

DISTRICT COURT OF MITROVICA

P. Nr. 40/08

21 October 2010

IN THE NAME OF THE PEOPLE

THE DISTRICT COURT OF MITROVICA, in the trial panel composed of EULEX Judges Hajnalka Veronika Karpati as Presiding Judge, and EULEX Judges Caroline Charpentier and Nikolay Entchev as panel members, with the participation of EULEX Legal Officer Tara Khan as Recording Officer, in the criminal case against;

K.H., originally charged with Aggravated Murder contrary to Article 147 Item 4 of the Provisional Criminal Code of Kosovo (PCK), Attempted Aggravated Murder contrary to Article 147 Item 4 as read with Article 20 of the PCK and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328 Paragraph (2) of the PCK, according to the Indictment of the District Public Prosecutor PP Nr. 235/07, dated and filed on 29 January 2008,

After having held the public hearing concerning the acceptance of the Plea Agreement dated 20 October 2010, on 20 October 2010, in the presence of the accused **K.H.**, his Defence Counsel Kosovare Kelmendi, EULEX Public Prosecutor Adebayo Kareem and Injured Parties L.G., G.G., H.G., Legal representative of Injured Party L.G., Agim Lushta, after having accepted the Plea Agreement on the same day and after it has been registered with the Court on 20 October 2010 and after having held the public hearing concerning sentencing on 21 October 2010, in the presence of the Accused, his Defence Counsel, the EULEX Public Prosecutor, Injured Parties G.G. and H.G., after the trial panel's deliberation and voting held on 21 October 2010, pursuant to Article 308A Paragraph (15) of the Criminal Procedure Code of Kosovo (CPC) pronounced in public and in the presence of the Accused, his Defence Counsel, the EULEX Public Prosecutor, the Injured Parties present, the following

JUDGMENT

The accused **K.H.**, son of S.H. and D. H., born on _____, in _____, Kosovar A., residing in _____, married, with no child, highest education secondary school, labourer by profession, with an income of approximately 200 Euros/month, in detention since _____,

Having pleaded guilty to the criminal offences of Murder in violation of Article 146 of the Criminal Code of Kosovo (CCK), Attempted Murder in violation of Article 146 as read with Article 20 of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328 Paragraph (2) of the CCK pursuant to the Plea Agreement dated 20 October 2010 and the Court having accepted the Plea Agreement on 20 October 2010, as registered with the Court on 20 October 2010

is

SENTENCED

- to 10 /ten/ years of imprisonment for the criminal act of Murder
- to 4 /four/ years of imprisonment for the criminal act of Attempted Murder
- to 1 /one/ year of imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons.

The aggregate punishment is determined in **13 /thirteen/ years of imprisonment**, pursuant to Article 71 Paragraph (1) and Paragraph (2) Item 2 of the CCK.

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

The weapon _____, calibre _____, with serial number _____ is hereby confiscated pursuant to Article 60 Paragraph (1) and Article 328 Paragraph (5) of the CCK.

The accused 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

The District Public Prosecutor for Mitrovica in the indictment PP. no. 235/07 dated 29 January 2008 charged K.H. with Aggravated Murder contrary to Article 147 Item 4 of the Provisional Criminal Code of Kosovo (PCCK), Attempted Aggravated Murder contrary to Article 147 Item 4 as read with Article 20 of the PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons, contrary to Article 328 Paragraph (2) of the PCCK.

The main trial was scheduled to commence on 18 October and continue on 19, 20 and 21 October 2010 but the start was adjourned due to ongoing plea negotiations between the parties. On 20 October 2010 the EULEX Prosecutor informed the Court that a guilty plea agreement had been finalized and signed by the parties and the Chief Public Prosecutor.

B. COMPETENCE OF THE COURT

Under Article 23 Item 1) i) of the CPCCK, 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 CPCCK, 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 Aggravated Murder pursuant to Article 147 of the CCK allows for the imposition of a minimum sentence of 10 years of imprisonment. In addition, the indictment in this case alleged that the accused had committed the acts in

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

On 02 August 2010 the President of the Assembly of EULEX Judges assigned the case to EULEX judges based on Article 3.3 on the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors.

Therefore, EULEX Judges assigned to the District Court of Mitrovica are competent to try this criminal case. The panel was composed of EULEX Criminal Judge Hajnalka Veronika Karpati as Presiding Judge and EULEX Judges Caroline Charpentier and Nikolay Entchev as panel members. All three judges are assigned to the District Court of Mitrovica.

None of the parties objected to the panel composition.

C. THE PLEA AGREEMENT

A Plea Agreement was presented to the Court in a public hearing pursuant to Article 308A Paragraph (9) of the CPCCK on 20 October 2010.

The Accused **K.H.** pleaded guilty to Murder in violation of Article 146 of the Provisional Criminal Code of Kosovo (PCCK), Attempted Murder in violation of Article 146 as read with Article 20 of the PCCK and Unauthorized Ownership, Control,

Possession or Use of Weapons in violation of Article 328 Paragraph (2) of the PCCK (as corrected during the session).

The Plea Agreement contained the following factual findings:

On the _____, at about _____ hours the defendant **K.H.** was involved in a fight with J.G. together with two of J.'s cousins whereby K. was reportedly beaten up. After the fight, K. reported the incident to his uncle R.H. who picked him up in his vehicle and drove him to the local police station in _____ where the incident was formally reported. R.H. was at the time of the incident a professional colleague and friend of S.G., who is an uncle to J.G.. R. therefore decided to speak with S.G. in order to explore ways of ensuring that such incident was not repeated. Both R. and S. agreed to meet later in the evening of the same day to discuss the matter. They then later met at _____ hours at a restaurant in _____. At that meeting were R.H., A.H. {who is a brother of R.}, S.G. and **K.H.**, although K. later excused himself to see a friend nearby. The parties, at the meeting mutually apologized to each other and agreed to speak with the younger parties to let peace reign between them. The H. then left for their vehicle whilst S. went to speak to his nephews who were also at a bar nearby. Whilst the H. were in their vehicle on their way home, A. realized he needed to buy cigarette and asked R. to stop and park the car. At that point K. also received a text message to meet a friend of his nearby. Both A. and K. then exited the car. Whilst K. was on his way to meet his friend, he met A.G. and L.G. on the way. These were people who had previously beaten him up on the day and he exchanged abusive words with A. which later descended into a fight between the two of them. Whilst this fight was taking place, L. ran to call his other cousins who were close by to tell them of the fight. These other cousins, about 4-7 of them then rushed to the scene. These included J.G., I.G., S.G., L.G. and R.H.. K., seeing them coming and noting that he was outnumbered, ran away into his uncle's car which was parked nearby. There is evidence and admission by members of the G. family that they chased K. in a threatening manner when he was running towards his uncle's car. There is also an admission by L.G. that 'I pulled the gun from the right side of my waistband and pointed it in the direction of K. {and shouted}: "Shoot I fuck your mother, you are not a man...I pulled the gun to scare him not to shoot him...'

Although L. states he only brought out his gun when the defendant had brought out his own rifle, the defendant disputes this stating that L. brought out his gun first. There is no other evidence supporting either account. In any case, when K. got into his uncle's car he brought out a rifle {which he had kept there, having, according to him, used it at a wedding few days before}, and threatened the crowd with it. Faced with the gun of L., and not in a position to know that the gun was not loaded with bullets, he shot at him. However he missed L. and instead the bullet hit J. G., who was not involved in any dispute with K.. K.'s uncle, seeing this, rushed at him to disarm him of the gun and in the struggle was hit by a shot from K.'s gun, wounding him on the shoulder. J. later died at the UCC.

Injured Parties G.G. - father of the victim J. G. (representing also I.G., the wife of the victim), H.G. - mother of the victim, L.G. - Injured

Party regarding the Attempted Aggravated Murder charge and his Legal Representative, Agim Lushta were present at the public hearing on 20 October 2010. The Injured Parties confirmed that they had been informed by the prosecutor about the Plea Agreement.

Pursuant to Article 308A Paragraph (5) of the CPCK, the Injured Party must be given an opportunity to present a statement to the court regarding the property claim. In the present case, none of the Injured Parties - after they were given the relevant instruction and after it was explained to them what the property claim means - submitted such a claim. They were given the opportunity to present their comments on the plea agreement whereby L.G. expressed his dissatisfaction with the proposed sentence.

The Plea Agreement was accepted by the Court on the day of the hearing pursuant to Article 308A Paragraph (10) and (15) of the CPCK with the following corrections: On top of page 3 the qualification of the weapon charge should read – Article 328 Paragraph (2) of the PCCK instead of Article 326 of the PCCK, Under point 4, on the same page third bullet point: Article 328 Paragraph (2) of the CCK instead of Article 328 of the CCK, On page 4, Factual Basis, the date of the criminal act should read instead of 27 August 2007.

The corrections were approved by the parties and entered into the minutes of the session.

After questioning the Accused, his Defence Counsel and the Public Prosecutor, the Court determined that the Plea Agreement met the conditions under Article 308A Paragraph (12); the Accused understood the nature and the consequences of the guilty plea, he voluntarily made the guilty plea after sufficient consultation with his defence counsel, he was not coerced in any way and was not forced to plead guilty. Furthermore, the guilty plea is supported by the facts and evidence of the case, testimonies of the witnesses, statements of the Accused and documentary evidence of the case file. Therefore, pursuant to 308A Paragraph (15) of the CPCK, the Court ordered that the Plea Agreement be filed with the Court and scheduled the sentencing hearing for 21 October 2010.

The Plea Agreement was filed with the Court on the same day, 20 October 2010.

D. THE SENTENCING

On 21 October 2010 the panel heard arguments from all parties regarding sentencing. The parties presented the mitigating and aggravating circumstances. Injured Party L.G. and his Legal Representative Agim Lushta did not attend this hearing. After deliberation, the Panel imposed the punishment pursuant to Article 308A Paragraph (15) of the CPCK.

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 CCK.

The Court considered as mitigating circumstances the following facts: Before the incident, earlier on the same day, **K.H.** had been beaten up by members of the G. family, which he had promptly reported to police. Through his uncle, he then made an attempt to reconcile with the G. family, which unfortunately did not prevent the later clash between the families and the shooting. **K.H.**, however, committed the murder of J. G. with indirect or eventual intent. He has shown sincere remorse for his actions, for the taking of J. G.'s life, and for suffering of the G. family. He pleaded guilty to all three charges. The Court also considered the fact that he has spent an exceptionally long period of time, over three years, in pre-trial detention due to the riot and closure of the Mitrovica District Court in March 2008.

The Court considered as aggravating circumstances that – although legally rehabilitated by the date of commission of the criminal offence – his previous convictions, together with the present case indicate his tendency to solve problems in a violent way, the fact that the late J. G. had to provide for a wife and children, and the fact that in one action during the critical event, **K.H.** committed three criminal offences.

For the criminal act of Murder the law foresees a punishment of at least 5 years of imprisonment pursuant to Article 146 of the CCK but a maximum of no longer than 20 years of imprisonment pursuant to Article 38 Paragraph (1) of the CCK. Considering all the mitigating and aggravating factors, the panel imposed 10 years of imprisonment for this criminal act.

For the criminal act of Attempted Murder pursuant to Article 146 as read with Article 20 of the CCK the minimum sentence is the same but the maximum shall not be longer than three-quarters of the maximum punishment prescribed for the criminal offence of Murder, that is maximum 15 years. The panel accepted the proposed punishment of 4 years of imprisonment and imposed that sentence. Although pursuant to Article 308A Paragraph (1) Item (i) of the CPCCK the recommended punishment should not go below the minimum provided by law, considering the circumstances of the commission of the criminal act as explained in the factual basis of the Plea Agreement and the explanation given by the Public Prosecutor during the session on 21 October 2010, the panel accepted it as a special clause in the Plea Agreement mandating mitigation of punishment pursuant to Article 66 Paragraph (3) of the CCK.

For the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328 Paragraph (2) of the CCK the law foresees a punishment of a fine or an imprisonment of 1 to 8 years. The panel imposed 1 year of imprisonment.

The Accused committed three criminal acts. Pursuant to the rules of calculation of compounded sentence, the aggregate punishment must be higher than each individual punishment, but not as high as the sum of the prescribed punishments. The panel imposed an aggregate punishment of 13 years of imprisonment pursuant to Article 71 Paragraphs (1) and (2) Item 2) of the CCK.

The accused **K.H.** has been in detention on remand since . This period of time is to be credited in the imposed punishment of imprisonment pursuant to Article 73 Paragraph (1) of the CCK.

E. THE APPLICABLE LAW

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 Paragraphs (1) and (2) of the PCKK, the law in effect at the time of commission of the criminal offence shall be applied to the perpetrator unless a new law is more favourable for the accused. The accused pleaded guilty to the criminal offences pursuant to the PCKK.

However, some changes, including the institution of “Plea Agreement” were introduced in the Criminal Procedure Code of Kosovo by the Law No. 03/L-003 that entered into force on 06 January 2009 and also the Provisional Criminal Code of Kosovo was amended by the Law No. 03/L-002 that entered into force on 06 January 2009.

Obviously, the provisions concerning a plea agreement can be applied only by reference to the “new” laws, the Criminal Code of Kosovo (CCK) and the Criminal Procedure Code of Kosovo (CPCK). Therefore, the Criminal Code of Kosovo is more favourable for the accused and the Court made reference to this law in the Judgment concerning sentencing.

F. CONFISCATION

The Court confiscated the weapon (an , calibre , with serial number) that had been used for the commission of the criminal offences pursuant to Article 60 Paragraph (1) and Article 328 Paragraph (5) of the CCK.

G. COSTS

The Court obliged the accused to 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.

Recording Officer
Tara Khan

Presiding Judge
Hajnalka Veronika Karpati

Panel members: **Caroline Charpentier**
Nikolay Entchev

Legal remedy:

This judgment concerning sentencing became final on the day of its announcement as it does not fall under Article 308A Paragraph (8) Item 1 of the CPCK.