

DISTRICT COURT OF MITROVICA

P nr. 127/2008

16 September 2010

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF MITROVICA, in the trial panel composed of EULEX Judge Charles L. Smith, III as Presiding Judge, and EULEX Judges Klaus Jung and Hajnalka Veronika Karpati as panel members, with the participation of Tara Khan EULEX Legal Officer as Recording Officer, in the criminal case against:

Xh.H., charged according to Indictment PP. nr. 108/08 filed on 24 November 2008 by Public Prosecutor Shyqyri Sylja with Attempted Murder, defined in Article 146 as read with Article 20 of the Provisional Criminal Code of Kosovo (PCCK), and Unauthorized Ownership, Control, Possession or Use of Weapons, defined in Article 328 Paragraph (2) of the PCCK;

After having held the main trial hearings open to the public on 13, 14, 15 and 16 September 2010, all in the presence of the Accused **XH.H.**, his Defence Counsel Xhafer Maliqi, EULEX Public Prosecutor Adebayo Kareem, Injured Party N.M. and his Legal Representative Abit Asllani (except on 16 September 2010);

After the trial panel's deliberation and voting held on 16 September 2010, on the same day pursuant to Article 392 Paragraph (1) of the Criminal Procedure Code of Kosovo (CPCCK), pronounced in public and in the presence of the Accused, Defence Counsel Xhafer Maliqi, EULEX Public Prosecutor Adebayo Kareem, Injured Party N.M. and his Legal Representative Abit Asllani, the following:

JUDGMENT

The accused **Xh.H.**, son of Xh.H. and Xh. R., born on in , Municipality of , Kosovo-A., currently residing at nr. Street, , completed primary school, former tradesman, currently unemployed, with average income of 80 Euros per month from social services benefits, married with children, no previous conviction;

is

FOUND GUILTY

I.) Because on _____ at approximately _____ hrs, during a dispute between XH.H. and Injured Party N.M. over the inconsequential subject of parking, XH.H. drew his pistol weapon - a _____ mm calibre handgun with no serial number - which he was carrying and fired at least three shots at N.M., hitting him in the left hand, chest and head.

By doing so, XH.H. committed and is criminally liable for the criminal act of Attempted Murder in violation of Article 146 as read with Article 20 of the PCCK.

II) - Because **XH.H.** was in possession of a weapon - a _____ mm calibre handgun with no serial number - without valid authorization and used that weapon in an attempt to deprive N.M. of his life.

By doing so, XH.H. committed and is criminally liable for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of to Article 328 Paragraph (2) of the PCCK.

Therefore, **XH.H.** is

SENTENCED

- to 12 /twelve/ years imprisonment for the criminal act of Attempted Murder /Count I/
- to 4 /four/ years imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons /Count II/

The aggregate punishment is determined in 15 /fifteen/ years of imprisonment, pursuant to Article 71 Paragraph (1) and Paragraph (2) Item 2 of the PCCK.

The time spent in detention on remand from _____ until _____ is to be credited pursuant to Article 73 Paragraph (1) of the PCCK.

The weapon – a _____ mm calibre handgun with no serial number - is hereby confiscated pursuant to Article 60 Paragraph (1) and Article 328 Paragraph (5) of the PCCK.

The accused **XH.H.** shall reimburse the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the CPCK with the exception of the costs of interpretation and

translation. A separate ruling on the amount of the costs shall be rendered by the court when such data is obtained pursuant to Article 100 Paragraph (2) of the CPCK.

Reasoning

A. Procedural Background

Indictment PP nr. 108/08 filed with the District Court of Mitrovica by Public Prosecutor Shyqyri Sylja on 24 November 2008, charged **Xh.H.** with Attempted Murder under Article 146 as read with Article 20 of the PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons under Article 328 Paragraph (2) of the PCCK. The indictment was confirmed on 29 December 2009.

EULEX Judges took over the case on 15 February 2010. The Main Trial was held on consecutive days from 13-16 September 2010 before the panel of EULEX judges. The closing statements of Prosecutor Adebayo Kareem, Defence Counsel Xhafer Maliqi, and Injured Party N.M. were heard on 16 September 2010. The verdict was orally rendered the same day.

B. Competence of the Court

Under Article 23 Item 1) i) of the Criminal Procedure Code of Kosovo (CPCK), District Courts are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of at least five years. Pursuant to Article 27 Paragraph (1) of the CPCK, territorial jurisdiction is proper with the court in the district where a crime is alleged to have been committed.

The Defendant is charged with the criminal offences of Attempted Murder, defined in Article 146 as read with Article 20 of the PCCK, and Unauthorized Ownership, Control, Possession or Use of Weapons defined in Article 328 Paragraph (2) of the PCCK. The criminal offence of Murder carries a minimum sentence of imprisonment for five years, while the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons is punishable by one to eight years. The Indictment alleged that the Defendant committed the criminal act in _____, which lies within Mitrovica District.

Therefore, the District Court of Mitrovica is the competent judicial body to hear this criminal proceeding.

On 15 February 2010, following a hearing, the President of the Assembly of EULEX Judges issued a decision for EULEX judges to take over the case pursuant to Article 3.3 of the Law on Jurisdiction¹ and assigned it to EULEX judges in the Mitrovica District

¹ Law nr. 03/L-053, Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

Court. Therefore, EULEX Judges assigned to the District Court of Mitrovica are competent to try this criminal case. The panel was composed of EULEX Judge Charles L. Smith, III as Presiding Judge, and EULEX Judges Klaus Jung and Hajnalka Veronika Karpati as panel members.

C. Summary of Evidence Presented

During the course of the main trial the following witnesses were heard:

- (1) N.M. (Injured Party), 13 September 2010
- (2) E.H., 14 September 2010
- (3) N.S., 14 September 2010
- (4) Police Officer Xh.J., 14 & 15 September 2010
- (5) Z.T., 14 September 2010
- (6) B.H., 15 September 2010
- (7) A.B., 28 April 2010

On 15 October 2010, the following documents were read into the record:

- (8) Officer's Report by B.F., .
- (9) Officer's Report by A.D., .
- (10) Officer's Report by S.J., .
- (11) List of Confiscated Items, .
- (12) Forensics Identification Report by Xh.R., .
- (13) Forensics Report by S.V., with photographs (p. 103-123 of the Prosecution bundle).
- (14) Report of Forensic Examination by L R., .
- (15) Description of photos by S.V. (p. 161 of Prosecution bundle).
- (16) Photo album (p. 164-169 of Prosecution bundle).
- (17) 3 medical reports by Drs. I.A. and S.K-M. (p. 170-175 of Prosecution bundle).
- (18) Discharge List by Drs. F.A. and A.M..

On 16 October 2010, the following documents were read into the record:

- (19) Medical report by V.K..
- (20) Medical report by Drs. N.B., S.H. and B.B..

The Defendant chose not to make a statement or answer questions during the main trial.

D. Evaluation of Presented Evidence

1. Testimony of the Injured Party

With regard to the facts of the incident, N.M. testified as follows:

On the afternoon of _____, N.M. was sitting in front of his jewelry shop located on Street in _____ with A.B., the owner of the shop adjacent to his. His nephew arrived in his car and stopped in front of _____ shop, which was 10-15 meters away from M.. The owner of _____ arrived in his van behind the nephew and wanted him to move his car so that he could unload goods for his shop. At that moment, **Xh.H.** arrived in his car and stopped right in front of the nephew's car, close enough so that their license plates were touching. Therefore, the nephew could not move his car. From his seat in front of the shop, M. called out to H. and asked him to pull forward. H. moved his car about half a meter and the nephew was able to pull out and left. H. then moved his car to in front of M. and came out of his car towards M.. M. got up to go into his store and had his back turned towards H.. M.'s hands were in his pockets. A.B. was positioned in between H. and M.. M. was about two meters away from his shop when he heard a gun being cocked and turned around. At that moment, H. began shooting his gun over A.B. and towards M.. The distance between H. and M. was approximately two to three meters. M. was at first hiding behind B. and was basically in his arms when he felt a bullet enter his body. He then tried to run away, in order to save himself and not place B. in further danger. H. chased him and shot him again. M. fell to the ground, and when he lifted his head up to see, H. shot him in the head. In total, M. was hit by four bullets: two bullets hit his left wrist, one bullet entered his front left armpit area, and one hit the left side of his head.

The Court found the testimony of N.M. to be credible. His testimony was generally consistent with the statement he gave to police on _____. The Defence Counsel argued that the testimony of M. was inconsistent with his prior statement. He based this argument on three discrepancies. First, in the police statement, M. said that he asked A.B. to get them tea immediately before the incident, but he did not mention this in his testimony. Second, M. testified that he called out to H. to move his car, however this was not in his police statement. Lastly, M. testified that he had his hands in his pockets during the time before H. began shooting, but this was not included in the police statement. When these discrepancies were put to the witness, he recalled that he had asked B. to fetch some tea, but that B. did not go because three of the shops were unmanned at the time. With regard to the other two facts, M. explained that the police conducted their interview in the hospital when he was in a critical health condition, and unable to provide a comprehensive account of the incident. The Court notes that the interview occurred approximately one month after the incident, and that M. had sustained serious wounds to the body and to the head. Therefore, the Court accepts his explanations as reasonable and credible.

2. Testimony of E.H.

E.H. testified that she was inside the shop of her father (the Defendant) when she heard a "noise" from outside. Upon questioning by the parties, E.H. could not describe in any detail the "noise" which she said she heard. In fact, at one point, she stated that she was

unconscious when she heard the noise.² Upon hearing this noise, she went outside to see what was happening. She saw her father near his car parked in front of the store.

It is unclear what E.H. saw next. She testified that she saw N.M. coming from the direction of his shop and going towards **Xh.H.**³ and that N.M. was threatening and cursing at her father.⁴ However, during various points of questioning by the Public Prosecutor, she contradicted whether she actually saw M. cursing:

Public Prosecutor: Where was N.M. when you came out?

E.H.: I did not see him.⁵

Public Prosecutor: Were you able to see both your father and N.M.?

E.H.: I saw my father by his car, and I saw he had to come to eat.⁶

Public Prosecutor: You were able to see your father and N.M.?

E.H.: I was there, my father was opposite the shop, I did not know they had problems.⁷

E.H. further testified that she saw M. throw stones at her father. However, upon questioning by the Public Prosecutor it was clarified that she did not actually see M. throw a stone at her father's car:

Public Prosecutor: And you heard him stone your father?

E.H.: I saw stones at my father's car.

Public Prosecutor: Did you see who threw the stones at your father?

E.H.: I did not see.

Public Prosecutor: So, you could not see and it could have been done by anybody then.

E.H.: The stones came from N.M.'s shop.

Public Prosecutor: But you did not see him throw them?

E.H.: I don't know who threw the stones, but they came from his shop.⁸

Lastly, E.H. testified that she then returned to their shop, told her mother and two sisters what she saw, and all four of them lost consciousness as a result. She testified that she fainted solely due to the shock of seeing her father being cursed.

² Minutes of the Main Trial Hearing, 14.09.2010, p. 4.

³ Minutes of the Main Trial Hearing, 14.09.2010, p. 5.

⁴ Minutes of the Main Trial Hearing, 14.09.2010, p. 4 & 6.

⁵ Minutes of the Main Trial Hearing, 14.09.2010, p. 5.

⁶ Minutes of the Main Trial Hearing, 14.09.2010, p. 7.

⁷ Minutes of the Main Trial Hearing, 14.09.2010, p. 7-8.

⁸ Minutes of the Main Trial Hearing, 14.09.2010, p. 6-7.

The Court found the testimony of E.H. to be unclear, and to contain illogical statements and numerous contradictions within itself, as well as contradictions to the statement she gave police on the night of the incident. Therefore, her testimony is deemed not credible.

In her statement to the police, which was given on the same night as the incident, E.H. stated that she saw N.M. curse at her father and throw a stone at his car, and then **Xh.H.** pulled out a gun and fired at M.. When confronted with this statement in Court, E. denied that she saw her father pull out a gun and shoot.⁹ She did not say that she did not hear shooting, but that she heard “noise” without being able to be more descriptive. She also claimed that she did not speak to the police, that the police did not record her statement accurately, and that she was unconscious at the time of the interview:

Public Prosecutor: Did you say this to the police, the statement I just read?

E.H.: No, just the first part. About the other part saying that my dad drew a weapon and shot, I did not see that happen.

Public Prosecutor: Did you speak to the police that day?

E.H.: No.

Presiding Judge: You just said that you told the first part of the statement, not the other, so did you talk to the police that day?

E.H.: About what he just said, I do not know how to read or write, so I do not know what he put there.

Presiding Judge: But he just read a statement, and you said that you said the first part but not the second part, so are you saying you spoke to the police but they did not write everything correctly?

E.H.: No. I said I was unconscious, so I do not know who came to that statement.

Public Prosecutor: You didn’t talk to the police?

E.H.: No.

Public Prosecutor: At the beginning of your testimony, you said you were unconscious when the police talked to you?

E.H.: I said I was unconscious, now I don’t know how it came to that statement.¹⁰

After her testimony, the Court summoned KP Officer *Xh.J.*, who had taken the statement from E.H.. Officer J. recalled the incident and remembered taking the statement of E.H. in the hallway of her family home. He testified that she did not appear sick or ill and that he informed her of her rights. He wrote down her statement, read it back to her verbatim, and then she signed the document on each page.

The Court believes that the statement which E.H. gave to the police is the accurate account of what she witnessed during the incident for several reasons.

The statement was given a short time after the incident occurred, when the event was fresh in her memory. It is signed on each page with the name “E.” in capital letters. The last page contains an acknowledgment that “The damaged party or complainant hereby states that the statement has been read out to her and was signed without any remarks”

⁹ Minutes of the Main Trial Hearing, 14.09.2010, p. 8 & 11.

¹⁰ Minutes of the Main Trial Hearing, 14.09.2010, p. 11.

and her signature appears below that. Although E.H. testified that she was illiterate, it is possible and reasonable that an illiterate person can know how to sign their name. The Court notes that her name appears in capital block letters rather than a script signature, and is even misspelled on the second page where it appears as “ ”. The Court finds that this a reasonable manner in which E.H., as an illiterate person, would sign a document.

In addition, the factual account in the statement corresponds with the statement of witness N.S. (described in full detail below) who heard a young female at the incident call out “Dad move away” immediately before the shooting began.

Furthermore, the Court also finds E. H. testimony that four people – E.H., her mother and her two sisters – lost consciousness over the mere fact that M. was cursing at **Xh.H.** unbelievable. It is more logical and credible that E.H. witnessed her father pulling out a gun and shooting at M., as she described in her police statement, and suffered traumatically due to this.

3. Testimony of N.S.

N.S. testified that at the time of the incident, he was going to a shop to purchase cigarettes. As soon as he entered the shop, he heard gunshots. He exited the shop and saw two men, one chubby and one skinny, who were about 2-3 meters away from him. They were arguing over the parking of one of their vehicles. One man said “You can not park here” and the other replied “Just wait a little and I will be gone.” The skinny man then pulled out a gun and immediately fired at the chubby man. The two men were about three or four meters apart. The skinny man fired four or five times and the chubby man was hit by the bullets.

This testimony is generally consistent with the statement which N.S. gave to police at on , the of the incident. He told police that he was heading in the direction of the bakery when he saw two men arguing. Nearby was a woman with a girl. He heard one man say to the other “Don’t swear, don’t swear”. The girl went between the men and said “Dad move away.” The two men moved away a bit, about two meters apart, and then one man pulled out a gun from the right side of his waistband and shot the other in the lower part of his body. The wounded man got up and tried to flee but the other man shot him again around his head.

There is one discrepancy between S.’s testimony and statement – whether there were any females present during the argument between the two men. During his testimony, S. was specifically asked about other persons present and said that there were only the two men. However, when the police statement was read out to him, he conceded that his memory had faded and was now refreshed, and that what he told to the police immediately following the incident was the full and accurate account of what he saw. The Court found that N.S. was credible, and accepted his explanation for the discrepancy. The statement to

the police will be viewed by the Court as the more complete account of what S. witnessed.

4. Testimony of Z.T.

Z.T. testified that at the time of the incident he was inside his shop on _____ Street with some customers. He heard two or three gun shots and went outside. He saw N.M. with a head injury, leaning onto a car near an electrical pole and then falling on the ground. Z.T. ran over and, together with A.B., put N.M. into a car to be taken to the hospital. He testified that he did not see **Xh.H.** shoot M., and only saw H. pass by on the way to his house.

His testimony differs from the statement taken by police from Z.T. at _____ hrs on the _____ of the incident. T. told police that he was inside the shop when he heard gunfire. He then saw N.M. sheltering behind a vehicle and an electrical pole. He saw a black gun and said to **Xh.H.** “Don’t shoot!” H. was approximately three meters away from T.. H. fired his gun at M. three times. Then Z.T. and A.B. placed M. into a car and took him to the medical center.

Z.T. was questioned in the Courtroom regarding the discrepancy between his testimony and statement – namely whether he witnessed H. shoot M.. T. maintained that he did not see H. with a gun and he did not see H. shoot M.. He further testified that the police statement was not read out to him before he signed it, and he did not read it before signing it.

The Court finds that the statement given by Z.T. to the police within a few hours of the incident is the true account of what he had witnessed. During his testimony, T. told a substantially different version. To have such a drastically different recollection of such an important and memorable event is suspicious, and the Court believes that this change in testimony could very well be the result of intimidation, or at the very least, a monumental lapse of memory. Police Officer Xh.J. was summoned back to Court a second time in order to testify regarding this witness. He recalled interviewing T. and testified that it is his normal practice to write the statement of the witness and then to read the statement back to the witness. He recalled T. signing the statement in his presence. The testimony of the Police Officer was believable, and there was no reason for him to fabricate the statement as was insinuated by T.. Further, the version of the offence given in the police statement was reasonably consistent with the other statements made by witnesses and the Injured Party.

5. Testimony of B.H.

B.H. testified that he was inside his bakery on _____ Street when he heard a noise which he thought was fireworks. He did not leave his store, but later heard from customers who

came in that there had been a shooting. According to his testimony, he did not witness any part of the incident whatsoever.

On the night of the incident, B.H. gave a statement to police which was substantially different from his testimony. He stated that he heard three gun shots while inside his bakery and looked outside. He saw a person named **Xh.** holding a dark hand gun and firing at N.M., who was trying to hide behind cars and a lamp post. When B.H. was confronted with his prior statement, he claimed that the police had added the extra information. He could not recall whether the statement had been read out to him before he signed it, but he was adamant that he did not read it himself before signing.

For the same reasons regarding witness Z.T. above, the Court found that B.H.'s testimony was not credible and the statement he gave to police is the accurate and true account. His statement is consistent with the police statements given by other witnesses and the testimony of the Injured Party. It contains details regarding the Defendant and the gun which were completely omitted from his testimony. These are important and memorable details which were given to the police officer immediately after the shooting, when the event was fresh in the witness's memory. Although Police Officer J. did not specifically recall B.H., he remembered taking his statement in his bakery and reiterated his practice of reading out every statement to each witness having them sign it. When H. was confronted with the discrepancies over what he witnessed, he professed that the only thing he actually witnessed was the Injured Party leaving in a car to get medical attention. However, he could not satisfactorily explain how he knew that the Injured Party was inside that particular car or why he would even notice that one car since, according to his testimony, he did not leave his shop at all and was not paying attention to what was going on outside.

6. Testimony of A.B.

A.B. had not previously been interviewed by police or prosecution. According to his testimony, on _____, he was sitting with N.M. outside of their shops on _____ street. A customer arrived and B. went into his shop. He heard a verbal commotion outside. He went outside and saw **Xh.H.** and N.M. exchanging words. A.B. placed himself in between the two men in order to separate them. H. pulled out a gun and started shooting in the direction of M.. M. did not have anything in his hands. He started running away and was hit by a bullet in his left hand. M. tried to hide but was hit by another bullet in the head and fell to the ground. A.B. and Z.T. went over to M. to place him into a car to be brought for medical attention.

The Court found the testimony of A.B. to be credible and corroborated by the police statements of the other witnesses. He could not remember all of the details of the event, however this was reasonable since two years had passed during which time neither the police nor the prosecution had spoken to him about the shooting. Without an official statement taken from the witness closer in time to the event, there was no possibility to refresh his memory.

E. Factual Findings

In view of the findings above, the Court considers the following facts as proven:

On _____, N.M. and A.B. were sitting in front of their shops on _____ Street. An argument developed between **Xh.H.** and N.M. over the issue of parking of vehicles. A.B. heard the argument and placed himself between the two men in order to separate them. **Xh.H.** pulled out his pistol – a _____ mm caliber handgun. M. was unarmed. The two men were a few meters apart when H. began firing his weapon. H. fired at least three bullets in the direction of M.. M. tried to run away and take cover behind a vehicle, but was hit by at least three bullets in the left hand, the left shoulder and the left side of his head.

F. Legal Qualification

1. *Applicable Law*

The Court applied the Provisional Criminal Code of Kosovo as that was the criminal code in effect when the criminal act was committed. The application of the new law, the Criminal Code of Kosovo, would not be more favorable for the Defendant. In such a case, the law in effect at the time of commission of the criminal act shall be applied. With regard to the procedure code, the panel refers to the Criminal Procedure Code of Kosovo as the law in effect when the criminal case is tried.

2. *Legal Qualification*

Xh.H. is charged with Attempted Murder as defined in Articles 146 and 20 of the PCCK. Murder is committed when the perpetrator unlawfully deprives another person of his or her life. An attempted murder is committed when the perpetrator takes an immediate and intentional action towards depriving another person of his or her life, although the killing itself is not achieved.

The following facts indicate that **Xh.H.** attempted to deprive N.M. of his life:

- **Xh.H.** intentionally pulled out a pistol during a verbal argument with N.M., who was unarmed.
- H. intentionally fired at least three bullets in the direction of N.M..
- H. began firing his weapon towards M. from a short distance of a few meters.
- H. continued to fire his weapon at M. as M. ran away.

- When firing, H. was not aiming towards M.'s feet or up into the air, but towards the body of M. and as such was able to hit him several times including once in the head.

Xh.H. took an immediate and intentional action when he pulled out his gun and began firing at N.M.. H.'s use of a lethal weapon from a short distance of a few meters firing in the manner described establishes that H. intended to kill M..

The Court notes that the criminal offence could have been qualified differently, as Attempted Aggravated Murder pursuant to Article 147 Paragraph (4) as read with Article 20 of the PCKK. A.B. had placed himself between the two arguing men. At that moment, while B. was still physically separating the two, **Xh.H.** pulled out his gun and fired the first shot towards N.M.. By doing so, H. endangered the life of A.B.. When a murder is attempted in a manner which intentionally endangers the life of another person other than the intended victim, the act may be qualified as aggravated murder.

While the Court is not bound by the legal qualification of the act presented by the Prosecution in the Indictment (principle of *iura novit curia*), it is, however, bound by the facts alleged in the Indictment.¹¹ In the Enacting Clause of the Indictment against **Xh.H.**, there is no mention of the presence of A.B. at the crime scene at all. During the main trial, the Public Prosecutor did not amend the factual allegations in the Indictment to reflect the presence of A.B. in the line of fire when **Xh.H.** began shooting at N.M.. Although this fact came out during the testimonies of the Injured Party and the witnesses during the main trial, because the Indictment was not amended, the Court could not consider the endangerment of A.B.'s life and re-qualify the criminal offence accordingly.

3. Necessary Defense

In his closing, Defense Counsel Xhafer Maliqi asserted that **Xh.H.** acted in necessary defense pursuant to Article 8 of the CCK, but that he acted disproportionately to the degree of danger posed by the Injured Party, thereby exceeding the limits of necessary defense. According to the defense, N.M. initiated an attack on **Xh.H.** by swearing at him and physically approaching him with the intent to assault him. H. reacted to this attack by firing his weapon once at M.. M. then continued the attack, bringing H. into a state of deep trauma and causing him to fire two more shots at M..

The evidence does not support the defense's version of the facts. There was no real and imminent attack by N.M. to trigger the exculpatory defense of necessary defense. The testimonies of N.M. and A.B. establish that **Xh.H.** and N.M. were engaged in a *verbal* argument when A.B. stepped in between them and separated them. M. was unarmed. There is no testimony by any witness that M. took any *physical* action to indicate an attempt to physically assault H.. An argument or cursing is not a real attack as envisioned by Article 8 of the PCKK. The testimonies of N.M., A.B. and N.S., as well as the police

¹¹ See Article 386 Paragraph (1) of the CPCK.

statements of E.H. and Z.T. all consistently confirm that H. pulled out a gun and began firing at M. without any physical provocation. The testimonies of N.M. and A.B., and the police statements of N.S. and B.H. further confirm that N.M. was running away, attempting to flee and seek shelter from the bullets behind a vehicle, when H. continued to fire his weapon towards him, hitting him in the head. Therefore, the defense that H. was acting in necessary defense to avert a real and imminent attack is without merit.

G. Rejected Motions

On 14 September 2010, Defense Counsel Maliqi proposed that the police statement of E.H. be declared inadmissible under Article 89 of the CPCK because E.H. professed to be illiterate while on the stand. The Court rejected this motion on 15 September 2010. Article 89 applies to persons against whom an investigative action is undertaken. E.H. was interviewed as a witness and not a suspect, therefore she was not the subject of an investigative action. Furthermore, if Article 89 was applicable, because the statement was read out to E.H. and she signed each page, the technical requirements of Article 89 would have been met.

On 15 September 2010, Defense Counsel Maliqi proposed that the police statement of Z.T. be declared inadmissible under Article 87 of the CPCK because it was not appropriately signed by the witness. The Court rejected this motion because each page of the statement bears the signature of Z.T.. The fact that T. may not have read the statement before he signed it does not effect its admissibility.

On 15 September 2010, Defense Counsel Maliqi proposed that the Court make a reconstruction of the crime scene in the presence of forensics and ballistic experts. The Court rejected the motion because such a reconstruction would not add anything of value to the evidence. The testimonies of the witnesses and the evidence already before the Court were sufficient to establish the facts of the case.

H. Sentencing

When imposing the criminal sanction, the Court must bear in mind both the general purpose of punishment to suppress socially dangerous activities by deterring others from committing similar criminal acts, and the specific purpose to prevent the offender from re-offending. In the present case, the Panel came to the conclusion that only by applying the imposed sentence of imprisonment would the above-mentioned double purpose be reached. The shooting of N.M. was a senseless act of extreme violence committed by one neighbor against another over the inconsequential issue of parking. **Xh.H.** committed such an act against a person with whom he had no prior dispute and with whom he had been neighbors for over ten years. Thus, the imposed punishment is intended to prevent H. from perpetrating violence against another neighbor, friend or person over a small disagreement while sending a message to society that such unnecessary, violent over-

reactions to a mundane issue which should be and can be settled amicably will not be tolerated.

In determining the duration of punishment, the Court must evaluate all mitigating and aggravating factors, pursuant to Article 64 paragraph (1) of the PCCK.

The Court considered as mitigating circumstances the fact that the Defendant has nine children and no previous criminal record. With regard only to the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, the Court also considered a mitigating circumstance the fact that the Defendant pled guilty.

The Court took as aggravating circumstances the especially senseless and violent act of the Defendant, the grave injuries inflicted on the victim, the ongoing suffering of the victim, the fact that the victim has been rendered permanently invalid and the devastating effect of this on his person, his family and his finances, the fact that the Defendant was carrying a loaded weapon during his daily activities in a crowded urban area where many people and children are present, the fact that the Defendant did not make any efforts towards reconciliation either personally or through an intermediary during the two years since the criminal offence, and the lack of remorse shown by the Defendant.¹²

For the criminal offence of Murder in violation of Article 146 of the PCCK, the law foresees a minimum punishment of five (5) years of imprisonment. When a perpetrator attempts to commit a criminal offence which is punishable by a minimum sentence of three (3) years imprisonment, the attempt itself shall be punishable (Article 20 Paragraph (2) PCCK), however the punishment imposed shall be no more than three-quarters of the maximum punishment prescribed for the criminal offence (Article 65 Paragraph (2) PCCK). The maximum punishment of imprisonment allowed by law is twenty years (Article 38 Paragraph (1) PCCK), therefore the maximum punishment allowed for the criminal offense of Attempted Murder is fifteen years. By applying the cited Article and considering all of the mitigating and aggravating circumstances, the Court imposed a sentence of twelve (12) years of imprisonment for this criminal act.

For the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the PCCK, the law foresees a punishment of a fine or by imprisonment of one to eight years. The Court imposed a sentence of four (4) years of imprisonment for this criminal act.

As **Xh.H.** has committed two criminal acts, pursuant to the rules of calculation of a compounded sentence, the aggregate punishment must be higher than each individual punishment but not as high as the sum of the prescribed punishments. Therefore, the Court imposed an aggregate punishment of fifteen (15) years of imprisonment.

¹² The Court could not consider as sincere the apology offered by **Xh.H.** which was given only when facing the Court at the end of the trial, when self-serving.

Xh.H. has been in detention on remand from until . That period is to be credited in the imposed punishment of imprisonment pursuant to Article 73 Paragraph (1) of the PCCK.

I. Confiscated Items

The weapon used to commit the criminal offences - a mm calibre handgun with no serial number - is hereby confiscated pursuant to Article 60 Paragraph (1) and Article 328 Paragraph (5) of the PCCK.

J. Costs

The Defendant shall reimburse the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the CPCK with the exception of the costs of interpretation and translation. A separate ruling on the amount of the costs shall be rendered by the court when such data is obtained pursuant to Article 100 Paragraph (2) of the CPCK.

District Court of Mitrovica
P. nr. 127/08

Prepared in English, an authorized language.

Recording Officer
Tara Khan

Presiding Judge
Charles L. Smith, III

Panel Member
Klaus Jung

Panel Member
Hajnalka Veronika Karpati

Legal remedy: Authorized persons may file an appeal in written form against this verdict to the Supreme Court of Kosovo through the District Court of Mitrovica within fifteen (15) days from the date the copy of the judgment has been received, pursuant to Article 398 Paragraph (1) of the CPCK.