

DISTRICT COURT OF MITROVICA

P. nr. 17/09

7 October 2010

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF MITROVICA, in the trial panel composed of EULEX Judges Charles Smith as Presiding Judge, and EULEX Judges Caroline Charpentier and Agnieszka Klonowiecka-Milart as panel members, with the participation of EULEX Legal Officer Noora Aarnio as Recording Officer in the criminal case against;

N.M., charged, according to the Indictment of the Prosecutor PP. nr. 98/08 dated 20 February 2009 and filed with the Registry of the District Court of Mitrovica on 24 February 2009 and amended on 17 February 2010, as confirmed by the Ruling on Confirmation of the Indictment dated 19 February 2010, with the following criminal offences;

- **Murder**, contrary to Article 146 in conjunction with Article 23 of the Criminal Code of Kosovo (CCK),
- **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328, paragraph 2 of the CCK,

R.Sh., charged, according to the Indictment of the Prosecutor PP. nr. 98/08 dated 20 February 2009 and filed with the Registry of the District Court of Mitrovica on 24 February 2009 and amended on 17 February 2010, as confirmed by the Ruling on Confirmation of the Indictment dated 19 February 2010, with the following criminal offences;

- **Murder**, contrary to Article 146 in conjunction with Article 23 of the CCK,
- **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328, paragraph 2 of the CCK,

After having held the main trial hearing in public on 4, 5, 6 and 7 October 2010 all in the presence of the accused **N.M.** and **R.Sh.**, their Defence Counsel Bajram Krasniqi and Haxhi Millaku, Injured Party **R.Sh.**, Authorized Representative of the Injured Party **X, H.** and EULEX Public Prosecutor Neeta Amin, after the trial panel's deliberation and voting held on 7 October 2010, pursuant to Article 392 paragraph (1) of the Criminal Procedure Code of Kosovo (CPCK) pronounced - on the same day - in public and in the presence of all the Accused, their Defence Counsel, the Injured Party, his Authorized Representative and the EULEX Public Prosecutor the following

VERDICT

The accused **N, M,** , no nickname, son of **F, M,** and **H, G,** , born on _____ in _____ Village, municipality of _____, Kosovo, of **A,** ethnicity, resident of _____ village, municipality of _____, married, father of children, highest education secondary school, unemployed, of poor economic status, no known previous conviction, in detention from _____ until _____, thereafter under the security measures of house detention _____,

is

FOUND GUILTY

- **because** on _____ at in the morning there was a conflict between the defendants **N, M,** and **R.Sh.** on one side and witness **R, S,** on the other. **T, S,** , the brother of **R.Sh.** , called the defendants **N, M,** and **R.Sh.** to meet and to resolve the dispute. They arranged a meeting at around 17:00 at the parking lot of the _____ Restaurant in _____ village, municipality of _____, **N, M,** and **R.S.** drove _____ vehicle. **T, S,** and **B, H,** drove _____ vehicle. **N, M,** had the weapon with serial number _____ and **R.Sh.** had the weapon with serial number _____. At least **N, M,** directs his pistol at **T, S,** , **T, S,** took out a weapon AK of calibre _____ mm with the serial number _____ and directed the gun to **R.Sh.** , **R.Sh.** moved towards **T, S,** and grabbed **T, S,** 's rifle. During the struggle the rifle is discharged resulting in **R.Sh.** being shot in the leg. **N, M,** shot several times at **T, S,** . **T, S,** received a bullet in the left part of his chest from the gun shots fired by **N, M,** . Both **T, S,** and **R.Sh.** fell to the ground because of the sustained injuries. **N, M,** tried to leave the crime scene. **T, S,** 's condition deteriorated because of the damage to his internal organs caused by the gunshot to the chest and he died on the same day. **R.Sh.** sustained serious injuries from the gun shots to the leg and arm. Therefore the defendant **N, M,** has deprived the life of the late **T, S,**

By doing so, the accused **N, M,** committed and is criminally liable for the criminal act of **Murder**, contrary to Article 146 in conjunction with Article 23 of Provisional Criminal Code of Kosovo (PCCK),

The accused **N, M.**, is

FOUND GUILTY

- **because** until the date of he had illegal possession of the weapon
of calibre with serial number .

By doing so, the accused **N, M.** committed and is criminally liable for the criminal act of **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328, Paragraph (2) of the PCCK.

The accused **R.Sh.**, no nickname, son of M, S, and Z, H,
born on in Village, municipality of , Kosovo,
of A, ethnicity, resident of village, municipality of ,
married, father of children, highest education technical secondary school, unemployed
(invalid), of poor economic status, no known previous conviction, has not been under
security measures

is

FOUND NOT GUILTY

- **because, as described above** he has not deprived the life of the late T, S,
in co-perpetration with the defendant **N, M.**

Therefore, pursuant to Article 390 paragraph 3 of the CPCK the accused **R.Sh.** is
acquitted of the charges of **Murder**, contrary to Article 146 in conjunction with Article
23 of CCK,

The accused **R.Sh.**, is

FOUND GUILTY

- **because** until the date of he had illegal possession of the weapon
of calibre with serial number .

By doing so, the accused **R.Sh.** committed and is criminally liable for the criminal act of **Unauthorized Ownership, Control, Possession and Use of Weapons**, contrary to Article 328, Paragraph (2) of the PCCK.

The Accused **N.M.**, is

SENTENCED

- to 5 /five/ years of imprisonment for the criminal act of Murder.
- to 4 /four/ years of imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons.

The aggregate punishment is determined in **7 /seven/ years of imprisonment**, pursuant to Article 71 Paragraph (1) and Paragraph (2) Item 2 of the PCCK.

The time spent in detention from until 17 February 2010, thereafter under the security measures of house detention, is to be credited pursuant to Article 73 Paragraph (1) of the PCCK.

The Accused **R.Sh.**, is

SENTENCED

- to 2 /two/ years of imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons.

The weapon of calibre with serial number , the weapon of calibre with serial number are hereby confiscated pursuant to Article 60 Paragraph (1) and Article 328 Paragraph (5) of the PCCK. The weapon of calibre mm with the serial number that was found and seized in the same occasion will be returned by a separate order as soon as the rightful owner or his Authorized representative presents the valid authorization card.

The accused **N.M.** and the accused **R.Sh.** shall reimburse their parts of 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 – THE INDICTMENT

On 24 February 2009, the District Public Prosecutor for Mitrovica filed indictment PP. no. 98/08 dated 20.02.2009 with the Registry of Mitrovica District Court. The indictment alleged that the defendant **N, M,** had committed the criminal acts of

- **Murder**, contrary to Article 146 in conjunction with Article 23 of the CCK
- **Unauthorized Ownership, Possession, Control and Use of Weapons**, contrary to Article 328 paragraph 2 of the CCK

The indictment alleged that the defendant **R.Sh.** had committed the criminal acts of

- **Murder**, contrary to Article 146 in conjunction with Article 23 of the CCK
- **Unauthorized Ownership, Possession, Control and Use of Weapons**, contrary to Article 328 paragraph 2 of the CCK

The Indictment was modified on 17 February 2010 but the legal qualification of the criminal acts for **M,** and **Sh.** remained the same.

The amended Indictment was confirmed by the Ruling of the EULEX Confirmation Judge on 19 February 2010.

Main Trial hearings were held on 4, 5, 6 and 7 October 2010. Closing arguments were heard from EULEX Prosecutor Neeta Amin, Defence Counsel Bajram Krasniqi and Haxhi Millaku on 7 June 2010. The Verdict was orally rendered the same day.

B. COMPETENCE OF THE COURT

Under Article 23 Item 1) i) of the 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.

As set forth above, the charge of Murder pursuant to Article 146, allows for the imposition of a sentence of imprisonment of at least five years. Furthermore, the indictment in this case alleges that the accused committed the acts in

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

On 18 November 2009, the President of the Assembly of EULEX Judges exercised her right to assign EULEX judges to cases falling under the subsidiary competence of

EULEX judges pursuant to Article 3.3 of the “Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo” and assigned this case to the EULEX Judges in the District Court of Mitrovica.

C. Summary of Evidence Presented

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

- (1) R. S. – Injured Party,
- (2) B. H. – Witness,
- (3) N. L. – Witness,
- (4) F. X. – Witness,
- (5) S. G. – Witness,
- (6) S. S. – Witness,

During the course of the main trial, the following documents were read and entered into evidence:

- (7) Initial Incident report dated _____ dated _____
- (8) Report on search of house and persons (**M.**) dated _____
- (9) Report on search of house and persons (**Sh.**) dated _____
- (10) KPS Sh. G. – Officer’s report dated _____
- (11) KPS H. H. – Report on Crime Scene Inspection, with photos attached, dated _____
- (12) KPS S. M. – KPS V. M. – Officer’s report dated _____
- (13) KPS B. R. – Officer’s report dated _____
- (14) KPS L. G. – Investigator’s report dated _____
- (15) K. O. – Criminal Report dated _____
- (16) KPS H. H. – Report on crime scene inspection, with photos attached dated _____
- (17) KPS K. O. – Forensic directorate, Crime scene sector, Request, undated
- (18) Forensic Identification file # _____ including the photographs
- (19) A. P. – Investigator’s report dated _____
- (20) R. B. – Autopsy report dated _____
- (21) Dr. P. D. – Autopsy report dated _____ including the photographs attached
- (22) Doctor’s note for injured R. Sh. dated _____
- (23) Doctor’ transcript undated
- (24) H. Sh. – Description of Case file content
- (25) Listing of evidence
- (26) Chain of custody

- (27) KPS L.R. – Criminal Examination Report
- (28) E. K. – Expert Analysis Report, including expert form analysis of Central Crime Laboratory (A), Central Forensic Laboratory Expertise/Analysis Form (B), Central Forensic Laboratory Expertise/Analysis Form (A), Template for Forensics Examination at the KPS Laboratory (A), and Template for Forensics Examination at the KPS Laboratory (B), undated
- (29) F. S. – Forensic examination report, Dactiloscropy sector, including the request for Expertise/Analysis of Evidence in the Forensic Central Laboratory (A) and the request for Expertise/Analysis of Evidence in the Forensic Central Laboratory (B) dated
- (30) KPS H.Sh. – Report from the inspection of crime scene dated
- (31) KPS F.F. – Forensics Identification Report including sketch of the crime scene and photo album cover, dated

During the main trial session on 6 October 2010 the Accused **N.M.** answered questions. **R.Sh.** exercised his right not to give a statement. The request of the Defence Counsel Xhelal Hasani to consider the statement of **K.X.** as read was granted.

The injured party R.Sh. stated in his testimony that he was working as a for Brigade for Kosovo guard (TMK), at , in the municipality of **N.M.** was the deputy commander of the brigade. **R.Sh.** was the immediate commander of **R.Sh.** . **Sh.**'s immediate supervisor was the Commander **B.O. , M.** was the deputy Commander. From the period of until the incident **R.Sh.** and **Sh.** had never had a disagreement after working hours.

Sh. testimony dealt purely with the nature of the dispute. A month prior to the shooting a dispute arose over working hours. **Sh.** had stated his opinion on working hours in front of the entire barracks. **M.** replied in front of the entire barracks that he would expel **Sh.** . **M.** did not have this authority. Two or three days prior to the shooting which is the subject of this case, a serious dispute arose between **Sh.** , **Sh.** and **M.** once again related to working hours. **Sh.** wanted to leave work early to help his wife attend to a sick child. **M.** and **Sh.** refused his repeated request. He went home without permission which he had not done before.

On **Sh.** was summoned to the office of **Sh.** . Upon entering, he sat by **Sh.** and remained seated until **M.** entered. **Sh.** was in a harsh mood and verbally confronted **Sh.** accusing him of being a "double dealer" which **Sh.** took as being very offensive. **Sh.** asked why **Sh.** had left barracks early on the day referred to above. **Sh.** noticed a type pistol in an open drawer near **Sh.** . **Sh.** had never attacked his superior officers, but said he had been attacked by them before. He was afraid that if he tried to use any force against **Sh.** , that **Sh.** would shoot him. **Sh.** was unarmed.

M. then entered the room with his pistol visible in his belt. He had his hand on the handle of the pistol. He was obviously angry and mentioned dismissing a member of the barracks from . Sh. suspected that they might be talking about him. M. addressed and questioned Sh. in the same manner as did Sh. . Sh. tried to explain the need for his absence. M. accused him of fabricating this excuse. This culminated in M. slapping Sh. in the face. Sh. was standing about one meter from Sh. . As it appeared to Sh. that M. was pulling his gun, Sh. left the office and while leaving either M. or Sh. kicked him from behind. He did not know which of them kicked him.

Sh. wanted to lodge a complaint against Sh. and M. . The members of the disciplinary commission at the barracks were Sh. and M. so Sh. had no choice but to make the complaint in the office of the Commander, O. . He told O. that he had been attacked by M. and Sh. physically and with a gun. O. told Sh. that he understood that three members had left the barracks without permission and he had forgiven it as they probably had good reason to do it. O. refused Sh.'s request for the matter to be referred to the public order inspectors and told Sh. that this was a private issue and that Sh. should deal with it. Sh. entered O.'s office at this point. Sh. asked O. for an exit permit as he felt threatened. O. agreed to the permit even though Sh. opposed it. Sh. went outside the office and in five minutes Sh. brought him the exit permit. Sh. went home.

On his way home R. Sh. by chance met his nephew B.H. . H. was driving his father's vehicle. They drove in their separate vehicles, to O.'s house to allow H. to leave his vehicle there. R. Sh. did not tell him about the incident with M. and Sh. .

In R. Sh. saw L. standing in front of a mechanical shop, wearing a uniform. R. Sh. asked L. if he had left the barracks without permission. L. said that he had left with permission as there was malfunction of the clutch of his vehicle. R. Sh. told L. that he had left before the end of his duty and that Sh. and M. had attacked him. Sh. stated that L. was sorry to hear this. H. was in a separate vehicle and could not have heard what R. Sh. and L. were talking about. After the conversation L. stayed at his shop and R. Sh. and H. continued in the direction of .

After R. Sh. and H. had left the vehicle in they came back to L.'s mechanical shop with R. Sh.'s vehicle. R. Sh. saw Sh. and M. there in their uniforms talking to L. , and they did not join them. He went for coffee with H. and afterwards went R. Sh.'s house.

At his house R. Sh. met an electrician and his brother T. Sh. . T. Sh. asked R. why he was home early. R. Sh. told him he had problems with Sh. and M. . T. Sh. asked if it was the M. from that he knew. R. Sh. affirmed that it was. Since the Sh. is had a nephew of their father, H. , in , T. Sh. said he would send H. to find out

what this issue was all about and to make amends with M. . The Sh.'s discussed briefly the amends to be made and T.Sh. said that if it was the way R. Sh. had explained then the amends would be achieved quickly, there and then.

R.Sh. left his brother, the electrician and H. there having juice and went to the house where he lived approximately 150 meters away to take off his uniform. R.Sh. left the vehicle at the house being built as well as the keys to the vehicle and his mobile phone.

When R.Sh. returned to work on the house he did not see his vehicle there. The electrician told R.Sh. that someone called from an unknown number. The caller had told that they were at the meeting place and asked if R.Sh. was on his way. The electrician had told the caller that R.Sh. had left as he did not know he was still there.

R.Sh. went to T.Sh.'s house where he met T.Sh.'s wife. He asked where T.Sh. went and she said she did not know. She also told him that the shotgun/hunting rifle was not in its usual location. It is also possible that she said that T.Sh. and H. had gone somewhere with R.Sh.'s car.

R.Sh. tried to call T.Sh. but his phone was either switched off or there was no coverage. R.Sh. did not try to call H. or H. as he did not have a number for them. R.Sh. tried to call T.Sh. again and this time the phone rang but no one picked up. R.Sh. went to the electrician to ask if T.Sh. and H. had said in which direction they were going. They had not, and the electrician did not see them leaving either.

R.Sh. , then, went to his uncle's, house next door.. While there O. called R.Sh. and confirmed that Sh. was home Then O. told R.Sh. that things had gone bad, that T.Sh. was killed, and that Sh. has been taken to the health centre in wounded. R.Sh. did not get any details of the incident by phone.

The Witness B.H. stated that on H. had to drive his father's to .

He says that once in he met R.Sh. by chance. They set off together because H. had left his father's car in and R.Sh. had to go home for some electrical work. H. and R.Sh. rode in the same car until arriving in where H. worked for his uncle T.Sh. about 150 meters from R.Sh.'s house.

While driving to , H. and R.Sh. noticed L. but they continued towards R.Sh.'s house. H. did not hear any conversation between L. and R.Sh.

At 4.30 o'clock T.Sh. asked H. to take him to the village of H. drove T.Sh. to village of with R.Sh.'s dark green . When asked why he had told to the Police when interviewed on that they had gone in his blue , H. said that he was very lost at the time and that he did not know what he was talking about. The did not belong to H. . It was registered under R.Sh.'s name.

It took them between half an hour to one hour to get to , as the road was a dirt track. While driving H. did not see anything in the back of the vehicle and he did not know that T.Sh. had a weapon. T.Sh. told H. that he was going to talk about his brother, that there was a problem and that they had to agree on something. Although not certain, it is possible that T.Sh. told H. that R.Sh. had been beaten up at work. H. does not know whether T.Sh. initiated the contact with the people he was supposed to meet. H. did not know who they were going to meet.

At village of they went to Restaurant . The cafeteria was closed. T.Sh. told H. the names of the two people they were to meet; Nj.M. and R.Sh. . H. knew M. by face.

There was another vehicle at Restaurant , a black that belonged to M. , as well as a yellow that was parked a bit further. T.Sh. told H. to park in the car park, with the front of their car facing the road.

H. claims that he saw six people, four of whom he saw clearly. According to H. , two of them were in the vehicle next to H.'s car, and the others were about 15 meters away by the cafeteria and behind the wall of the cafeteria. H. saw weapons on three of those people. He is not familiar with firearms but they were handguns and they looked like the 's in the photos that he has seen in the Prosecutor's files. In H.'s opinion he and T.Sh. were ambushed.

According to H. Sh. was the first person to get out of the car. He pulled his pistol out. M. also had his pistol pointing at T.Sh. . H. got out of the car in which he was riding first and as he got out he heard shots. Then T.Sh. went to get the rifle from the boot of the car and told H. "Go away nephew." At this point Sh. was not shooting. H. did not hear any conversation between T.Sh. and M. and/or Sh. before the shooting started.

On the question as to who shot first H. replied that the very first shot in the whole event come from further down. So it was none of the people by the car, M. , Sh. , T.Sh. or H. that started the shooting. Out of the four people by the cars, T.Sh. was the first one to shoot. T.Sh. shot Sh. in the leg and then M. shot at the direction of T.Sh. and Sh. .

H. also gave two versions of the struggle over the gun. He testified that Sh. was shot in the leg and then Sh. grabbed T.Sh.'s rifle. He also testified that Sh. jumped on T.Sh.'s rifle, they struggled for the rifle and then Sh. was shot in the leg. T.Sh. shot and hit Sh. once. H. saw that Sh. grabbed T.Sh.'s rifle with two hands. H. testified that he does not know what happened to the pistol Sh. had pulled out before. In contradiction to that he also testified that T.Sh. grabbed Sh.'s pistol after Sh. had first grabbed T.Sh.'s rifle.

H. claimed that while Sh. and T.Sh. struggled, that others near by were shooting at T.Sh. At that time M. la was shooting as much as he could, from the top of the hood of his car, towards T.Sh. He was not far, about 4 or 5 meters away. H. did not see anybody shoot in the air. H. is not sure who wounded Sh. on his chest. Sh. did not shoot at T.Sh. According to H. the others further down, all four of them, also shot. H. does not know what kind of gun those others further down had nor does he know how many shots could there have been from those others.

Sh. fell to the ground and T.Sh. fell over Sh. After seeing this H. claims to have "lost himself" and ran away.

The witness N. L. stated that he had previously worked together and was a close friend with R.Sh., Sh. and M. To L.'s knowledge R.Sh. and M. have also been on very good terms, and never had any misunderstandings between them. N.L. has not worked with the TMK for the last two years.

L. and R.Sh. met on , during working hours. Although L. was on leave he was summoned for a ceremony meeting in KFOR. They were all lined up that day. It was there that the others learned that L. had had the ceremony of of his at home. They said they would pay a visit to congratulate L. and that they would let L. know by phone in advance.

L. did not know about R.Sh. wanting to go home early that day, nor did he find that out later.

L.'s car broke down on his way back from work. As he was dismantling the car to locate the problem, R.Sh. and others stopped by L.'s place. After 2 o'clock, while L. was working on his car, R.Sh. and his H. stopped by. They were driving with R.Sh.'s car. L. offered them a drink but they only stayed up to five minutes talking about H.'s repatriation, and the time for them to come and visit L. R.Sh. did not tell L. about the problems at his work.

L. then borrowed his brother's car, an , to go to buy the spare parts. Travelling to , L. saw a Police car in front of him and it cut him off. From then on L. drove behind them. The Police car stopped all of a sudden and L. had to avoid crashing into them. As the Police car stopped it moved off of the road and it was

stopped near a ditch but still blocking the way, so L. had no choice but to park. L. saw the Police running with weapons, he got scared and thought they had some problem with him. L. parked the car with the intention to ask them why they drove in such an obstructive manner and stopped in the manner they did as L. nearly crashed his car into them.

When L. first came into the car park behind the Police, he did not hear any shooting. He saw only M., Sh., T.Sh., and the Police at the crime scene. There were two cars at the car park, and one . The doors of the cars were wide open. Later people were coming from all directions; five or six, maybe more. The situation was somewhat chaotic because other vehicles were stopping by and people were getting out of their cars.

When L. got out of his car he overheard the Police say: "Stop shooting! Stop shooting!" and then "Lie down". L. saw two people lying on the ground on top of each other. The person underneath was lying on his back. This was Sh., although L. recognised him only after approaching to help them. Sh. shouted, "Help! Is there anyone who can help?" He kept shouting loudly, asking for help. The person on top was facing down. There was a rifle there and the person on top was holding a handgun, model , by the handle in his right hand. The handgun was unloaded. It was open. Their heads were to the same direction. However, he also testified that the person on top had both his arms around the neck of Sh. .

Further away there was also another person, M. lying on his stomach in the courtyard of the restaurant holding a handgun in his hand. L. did not see any shooting coming from that gun. M. was about 10 to 15 meters from where L. was. M. and L. did not speak at the site of the incident.

The Police officers were asking for help from people there. There were two Police officers next to R. . L. recognized Sh. after he approached. He helped to put Shala aboard a vehicle.

L. did not hear any shooting as he approached Sh. .

The witness F.X. stated that he does not personally know the suspects N. M. and R.Sh. .

On the day of the shooting, at X. was travelling on foot from his house to where he worked with the heavy machinery behind the large hill nearby. X. saw a vehicle at the restaurant on his way to the heavy machinery. The place where the incident took place was 15 meters from his house and work place. The restaurant could not be seen from where he was working because there was a hill between them. The restaurant was closed because X.'s mother had recently passed away.

Once he got to the work site, X. heard from 4 to 6 gunshots, with considerable pauses between the shots. X. was not able to determine the type of fire arm.

Once X. heard the shots he stopped the machine and went to the restaurant. He first saw the crime scene from the road opposite of the restaurant. There were two vehicles present at the crime scene; a [redacted] was parked facing the brick fence and the [redacted] that X. had seen earlier on his way to the heavy machinery was still there as well. X. saw two people lying on the ground - one was on top of the other. He was 20-30 meters from them. There was a long-barrel weapon very close to the people lying on the ground. X. is not sure if he saw any other weapon on the two bodies lying down. X. was not there longer than 5 to 10 seconds before the police arrived. The police did not permit anyone to approach.

X. also saw one person holding a weapon and walking backwards. X. could no longer remember what kind of weapon the person walking backwards was holding. When he was read from his statement to the police "I saw a person with a weapon of a small caliber, short, I noticed him while he was walking backwards in the [redacted] direction and pointing the weapon in the direction where the incident had occurred" he confirmed that this is correct. X. did not see this person firing the gun. In the main trial hearings X. recognized M. as the person walking backwards.

X. also saw a person running in the direction of his house. X. does not know if this person had a weapon.

X. testified that the police might have stopped cars passing by to ask for help, although he was not sure of this fact. A driver of a vehicle and the police first helped to get the wounded person in a vehicle. X. did not have access to him or touch him. X. approached to help only when he was asked to do so by the police. The police asked X. to help remove the second person and put him inside the vehicle, and X. did this. X. himself assessed that this person might be dead because he was not moving and was sort of yellow and heavy when they lifted him. X. did not see anything on his hands or anyone remove objects from his hands.

2 or 3 days later X. informed the police that it appeared that gunshots had been fired towards the restaurant as there was a bullet hole on the door and on the wall. There is no evidence to connect these bullet holes to the incident in [redacted].

The witness Sh.G. [redacted] stated that on [redacted] G. and his colleague Sh.S. [redacted] were you on patrol duty. They were driving towards [redacted]. G. did not pay attention as to whether someone was following them. They did not hear any shooting but their attention was caught by a young man running along the road, then crossing the road and continuing running heading towards [redacted]. Later G. learned he was the victim's nephew. G. and S. headed towards him but did not stop him because they arrived at the crime scene.

When they approached the car park of Restaurant [redacted] there were two vehicles there. One of them was an [redacted]. The distance between the vehicles for one another was one to two meters. G. did not notice any other vehicles.

G. saw two persons lying on the ground on top of one another. They had their heads towards the fence and their legs towards the road. About ½ meter from them, approximately by the belly, was a handgun of make and a long barrelled rifle. The weapons were close to each other, on the right hand side of the person lying beneath.

By the restaurant G. also saw a person holding a handgun with the barrel directed from up to down, pointing in the direction of the two persons on the ground but not shooting.

G. cannot clearly determine if the handgun was aimed at the two persons on the ground.

G. saw no other people at the car park.

G. knew both M. and Sh. from before but he did not recognize them when he came to the crime scene. Only later did he understand who they were.

As G. and S. pulled over close to the crime scene the person still standing and holding the weapon was in front of them and the two lying on the ground were beside the police car, close to G. . G. got out of the vehicle with his weapon in his hand and told the person holding the handgun, which G. later learned was N.M. , to drop the handgun. M. did as told. G.'s colleague S. handcuffed M. . M. asked for help.

The person lying on the ground, underneath, was facing upwards and he had a serious wound on his leg. Later G. found him to be R.Sh. . Sh. screamed out that his leg was cut and asked for help. G. did not see any weapons on Sh. . Sh. did not tell G. what had happened, nor did G. ask.

The person on top was facing the ground. The person on top was quite heavy so Sh. could not move him. G. grabbed him and asked assistance from a person that was there. The person on top was not screaming and did not complain about being moved so G. ignored everything regarding his condition. G. saw blood but he did not see injuries on him. This is likely to be the same blood that is marked with number [blood] in the sketch the police made of the crime scene. G. could not tell how the hands of the two lying on the ground were placed.

A vehicle arrived in the car park while G. was looking after the persons on the ground and G. and his colleague stopped two civilian vehicles. G. asked three people to help him but he does not remember who they were. Because the weapons were still on the ground one of the police officers continued to guard them.

G. put the wounded in the vehicles to be taken to get first aid. After this G. removed the weapons so that no one else had access to them. The rifle had a bullet in the chamber and the hand gun was emptied, the chamber open. G. put the weapons in a bag and called back-up to assist them. G. secured the crime scene with the tape and then back-up arrived. G. left and the other officers took over the crime scene. G. did not attend to the bullet shells at the crime scene as the crime inspection would deal with them. Soon after they arrested the person they had seen running away.

The witness Sh.S. stated that he was on duty on with a colleague of his, Sh.G., who was driving the car. They saw a man running in front of their vehicle from the direction of towards to some 70-80 meters from the Restaurant . This man was B.H.

Once they came close to the Restaurant they saw two people lying on the ground on top of each other and they stopped the vehicle.

Then, almost at the end of the restaurant, they saw a third man with a weapon pointing in the direction of the people lying on the ground. S. did not see anyone else at the car park. S. did not hear any shooting while he and G. were at the scene.

There were two vehicles at the car park, a blue and possibly a . The was parked properly. S. does not remember how the was parked. In front of the , there was the wall. The distance between the two vehicles was not great, not more than 2-3 meters. The distance between the two people lying on the ground and the vehicles was approximately 2 to 4 meters.

When S. exited the vehicle he heard someone asking for help: "My leg has bee hurt". The man who was crying for help was underneath, lying on his back. At first S. did not go near the two people lying on the ground as he was concentrating on the man with the weapon. Later S. understood the weapon to be a revolver and recognized the person holding it as N.M. . S. and G. drew their weapons and asked M. to drop his. M. immediately cooperated with the police orders and S. went to handcuff M. . M. did not ask for help but once they arrested him he asked them to provide security to him by saying "Take me as they are coming to kill me ". Once S. had handcuff M. he was keeping an eye on M. as the one lying down was saying: "They are going to kill me".

S. does not remember if he saw any injuries on the person on top of the other on the ground. There were weapons next to the two people lying on the ground but S. does not remember where exactly they were because G. removed the weapons. After G.

collected the weapons S. understood them to be a and a bullet magazine rifle. G. also collected the pistol M. had dropped and put it with the other two weapons.

Once S.'s colleagues had collected the suspect and the weapons, then he and G. approached the two lying on the ground. G. put one of them in the civilian vehicle and asked people to take the victim to the hospital. S. did not speak to the driver of that vehicle.

Sh.S. does not know the number of the bullet shells recovered at the crime scene as this was the task of the crime technicians.

The defendant N.M. stated that he and Sh. are friends, as are all members of the Brigade. M. and Sh. were at war together and after the war in KPC. They socialize together but they never talked about weapons. Apart from war time M. has not seen a weapon on Sh. so M. did not know if Sh. carried a weapon.

When M. is not wearing his uniform he always carries his pistol at his waist for security reasons because he would have meetings at midnight and later. He had never had to use the weapon. The weapon had belonged to his brother who fell during the war.

M. does not know if Sh. knew that he had the weapon as he had not shown it or used it.

As to the dispute over working hours, M. testified that Sh. never asked M. for a permission to leave early, and denies ever telling Sh. that Sh. could not leave early. On the contrary, M. testified that he had, through Sh., once given a permission to Sh. to leave early.

On M. went to the office of the Commander to receive his tasks for the day and O. ordered M., who at that time was a Head of the Disciplinary Commission in the Brigade, to take statements from three members who were absent three days before. One of them was R.Sh.

Because of the order from O. M. went to Sh.'s office. R.Sh. was there with Sh. and the subject of their conversation was R.Sh.'s absence. M. asked what had happened because R.Sh. had never before left without permission. R.Sh. replied that his son had been ill and his wife had called him. M. asked why R.Sh. had not told them about his son being ill as M. would have taken him home himself in his vehicle. M. had done this before. R.Sh. replied that he did not care to ask anyone but he would leave whenever he wanted. Because R.Sh. was speaking loudly and in a manner that made it impossible to

communicate with him **M.** asked **R.Sh.** to leave the office and informed the Commander. **M.** testified that it could be that **M.**'s voice was somehow raised when he told **R.Sh.** to leave but there was no reason for him to run. The meeting was conducted in an official manner. **M.** did not at any stage slap **R.Sh.** on the face or deny **R.Sh.** a permission to go home. **R.Sh.** had not been threatened with guns. **M.** did not have his Black -pistol on him but in fact it was in his vehicle.

Afterwards **M.** learned that **R.Sh.** had gone to see **O.** although he did not have the right to do so. According to the internal rules **R.Sh.** should have gone to **O.** with **Sh.** As far as **M.** knows **R.Sh.** went to ask for permission to leave and told **O.** that an argument had broken out between **M.** and **Sh.** on one side and **R.Sh.** on the other side and that he had been threatened by them. Nevertheless, according to **M.**, there was no anger on this issue and it was not personal but official.

On **T.Sh.** called **Sh.** using the phone of **R.Sh.** when they left work. **M.** does not know what **Sh.** and **T.Sh.** spoke about, apart from **T.Sh.** asking to speak to **M.**. **Sh.** handed the phone to **M.** and he spoke to **T.Sh.**. **M.** first asked who he was speaking to. **T.Sh.** told **M.** he was the elder brother of **R.Sh.**. **T.Sh.** asked if they could meet in the centre of to sit and talk over about some official words **M.** had had with **R.Sh.**. **T.Sh.** also wanted to speak about **R.Sh.**'s problems and the reason for his absences as well as the possibility to grant permission to **R.Sh.** as he had works going on in his home. So, regards the meeting with **T.Sh.**, it was supposed to be friendly.

In a friendly manner **M.** told **T.Sh.** that **M.** and **Sh.** could come to the home of **Sh.** and discuss the matter. **T.Sh.** replied; "No. We should meet in . They set the meeting time for in . **M.** agreed to meet **T.Sh.** because all the families of the Brigade had good relations and he met with all family members of their personnel. **M.** had once been at the home of **Sh.**'s to express his condolences but **M.** does not remember if **T.Sh.** was there. If not then **M.** had not met **T.Sh.** before. So it phone conversation was the first time **M.** spoke to **T.Sh.**.

M. and **Sh.** were wearing uniforms. As they were not allowed to hang around in cafés in uniform **M.** drove **Sh.** to his home and then went home. He had lunch with his family. At about **T.Sh.** called **M.** again and asked if **M.** could come at instead of as **T.Sh.** had some business to do after work. **T.Sh.** asked to meet in village of by the trees where there is a gas station. **M.** agreed and informed **Sh.** also as they had agreed to go together. **M.** picked **Sh.** up in his car and they headed towards . **M.**'s vehicle was a Black

and in it **M.** arranged a place by the gearbox to keep his pistol. During the journey **M.** and **Sh.** were discussing on what to buy for their children as they had received their salaries on that day.

On the way to meet **T.Sh.**, **M.** received phone calls from him. **T.Sh.** called twice to ask where they were and how long we would be. **M.** told him where we were – at the Village of or thereabouts. **Sh.** also called **T.Sh.** when they were at to ask if **R.Sh.** was with him but someone else answered the phone. This person told **Sh.** that they had left, including **R.Sh.**

T.Sh. called **M.** on his phone again asking if **Sh.** was with him. **M.** said “Yes” and asked where they were to meet. **T.Sh.** replied that he was by the gas station. **M.** told him to approach Restaurant and to order as they would be there in a few minutes. **T.Sh.** promised to wait for them there and **M.** was expecting to meet **T.Sh.** and **R.Sh.**. From **T.Sh.**’s last call it took **M.** five to ten minutes take to get to Restaurant

When **M.** and **Sh.** arrived at Restaurant **R.Sh.**’s was there. **M.** pulled over very close, one and half meters, to the . The front of the was facing the road and **M.**’s is facing the wall. The was closer to the wall and the was closer to the road. There were two persons standing outside the vehicle and near it - one on driver’s side and one on passenger’s side. **M.** did not you recognize them. **R.Sh.** was not there.

While **M.** and **Sh.** were pulling over to the car park, and **Sh.** was getting out of the car and **M.** turning the engine out, **T.Sh.** opened the front passenger door and from underneath his seat took out the long barrelled rifle. **Sh.** was facing he road.

T.Sh. moved behind **M.**’s vehicle. **Sh.** was still close to the door of the car and raised his hands. **Sh.** said: “For God’s sake! We did not agree to meet for this but to have coffee”. **T.Sh.** aimed the rifle right at **Sh.**’s chest. **M.** got out of the car from the driver’s side, turned around to see what was happening and stayed here, close to the door. **M.** thought **T.Sh.** was going to shoot at **M.** and **Sh.** and kill them. In **M.**’s opinion they were betrayed and ambushed and it was clearly **T.Sh.**’s purpose to meet **M.** and **Sh.** to kill them both.

Sh. jumped and by mere luck grabbed **T.Sh.**’s rifle by the barrel and lowered it.

T.Sh. never let go of the rifle. Then the gun went off and hit **Sh.** on the leg. This was the first shot **M.** heard. **Sh.** yelled “Oh God”. After having wounded **Sh.**

T.Sh. pointed the weapon at **M.**, who was maybe 7-10 meters away, but **Sh.** grabbed hold of **T.Sh.** weapon again and lowered it down. He was hanging on to the rifle, even though wounded. **M.** was scared because he had just seen **T.Sh.** shoot at **Sh.** and though that if he shot in the air it would stop **T.Sh.** from

shooting at him. Still by the door of his vehicle **M.** pulled his weapon by the waist and shot times in the air. **T.Sh.** was still holding on to the rifle with his right hand and **Sh.** was still holding on to the barrel of the rifle when **T.Sh.** drew a weapon with his left hand and shot at **M.** at least once, maybe twice. When **Sh.** shot at **M.**, **M.** had his -pistol in his right hand. He was holding it lowered, to the side of his leg, and it was remained open. It might have been out of bullets or stuck. **M.** usually carries the pistol with bullets.

M. dropped to the ground so he could flee and was not able to see what was going on between **T.Sh.** and **Sh.**. The weapon that **T.Sh.** drew was black but **M.** could not see the type of the weapon. In **M.**'s opinion **T.Sh.** was shooting at **M.** to kill him. **M.** tried to figure out a place to go as not to be hit. He then turned his back to **T.Sh.** and heard a gunshot.

In his statement to the police, dated witness **K.X.** stated that while he was working in front of the Restaurant behind a hilly land he heard shots. He went to the hill from where the restaurant could be seen and saw a person at the far end of the parking of the restaurant with a revolver in his hand. This person was shooting in the direction of the parking located in front of the restaurant. At that moment the police patrol arrived.

D. Evaluation of Presented Evidence

1. Factual Findings

Upon the evidence presented during the course of the main trial, the Court considers the following facts as proven:

It is undisputed that two or three days before **M.**, **Sh.** and **R.Sh.** met at the office of **Sh.** to discuss the absences of **R.Sh.**. This fact is supported by the statements of both **R.Sh.** and **M.**. **M.** and **Sh.** both state that **R.Sh.** told that his son had been ill and his wife had called him. Furthermore their statements concur in that **M.**'s voice was raised at the end of the meeting. The Court further finds that the meeting was not conducted purely in an official manner. There clearly was a work related dispute between **R.Sh.**, **M.** and **Sh.** and some harsh words were exchanged between them possibly resulting in a physical attack upon **R.Sh.**. This conclusion is supported by the undisputed fact that after the meeting **R.Sh.** went to speak to Commander **O.** and claimed that **M.** and **Sh.** had threatened him. Further the Court finds that **M.** and **Sh.** were in a superior position to **Sh.**.

On [redacted] R.Sh.'s brother, T.Sh. on one side and M. and Sh. on the other side agreed to meet to discuss this dispute about the absences of R.Sh. This fact is supported by the statement of R.Sh. who stated that he had told T.Sh. that he had problems with Sh. and M. and T.Sh. said he would send H. to find out what was this issue all about and to make amends with M. When R.Sh. returned from having changed his uniform the electrician working at R.Sh.'s house told him that someone called from an unknown number and said that they were at the meeting place. This fact is also supported by the statement of H. who stated that T.Sh. asked H. to take him to the village of [redacted]. While they were driving T.Sh. told H. that he was going to talk about his brother, that there was a problem and that they had to agree on something. Possibly T.Sh. told H. that R.Sh. had been beaten up at work. This fact is also supported by the statement of M. who stated that when M. and Sh. left work M. spoke on the phone with T.Sh. and T.Sh. asked if they could meet in the centre of [redacted] to sit and talk over about some official words M. had had with R.Sh. M. agreed to meet T.Sh. because all the families of the Brigade had good relations and he met with all family members of their personnel. The court finds that T.Sh., M. and Sh. agreed to meet at Restaurant [redacted] to discuss the dispute.

On [redacted] T.Sh.'s and B.H. were the first to arrive at the car park of Restaurant [redacted]. This fact is supported by the statements of F.X., who stated that as he was travelling on foot from his house to where he worked with the heavy machinery behind the large hill he saw a [redacted] vehicle at the restaurant. F.X.'s statement is also supported by the fact that the [redacted] had been parked facing the road, which indicates that the driver had had time to park the vehicle. It is also clearly found by the Court that T.Sh. and B.H. were the first to arrive and parked facing the road, and that M. and Sh. arrived second and parked facing the wall with the back of their car facing the road.

On [redacted] N.M. was in the possession of a [redacted] pistol and he fired his pistol while at the car park. These facts are not disputed but confirmed by M. himself. This statement is also supported by the undated Criminal Examination Report by L.R. that states that seven shell casing of the type used in a [redacted] pistol like M.'s (X mm) were found at the scene and that four of these seven shell casings match forensically as having been fired from the pistol with serial number [redacted] which M. admitted was his. The Court further finds that the other [redacted] shell casings matched none of the weapons at the crime scene. The only other shell casing found at the scene was of the type used in the long rifle identified as belonging to T.Sh. (X mm) however no forensics were performed on this shell casing to determine if it had, in fact, been fired by T.Sh.'s rifle. No other shell casings were found at the scene by investigating officers.

It is undisputed that T.Sh. was killed and that R.Sh. was injured on his leg and to the right side of his chest close to the neck during the exchange of gun shots at the car park of Restaurant [redacted].

2. Evidence concerning the murder by N.M.

As stated above, N.M. has admitted to shooting four times in the air after T.Sh. had shot Sh. in the leg and while T.Sh. and Sh. were struggling for the rifle.

M. stated that H. and T.Sh. were already at the car park of the Restaurant when he and Sh. arrived there. This statement supported by the statement of F.X. who stated that when he was travelling on foot from his house to where he worked he saw a vehicle at the restaurant on his way to the heavy machinery. It is also indirectly supported by the pictures taken by the police investigating the case that indicates that the vehicle was reversed to the car park and parked with its rear towards the fence. This fact supports the courts finding that T.Sh. and H. were under no threat at the time they arrived at the location of the shooting as it is unlikely that someone would park in this manner if threatened. Further, the Court does not believe M.'s claim that T.Sh. immediately pulled the rifle out from under the seat of his vehicle. First of all this is completely contrary to H.'s statement that he saw no such weapon in the car, but perhaps more importantly is considered practically impossible for a weapon of the size of T.Sh.'s rifle could be stored under the front seat of the vehicle and pulled out in an reasonable manner. The testimony that it was in the trunk as stated by H. is more plausible and believed by the court.

According to the undated Criminal Examination Report by L.R. four of the shell casings found on the crime scene were matched to M.'s pistol. The only other casings at the scene, three in number, matched to none of the weapons found at the scene of the shooting. Three of these four shell casings matched to M.'s pistol were found in the vicinity of the staircase of the restaurant, near M.'s car. The forensic evidence supports H. stating that M. was shooting as much as he could, from the top of his bonnet, towards T.Sh.

The Court finds M.'s statement of him shooting into the air unbelievable for the following reasons: first, M. stated that while immediately after being shot at by T.Sh. he was holding his -pistol lowered to the side of his leg and then he dropped to the ground. The Court finds, it unbelievable that one being shot at, while holding a pistol in his hand, would hold the gun at his side and then drop to the ground; second, H. who was an eye witness to the event clearly noted that M. was shooting at the direction of T.Sh. and Sh.; third, witness F.X. saw M. walking backwards near the restaurant holding a weapon and pointing the weapon in the direction of T.Sh. and Sh. who were on the ground. It is inconsistent that M. would hold his gun down while being fired at but a moment later point it at the two people lying on the ground helpless; fourth, witness K.X. stated that he saw a person at the far end of the parking of the restaurant with a revolver in his hand shooting in the direction of the parking located in front of the restaurant. Finally, according to the undated Criminal Examination Report by L.R. no shell casing matched the pistol with

serial number alleged by **M.** to have been used by **T.Sh.** . Therefore the forensic evidence does not support the statement of **M.** in so far as he stated that **T.Sh.** drew a weapon with his left hand and shot at **M.** at least once, maybe twice. Furthermore, this indicates that **M.** was not shot at before he fired his weapon.

According to the investigator's report dated the police found long weapon cartridges of caliber X mm, and the same as could be used on **T.Sh.** 's weapon, at the crime scene. From the photograph number attached to the forensic identification file # one can see that these cartridges were intact. According to the abovementioned report one empty cartridge of the same caliber was found as well. This shell was never tested but was found near the rifle and is of the same calibre as the other unfired cartridges.

There were no shell casings found to support **H.**'s statement of there being other people further down that fired the first shot neither is it supported by a statements of anyone else at the crime scene. **H.** was clearly wrong, or, in the danger of the moment, confused – in his words “lost” - as to the existence of these “others”.

It has therefore been proven that no more than one bullet was shot by **T.Sh.** hitting **Sh.** in the leg during the struggle over the gun and that the only other shots fired were fired by **M.** , four in number. This also is supported by the statement of **F.X.** who heard four to six shots. It follows that one of the four shots **M.** fired hit and killed **T.Sh.** . The Article 146 of the Provisional Criminal Code of Kosovo describes murder as “whoever deprives another person of his or her life” The actions of **M.** match this legal description.

3. Evidence concerning the Unauthorized Ownership, Control, Possession and Use of Weapons by N , M.

M. pleaded guilty to the unauthorized possession of the weapon, a serial number . The Plea is supported by the statements of **F.**, **X.**, **G.** and **S.** .

4. Evidence concerning the murder by R. Sh.

Hajdini stated that **Sh.** pulled out a weapon but he did not shoot at **T.Sh.** . The forensic evidence supports **H.**'s statement as there were no shell casings found from the crime scene that matched the weapon of **Sh.** , serial number .

Witness **L.** testified that the handgun he saw in the people lying on the ground was unloaded, open. In his testimony **M.** does not mention **Sh.** shooting at **T.Sh.** . In fact, **M.** does not mention **Sh.** having a weapon at all.

There is no evidence showing the intent on **Sh.** 's part to commit the offence of Murder nor is it proven that he substantially contributed to its commission. **Sh.** simply reacted

to the situation he found himself in and engaged in a struggle over the weapon held by the victim T. Sh. . During the struggle the weapon was discharged in some manner and he was injured. This struggle over a weapon does not constitute intent or contribution to the crime. Therefore, the requisites of the criminal offence are not established.

Therefore the Court finds that the evidence presented to find Sh. guilty as a co-perpetrator in the murder of T. Sh. is insufficient.

5. Evidence concerning the Unauthorized Ownership, Control, Possession and Use of Weapons by R. Sh.

R.Sh. testified that both M. and Sh. regularly had unregistered weapons on their person and in their office. H. testified that he saw Sh. pull his pistol out. G. testified that he saw was a handgun of make, on the right hand side of the person lying beneath [Sh.], about ½ meter from them.

L. testified that the person on top [therefore T. Sh.] was holding a pistol in his right hand. This is not in consistent with the statement of G. who was amongst the first to approach the people lying on the ground. It is also unbelievable that T. Sh. would have a pistol in one hand, a long rifle with a bayonet attached in the other hand and struggling with Sh. all at the same time. It is further unbelievable in that L. not only stated that Sh. had a pistol in one hand, at the same time he stated that Sh. (the one on top) had both hands around Sh.'s throat. These statements are inconsistent and somewhat contradictory. According to his own testimony L. was a close friend with R. Sh. , Sh. and M. . This might have affected L.'s testimony as to who was holding the weapon. The Court further notes that there is no record of the victim T. Sh. having such a weapon. It is also completely illogical that he would have gone to the trouble to extract a bulky rifle from the boot or even under the seat of the vehicle had he had a pistol on his person.

The Court finds that the testimonies of R. Sh. , H. and G. are sufficient to convince the panel that Sh. is guilty of the offence of unauthorized possession of the weapon, serial number .

6. Rejected Motions

Defence Counsel Haxhi Millaku requested the Court to inspect the crime scene to survey it, so that the Panel would have true picture of it and to objectively understand the matter. Because of the detailed sketch and the photos presented as evidence by the Public Prosecutor the Panel has sufficient information of the crime scene. Visiting the crime scene would not bring additional relevant information. Therefore the panel decided to reject this request.

Defense Council Xhelal Hasani requested that the statements of M. G. and M. L. given to the police on were considered as read. The Court rejected this request because the witnesses have not been given the chance to decline from testifying as stipulated in the Article 160 of the CPCK.

E. LEGAL QUALIFICATION

1. Law applied

The criminal acts were committed on . At that time the Provisional Criminal Code of Kosovo (PCKK), that entered into force on 06 April 2004, was the applicable law. Pursuant to Article 2 paragraph (1) of the PCKK, the law in effect at the time of commission of the criminal offence shall be applied to the perpetrator, unless the application of a subsequent law would be more favourable for the accused. There was no change in the law that would be more favourable for the accused. Although the accused were charged according to the "Criminal Code of Kosovo" (CCK), the change in the law that entered into force on 06 January 2009 and introduced this new name of the criminal codification did not entail any material amendment relevant to this case. The provisions applicable in this case, remained exactly the same.

2. Necessary defence

M. 's defence was that he did not shoot T. Sh. but in the air. As stated above, it has been established that the accused N.M. caused the death of T. Sh. and possibly serious injuries to R. Sh. .

The court examined whether acts of N.M. could have fallen under the legal scope of necessary defence. According to Article 8 paragraph 2 of the CCK an act is committed in necessary defense when a person commits the act to avert an unlawful, real and imminent attack from himself or another person and the nature of the act is proportionate to the degree of danger posed by the attack. The court found that in the case before it the constituent elements of necessary defence were not present.

Undisputedly, both M. and Sh. went to the rendez-vous carrying weapons ready to use, which readily indicates a confrontational, if not provocative, attitude. This indication is strengthened by the prior incident of both of them brandishing weapons at R. Sh. earlier that day. As concerns the course of action at the crime scene, H. stated that T. Sh. armed himself only after seeing the weapons on M. and Sh. . H. was undisputedly unarmed.

M. stated that while he and Sh. were pulling over to the car park T. Sh. took out the long barrelled rifle from underneath his seat. As stated before, the Court finds it

unlikely or nearly impossible for the long rifle to have been stored and extracted in any reasonably quick manner under the front seat of this vehicle. Accordingly, the Court finds it unproven that **M.** and **Sh.** were under threat at the time they arrived at the location of the shooting.

M. claimed that he pulled his gun out from his waist only after he had witnessed **T.Sh.** shoot at **Sh.** . Since **M.** had earlier stated that he carried his gun for his protection the Court finds it unlikely that he would watch his friend being shot without using, or at least pulling out, his weapon. **M.** 's statement is also unbelievable in that his statement in court was that the pistol is carried in a location by the "gear box" of his car. If that was the case, how did it suddenly become placed in his belt upon leaving the car. His story about the location of his and **T.Sh.** 's weapons brings serious doubt as to his testimony.

The Court deems it therefore proven that the four people put themselves in a situation where both parties were threatening and at the same time threatened with a weapon, which excludes the element of "attack". The court believes that by a greater weight of credible evidence, **M.** and **Sh.** began this incident by getting out of their car armed.

T.Sh. , in order to equalize the situation drew his rifle from the car. According to **M.** 's statement **Sh.** was the first to act in this situation as he jumped and grabbed the rifle of **T.Sh.** . Only after this did the gun go off and hit **Sh.** on the leg. **H.** gave two versions of the struggle over the gun; one stating that **Sh.** was first shot in the leg and then he grabbed the rifle; and one stating that **Sh.** jumped on rifle, they struggled and then **Sh.** was shot in the leg. The Court accepts that in an occasion where a person is suddenly caught up in a possibly life threatening situation his perceptions and memories of the situation can be affected. Exactly this was described by **H.** when he stated that he "lost himself". Therefore the Court considers **M.** 's account, **Sh.** acting first, as proven. Furthermore, both **H.** and **M.** state that **M.** only fired his gun after **Tafil Shabani** had shot **Sh.** in the leg and while they were struggling for the gun.

To conclude, the Court states that there was no attack by **T.Sh.** on **M.** or another. In fact, **T.Sh.** was confronted by two armed men and then attacked by **Sh.** who grabbed the rifle and struggled with **T.Sh.** resulting in the discharge of the weapon. At this point, only after this struggle, **M.** discharged his weapon four times hitting **T.Sh.** once fatally.

At this point **T.Sh.** was both outnumbered and engaged in a struggle with **Sh.** and therefore no longer aiming his weapon at either **M.** or **Sh.** . Of course all of this could have been avoided if no one came to this simple discussion armed. Because all were armed, one is dead, one impaired for life and one facing the serious crime of murder. This is precisely why the law prohibits brandishing of weapons under severe penalties and why those who brandish firearms may not invoke the necessary defence when their opponent responds by actually firing.

Therefore, Court excludes this defence.

F. DETERMINATION OF PUNISHMENT

When imposing the criminal sanction the Court has to bear in mind both the general purpose of punishment – that is 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 determining the duration of punishment, the Court has to evaluate all mitigating and aggravating factors, pursuant to Article 64 paragraph (1) of the PCCK.

For the criminal act of Murder pursuant to Article 146 of the PCCK, the law foresees a punishment of at least five years of imprisonment.

For the criminal act of Ownership, Control, Possession or Use of Weapons, pursuant to Article 328 paragraph (2) of the PCCK, the law foresees a punishment of up to 8 years of imprisonment.

In case of the murder by the accused **M.** the Panel took as an mitigating factor the fact that there was a struggle involving 3 persons with weapons, that he did not initiate the meeting, that his friend was injured and that he may have overreacted to the situation.

In case of the unauthorized possession of a weapon by the accused **M.** the Panel took as an aggravating factor the fact that he has held the weapon in his possession for at least 10 years, carries it loaded on his person, that he seems to regard the law against such matters as irrelevant as to him, and the grave consequences of the use of weapons in this specific case.

Considering the mitigating factors, the panel imposed 5 years of imprisonment for the criminal act of Murder in case of **M.** . Considering the aggravating factors, the panel imposed 4 years of imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in case of **M.** . Pursuant to Article 71 Paragraph (1) and Paragraph (2) Item 2 of the PCCK the panel determined the aggregate punishment in seven years of imprisonment.

The accused **M.** has been in detention on remand from _____ until 17 February 2010 and thereafter under the security measures of house detention. That period is to be credited in the imposed punishment of imprisonment pursuant to Article 73 paragraph (1) of the PCCK.

In case of the unauthorized possession of a weapon by the accused **Sh.** the Panel took as an mitigating factor the fact that his weapon must have been unloaded at all times as no casings were found, he was under some control of his superior officer although off duty, and was severely injured as a result of this activity.

Considering the mitigating factors, the panel imposed 2 years of imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons in case of **R.Sh.**

The panel confiscated the three weapons that have been used on the day of the event.

G. COSTS

The accused **N.M.** and the accused **R.Sh.** were found guilty, therefore, they must reimburse the costs of criminal proceedings pursuant to Article 102 paragraph (1) of the CPCK, except the costs of interpretation and translation throughout the criminal proceedings. 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.

H. COMPENSATION CLAIM

At the beginning of the main trial, the Injured Party was reminded that he may file a motion to realize property claim within the criminal proceedings, pursuant to Article 355 paragraph (2) of the CPCK.

Injured Party **R. Sh.** did not file a motion to realize property claim.

District Court of Mitrovica
P. nr. 17/09

Prepared in English, an authorized language.

Presiding Judge
Charles Smith

Panel Member
Caroline Charpentier

Panel Member
Agnieszka Klonowiecka-Milart

Recording Officer
Noora Aarnio

Legal remedy:

Authorized persons may file an appeal in written form against this verdict through the District Court of Mitrovica to the Supreme Court of Kosovo within fifteen days from the date the copy of the judgment has been served.