented by the defence follows *after* this list of facts although the facts cannot be determined "beyond reasonable doubt" before assessing the evidence altogether including evidence presented by the defence. In addition the list is anything but exhaustive. A reconstruction of the shooting event, as far as it is possible on the basis of available evidence, cannot be found. As to the contribution of the accused it merely states that "D. was among the ambushers", what is not sufficient to explain his deed and his guilt. Neither does it allow the conclusion that the accused had "a prominent role in the occasion of the shooting", however later even used as an aggravating circumstance against him[4]. The aggravating element "in an insidious manner" is in the list of facts deducted from the mere idea that "the killers ambushed the victims taking them completely by surprise", although the conclusion that the victims were caught by surprise is not supported by any facts.

Such insufficient description of facts in the grounds of the judgment would not allow the Supreme Court to technically correct the enacting clause by supplementing it with facts described in the reasoning, even if such amendment of the first instance judgment was legally possible. Thus the question whether and under which extraordinary circumstances an amendment of the enacting clause by the court of appeal would be possible does not need to be answered by the Supreme Court of Kosovo in the case in question.

Since the flaws of the enacting clause require an annulment of the judgment the Supreme Court refrains from deciding upon the other objections raised by the defence counsels against the first instance judgment. However, the Supreme Court in order to avoid further complications during the retrial sees the need to draw the attention to a few other matters.

The above mentioned inadequacy in establishing the facts is also reflected in other parts of the judgment such as the incomplete description of the victims' injuries[5]. A precise description of the autopsy reports would have revealed that D. A. died from gunshots which hit his head mainly from the back. The other victim, T. A. , died from gunshots which hit his head from the back and from the right side. This renders it arguable whether the accused had a "prominent role in the ambush" by standing in front of the car.

The court of first instance based this conclusion regarding the "prominent role" of the accused upon the statement of witness L. A. , although L. A. did not mention this particular detail during the main trail[6]. He had reported this detail only during the interrogation by the investigating judge on 14 April 2004. Indeed the first instance court assigned a particular importance to this detail[7] although witness L. A. during the main trial had not even been confronted with this detail of his previous statement. Witness L. A. was confronted with his previous statement given before the

[4] See 4.9 The Punishment
[5] See 4.2. The autopsies
[6] See minutes of 5 May 2009
[7] See footnote 5 of the appealed judgment

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investigative judge[8], however only regarding the question whether T. A. mentioned the first names and also the surnames of the attackers. He was not confronted with the alleged remark of T. A. "D. was in front". Hence this detail was not confirmed during the main trial and consequently cannot be used against the accused.

Furthermore, using this detail against the accused would have required a thorough assessment why witness L. A. mentioned such a special detail only once before the investigating judge and never again, not even during his questioning in the previous main trial against A. N. and R. B.[9].

Further concerns regarding the determination of facts arise from the rejection of motions for a crime scene inspection. Instead the court of first instance relied upon the minutes of a crime scene inspection conducted by a different panel in a previous trial against different defendants, and upon a sketch of the crime scene which is attached to the judgment. This does not seem to reflect the principle of a fair and thorough examination of the case since the defence substantially challenged the accuracy of some witness statements based on the reason that the distances/circumstances at the crime scene did not allow the observations reported by the witnesses. In addition it appears that the first instance court did not have an accurate picture of the crime scene. The sketch the first instance court relied upon is not to scale and consequently does not give a clear picture of the area. Also witness L. A. pointed out that the sketch is not accurate and does not reflect the course of the roads with the desired accuracy[10]. A precise picture of the crime scene and the surrounding area, however, is of crucial importance given the conflicting evidence of witnesses regarding distances. Instead it emerges from the first instance judgment that the letters assigned by the panel to specific spots on the sketch[11] do not entirely match the sketch itself. The letter "B", for instance, is supposed to mark R. and P. B. 's house, although in the sketch a different house far away from point "B" is marked as "B. 's house". The judgment also refers to a letter "F" which supposedly marks A. N. 's house. The letter "F", however, cannot be found on the sketch. A group of houses, on the other hand, is marked on the sketch with letter "L", although this letter does not appear on the list in the judgment.

Further concerns regarding the thoroughness of the determination of the factual situation emerge from the assessment of witness' L. A. 's testimony.

The first instance court correctly assigned a high importance to this witness. However, it does not appear to be duly taken into account that this witness testified the most important part of the events, i.e. the shooting itself, only from hearsay. An eye witness statement of these events exists only from one of the victims, T. A., who initially survived the attack and died a few hours later. Hence T. A. is the only eye-witness of the shooting who was able to somewhat talk to L. A. and others about the events.

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[8] See minutes of 5 May 2009, page 10 and 21
[9] See minutes of 1 March 2005 in the case P. Nr. 1/05, District Court of Pejë/Peć
[10] See minutes of 5 May 2009, page 21 English version
[11] See 3. The merits of the case

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In this situation the approach of the first instance court to deal extensively with the statements given by L. A. and to assess the "statement" of heavily injured T. A. only under the aspect of his physical ability to speak falls too short, because it accepts T. A. 's description of the event as accurate and truthful without any further assessment. Doubts, however, regarding the accuracy of his report arise from the first instance judgment itself according to which T. A. also mentioned L. as one of the attackers who, also according to the first instance judgment, met the attackers some time later at a different location and was clearly not present at the scene of the shooting.

In conclusion a careful and thorough assessment of all available evidence including autopsy reports, photographs, crime scene report etc. will have to be done during the retrial in order to establish as precisely as possible the shooting event itself. In a second step the individual contribution of the accused has to be assessed thoroughly in order to determine his personal guilt.

For the application of the provisions of criminal law, in case the accused will be found guilty, the Supreme Court of Kosovo points out the following.

Applicable law is in general the law which was in force at the time the crime occurred. However, since the Provisional Criminal Code of Kosovo (PCCK) entered into force after the commission of the crime the court has in accordance with Article 2 of the PCCK to apply the most favorable law. The assessment which law is more favorable cannot be done *in abstracto* based upon the charges in the indictment. The Supreme Court explained already in previous decisions[12] that there are several specific rules that attach to the principle of the more favorable law. Primarily, however,

> "it must be stressed that the comparison of the 'severity' between the new and the old law is not done in regard to those laws (or specific provisions) taken *in abstracto*, but always in regard to the outcome of the application of these laws to the concrete case. The practical consequence is that the act under judicial consideration must be evaluated under the old law and under the new law, and then the results compared. If the result for the accused is the same under the old law and the new law (...), PCCK require(s) that the old law apply"[13].

[12] AP KZ 382/2003
[13] See also Supreme Court of Kosovo, AP KZ 490/2003

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Furthermore, the court of first instance imposed two (2) single sentences onto the accused for two (2) cases of murder[14]. In doing so the court failed to consider Article 30 Paragraph 3 of the CLK which reads:

> *(3) The punishment as per Para 2 of this article shall be imposed on a person who committed several premeditated murders ... disregarding the fact that he is being tried for all the murders by the application of the regulations relating to concurrence or the fact that he was previously convicted of another murder.*

Clearly, on the basis of the opinion of the first instance court that the accused is guilty of depriving the two (2) victims of their lives Paragraph 3 of Article 30 of the CLK would have been applicable in this case and it would have precluded the imposition of a single sentence for each of the two (2) murder victims.

2. The appeal filed on behalf of the injured parties

Since the judgment of the first instance court is annulled and the case returned for retrial the appeal filed on behalf of the injured parties does at the moment not fall into the subject matter of the case.

III. Detention on remand

Detention on remand of the accused has to be extended for two (2) months.

The Supreme Court notes that the accused has been in detention on remand for almost two (2) years. However, there are reasons to further keeping him in detention on remand.

Given the evidentiary situation there is still grounded suspicion that the accused committed the crime he is charged with. Also the risk of flight still exists. Shortly after

[14] The argument of the defence counsels that the accused was found guilty only for the murder of D. A. is based upon a mistake in the translation of the judgment from the original English into the Albanian language

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the events on 19 March 2004 the accused fled Kosovo, using a false passport. In addition there are grounds to believe that he will influence witnesses. The crime he allegedly committed emerges from a blood feud situation between two families who live close to each other in a small village. Most of the witnesses reside also in this village and hence are particularly vulnerable to intimidation or any other means of influence. Finally, the continuation of detention on remand cannot be seen as disproportionate to the alleged crime and the punishment the accused has to face in case he will be found guilty again. The accused is charged with murder of two persons and hence facing a sentence of at least ten (10) years imprisonment pursuant to Article 30 Paragraph 2 and 3 of the CLK.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
AP – Kž. No. 368/2009

Presiding Judge

Norbert Koster

Panel Member

Gerrit-Marc Sprenger

Panel Member

Avdi Dinaj

Panel Member

Valdete Daka

Panel Member

Emine Mustafa

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