Supreme Court of Kosovo
AP – Kž. No. 24/2010
4 May 2010

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judges Maria Giuliana Civinini and Guy Van Craen and Supreme Court Judges Valdete Daka and Avdi Dinaj as members of the panel, assisted by Valentina Gashi as recording clerk,

in the criminal case against the defendant P.D de, fathers name , mothers maiden name , born on in ., Republic of Serbia, of Serbian ethnicity and Serbian citizenship, last known residence at village, Municipality of , Republic of Serbia, single, education three (3) years of vocational school, unemployed, no previous conviction,

held in detention on remand since 14 June 2008,

charged with the criminal act of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance, contrary to Article 115 Paragraph 3 as read with Paragraph 1 of the Criminal Code of Kosovo (CCK), Commission of Terrorism, contrary to Article 110 Paragraphs 2 and 1 as read with Article 109 Paragraph 1, Subparagraphs 2, 7 and 10 of the CCK, Attempted Aggravated Murder, contrary to Articles 146 and 147 as read with Article 20 of the CCK,

deciding upon the appeal filed by Defence Counsels Ljubomir Pantović and Miodrag Brkljač, dated 31 December 2009, on behalf of the defendant, and upon the appeal, dated 27 January 2010, filed by E. and A. as injured parties, against the Judgment P. No. 134/2008, rendered by the District Court of Mitrovicë/Mitrovica on 19 November 2009,

in a session, held on 04 May 2010, after a deliberation and voting renders this

JUDGMENT

The appeal of defence counsels Ljubomir Pantović and Miodrag Brkljač filed on behalf of the defendant, is **rejected.**

The appeal of A. filed as injured party is **dismissed as belated.**

The appeal of injured party E. is **granted**. The judgment of the District Court of Mitrovicë/Mitrovica, dated 19 November 2009, is **partially modified.** For Count B – Attempted Aggravated Murder contrary to Article 147 item 10 of the CCK – the accused is sentenced to

twelve (12) years imprisonment,

resulting in an aggregated punishment of

twelve (12) years and three (3) months of imprisonment.

As to the remaining parts the judgment of the District Court of Mitrovicë/Mitrovica, dated 19 November 2009, is affirmed.

Reasoning:

I. Procedural History

On 16 June 2008, Public Prosecutor Shyqyri Shala of the District Public Prosecution Office of Mitrovicë/Mitrovica issued a Ruling on Initiation of Investigation against the defendant. On 12 December 2008, Public Prosecutor Shyqyri Shala filed an indictment against the defendant for the criminal offences of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance, and Commission of Terrorism.

On 16 April 2009, the Special Prosecution Office of the Republic of Kosovo (SPRK) took over the case.

On 02 July 2009, an amended indictment was filed, charging the defendant also with the criminal offence of Attempted Aggravated Murder.

The injured parties propose to amend the judgment of the first instance court and to impose a more severe sentence onto the defendant. They contend that the sentence imposed is below the foreseen minimum. Hence the court of first instance exceeded the legal authorization for a more lenient punishment. The mitigating circumstances were overrated whereas the aggravating circumstances were not duly taken into account. In particular the court of first instance should have taken into account:

- the decisiveness of the defendant to get to the minaret of the -mosque by ascending from the outside,
- the fact that the defendant raised the flag of another ethnical group with different religious believes on the minaret of the mosque in a town were inter-ethnical tensions are very aggravated and high,
- the fact that the accused pretended to be deaf-mute when contacting the police officers, in doing so misleading them about his condition,
- the determination to enter by all means the Police Station with a knife in his hand after he injured Police Officer E.

The Office of the State Prosecutor of Kosovo (OSPK) with opinion, dated 23 February 2010 and filed with the Supreme Court on 30 March 2010, submits that the appeal filed by the Defence Counsels is not grounded. The deed of the defendant – firing one (1) shot from a close distance at Police Officer E. – does not allow any other conclusion than his intention to deprive the victim of his life. Hence the sentence imposed onto the defendant cannot be seen as too severe. Neither is this sentence too low. The court of first instance rightfully established that there are particularly mitigating circumstances which indicate that the purpose of the punishment can be achieved by imposing a sentence which is below the limits provided by the law.

III. Findings of the Supreme Court

1.

The appeal of defence counsels Ljubomir Pantović and Miodrag Brkljač is timely filed and admissible.

This appeal, however, is not grounded.

Since Count A of the first instance judgment - Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance – is not contested by defense, the Supreme Court of Kosovo is confined to deal only with Count B - attack on police officer E.

The amended indictment was confirmed by the District Court of Mitrovicë/Mitrovica with Ruling, dated 06 July 2009.

The main trial was held between 27 July and 19 November 2009. The panel on 19 November 2009 found the defendant guilty of the criminal offences of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance, and Attempted Aggravated Murder. The charge of Commission of Terrorism was rejected pursuant to Article 389 item 1 of the KCCP. The court of first instance imposed single sentences of six (6) months for the criminal offence of Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance and six (6) years for the criminal offence of Attempted Aggravated Murder onto the accused. The court held that the mitigating circumstances outweigh the aggravating circumstances and, based upon Article 66 and 67 of the PCCK, imposed a lesser punishment than the minimum prescribed by law onto the defendant.

On 5 January 2010 Defence Counsels Ljubomir Pantović and Miodrag Brkljač on behalf of the accused posted an appeal against the judgment. This appeal was filed with the District Court of Mitrovicë/Mitrovica on 11 January 2010. On 27 January 2010 E. and A. as injured parties filed an appeal against the judgment.

II. Issues raised in the appeals:

Defence Counsels Ljubomir Pantović and Miodrag Brkljač propose to render a decision amending the Judgment of the District Court of Mitrovicë/Mitrovica as regards Count B – Attempted Aggravated Murder - by pronouncing the defendant guilty of the criminal act of Serious Bodily Injury contrary to Article 154 Paragraph 1 item 1 of the CCK and to pronounce a less harsh punishment.

Defence Counsels claim a violation of the Criminal Law, because the first instance Court should have found the defendant guilty of serious bodily injury rather than aggravated attempted murder. The defendant was not determined to deprive the victim E. of his live. He fired only one (1) shot which did not kill the victim. The second bullet remained in the barrel of the weapon. It results from the ballistic expertise that the pistol of the defendant was in good condition. Hence he could have shot a second time.

Defence Counsels furthermore claim that the punishment for this deed of the accused is too high, even if the legal qualification of the first instance court would be upheld. The fact that E. received a serious bodily injury cannot represent an aggravating circumstance, because such injuries are the regular consequence of the use of firearms. Possible long term consequences of this wound are hypothetical and therefore cannot represent an aggravating circumstance.

With this attack the accused committed the criminal offence of attempted aggravated murder and not just serious bodily injury. The accused fired one shot from a very close distance – he and police officer E. were standing next to each other – at the victim, hitting his body at the height of his waist. In doing so the accused showed his intent to deprive E. of his life. It reflects common knowledge that firing a bullet from such a close distance at a part of the body which contains vital organs and internal arteries puts the life of the victim at a very high risk which by no means can be controlled by the perpetrator. Hence the Supreme Court of Kosovo agrees with the court of first instance that action itself clearly allows drawing the conclusion that the accused at moment he fired the shot was intended to kill police officer E.

The fact that the accused had a second bullet in his pistol which he did not even attempt to fire is not sufficient to successfully challenge his intent to deprive E. of his life. This fact can only be discussed under the legal question whether the accused voluntarily abandoned the commission of the criminal offence of attempted aggravated murder pursuant to Article 22 of the PCCK. The accused, however, cannot benefit from this provision of the law. First of all, his behaviour lacks the element of voluntariness since police officer E. almost immediately returned fire and in doing so deterred the accused. Secondly, it is clear that the accused did not intend to fire more than one bullet at the victim. Hence with firing this shot his act was completed with the consequence that he would have had to prevent the occurrence of the consequences – i.e. the possible death of the victim – in order to benefit from the provision of Article 22 of the PCCK. This would have required a specific activity of the accused such as, for instance, calling the ambulance. Just remaining passive by not firing the second bullet was not sufficient to meet this specific requirement of Article 22 of the KCCP.

Since the accused committed the criminal offence of attempted aggravated murder the punishment imposed by the court of first instance cannot be seen as too severe. On the contrary the Supreme Court of Kosovo finds that this punishment is far too lenient, as it will be explained later in context with the appeal of injured party E.

As a result the appeal filed by the Defence Counsels on behalf of the accused is not grounded and has to be rejected pursuant to Article 423 of the KCCP.

2.

The appeal filed by A. as injured party is belated and inadmissible. The first instance judgment was served on A. on 11 January 2010. The appeal was filed with the District Court of Mitrovicë/Mitrovica on Wednesday, 27 January 2010 and hence after the period of 15 days (see Article 398 Paragraph 1 of the KCCP in conjunction with Article 95 Paragraph 2 of the KCCP) had elapsed. The appeal has to be dismissed as belated in accordance with Article 420 Paragraph 1 item 1 of the KCCP. Against this background the question raised by Defence Counsel Ljubomir

Pantović only during the session on 4 May 2010 whether A. is an injured party or not does not need to be answered.

3.

The appeal of injured party E. is timely filed and admissible. The Supreme Court notes that E. failed to announce an appeal. This, however, does not render his legal remedy inadmissible. Article 400 Paragraph 2 of the KCCP states that if a person entitled to appeal fails to announce an appeal, he or she shall be deemed to have waived the right to appeal, except in instances from Paragraph 4 of Article 400. Paragraph 4 of this provision refers to cases in which the accused has been punished by imprisonment.

In the case in question the accused has been sentenced to six (6) years and three (3) months imprisonment. Hence Paragraph 4 of Article 400 of the KCCP applies with the consequence that an appeal had not to be announced.

The appeal of E. is also grounded. The Supreme Court of Kosovo finds that the sentence imposed by the court of first instance for the criminal offence of attempted aggravated murder is too low.

An extraordinary mitigation of punishment pursuant to Articles 66 Paragraph 2 and 67 of the PCCK is not appropriate in the case in question. The first instance court based the application of this provision on three (3) arguments: that the accused has no previous criminal record, that the criminal offence was an attempt and that he is of an unbalanced mental state. These reasons are not sufficient to shift the range of punishment from a possible minimum sentence of ten (10) years to one (1) year imprisonment. The fact that the criminal offence was just an attempt results in mitigation of punishment pursuant to Article 65 Paragraph 2 of the KCCP and cannot be used another time to justify the application of Article 66 of the KCCP. The lack of a previous criminal record of the accused can be taken into account as a mitigating circumstance, however is anything but extraordinary to such an extent that it would allow the application of Article 66 of the KCCP. The same applies to the mental state of the accused which according to the psychiatric expertise did not even result in a diminished mental capacity as required by Article 12 Paragraph 2 of the PCCK. The Supreme Court of Kosovo holds that not even the combination of these three factors is so extraordinary that the requirements of Article 66 Paragraph 2 of the KCCP would be met.

Hence the punishment has to be determined by applying the range of possible punishment deriving from Article 147 of the PCCK as mitigated in accordance with Article 65 Paragraph 2 of the KCCP - minimum ten (10) years or long-term imprisonment up to thirty (30) years imprisonment.

Within this range the Supreme Court of Kosovo took duly into account all aggravating and mitigating circumstances as listed by the court of first instance. It has to be stressed

that as aggravating circumstance the Supreme Court in particular considered the fact that the bullet is still inside the body of the victim and is unlikely to be removed. Contrary to the opinion of the Defence this is not a "usual consequence" of using a firearm, the more so as cases of attempt of murder might even be possible in cases where the bullet misses the body of the victim. On the other hand the Supreme Court of Kosovo gave particular weight to the mental state of the accused as mitigating circumstance. Hence it was possible to impose a sentence of twelve (12) years imprisonment onto him which is close to the minimum possible punishment.

As far as the punishment for count A - Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance – is concerned E. has no right to an appeal as he is not injured by this deed of the accused. Since neither the Defence challenged the sentencing regarding this count the Supreme Court of Kosovo has no power to reassess the punishment imposed onto the accused for this count.

In accordance with the provision of Article 71 of the KCCP the Supreme Court of Kosovo determined an aggregated punishment of twelve (12) years and three (3) months of imprisonment.

Based upon the above the judgment of the court of first instance is amended as described in the enacting clause. As to the remaining parts the first instance judgment is fully affirmed.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
AP – Kž. No. 24/2010

Presiding Judge

Norbert Koster

Panel Member

Maria Giuliana Civinini

Panel Member

Guy Van Craen

Panel Member

Valdete Daka

Panel Member

Avdi Dinaj