DISTRICT COURT OF MITROVICA

P nr. 320/2007

01 December 2010

IN THE NAME OF THE PEOPLE

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

S.H. .

Announces the following:

JUDGMENT

The charge of Murder contrary to Article 30 of the Kosovo Criminal Law against:

S.H. , son of H. H. and Z. K. , born in the Village of in Municipality, currently residing at Street Nr. , Village, , Kosovo A. ;

is hereby **REJECTED** pursuant to Article 389 Item (3) of the Criminal Procedure Code of Kosovo

Because the Accused was previously convicted of the same act, namely the Murder of B. Sh. on at around hours in Street in , under a final judgment.

Pursuant to Article 103 Paragraph (1) of the Criminal Procedure Code of Kosovo, the costs of criminal proceedings under Article 99 Paragraph (2) Subparagraph 1 through 5,

the necessary expenses of the defendant and the remuneration and expenditures of defense counsel, as well as the costs of interpretation and translation, shall be paid from budgetary resources.

REASONING

I.

EULEX Judges of the District Court of Mitrovica were assigned to this case by Decision of the President of the Assembly of EULEX Judges, dated 02 August 2010, based on Articles 3.3 and 3.5 on the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors.

II.

The charge of Murder submitted to the Court by the indictment PPNo. 338/07, dated 29 November 2007 and confirmed on 27 December 2007, had to be rejected, because the Accused was previously convicted of the same act under a final judgment.

1.

It is a basic principle of fair trial that no one shall be tried and/or punished twice for the same action, often quoted with the Latin phrase "*ne bis in idem*". This principle originating in Roman Civil Law is guaranteed by Article 4 Paragraph 1 of the Protocol No. 7 to the European Convention on Human Rights[1] and by Article 14 Paragraph 7 of the International Covenant on Civil and Political Rights[2]. It is incorporated in all modern legal systems.

The Criminal Procedure Code of Kosovo (CPCK) determines *ne bis in idem* as a general principle in Article 4, which reads:

(1) No one can be prosecuted and punished for a criminal offence, if he or she has been acquitted or convicted of it by a final decision of a court, if criminal proceedings against him or her were terminated by a final decision of a court or if the indictment against him or her was dismissed by a final decision of a court.

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[1] As amended by Protocol 11 on 22 November 1984, entered into force on 1 November 1998.
[2] Adopted by the UN General on December 16, 1966, and in force from 23 March 1976.

(2) A final decision of a court may be reversed through extraordinary legal remedies only in favor of the convicted person, except when otherwise provided by the present Code (Article 442 paragraph 2 of the present Code)."

This Code also provides provisions implementing the principle. Related to proceedings that reached the main trial stage, Article 389 Item (3) CPCK determines that if the accused was previously convicted of the same act under a final judgment, the court shall render a judgment rejecting the charge.

Thus, in such case, the court has no discretion and no other choice but to reject the charge.

2.

The Court is convinced that such previous conviction exists based on the evidence it has taken related to the existence of a final judgment convicting the Accused of the same criminal offence.

a) In the current proceedings the Accused is charged with Murder contrary to Article 30 of the Kosovo Criminal Law[3], because – according to the indictment – "on at around hours in Street in in a sly and cruel manner he has deprived of his life the late B. Sh. " by running him over with a car and stabbing him several times.

b) By judgment of the District Court of Mitrovica, K. no. 26/97 dated 21 January 1998, the Accused was found guilty of Murder because "on at around hours in Street in : , Municipality of , with premeditation and in an insidious manner he deprived Sh. B. of his life" by hitting him from behind with his vehicle ' ', trying to run over his legs with the car and stabbing him with a knife twice in the chest area, once in the area of the right upper arm and once in the back.

The existence of this judgment is proven by the stamped copy of the judgment provided by witness K.B. in connection with his testimony. Witness K.B. testified that he was *ex officio* appointed as defence counsel for the Accused in proceedings before the District Court of Mitrovica in 1998, in which the Accused was charged with the murder of Beshir Sheremeti, tried in absentia and convicted to 14 years imprisonment. Having kept the file, Mr. B. had in his possession a stamped copy of

[3] Criminal Law of the Socialist Autonomous Province of Kosovo (1 July 1977).

the verdict, which was inspected by the Court and all parties. The court stamp on each side was clearly visible.

The statement of the witness is credible and convincing. The witness has no personal relations to any of the parties and no personal interest in the outcome of the proceedings. He is a well-known professional of undisputed integrity. The mere fact that he did not remember that the Accused had been tried in absentia before he checked the judgment during his examination, does not question the reliability of his statement. Firstly, it is normal that a practicing lawyer does not remember all details of a case he dealt with twelve years ago, especially when he has never met the client in person. Secondly, the essential parts of his statement are supported by the papers on that case which he had in his possession.

Before, Injured Party H. Sh. , son of B. Sh. , being heard as a witness testified correspondingly that he had participated in that trial and as an injured party he had received a copy of the judgment. This copy, which was not stamped, was made available to the Court and the parties in the current proceedings.

All parties agreed that the text of the unstamped copy provided by the Injured Party is identical with that of the stamped copy in possession of witness K. B.

c) The criminal offence for which the Accused is convicted by the judgment dated 21 January 1998 is obviously identical with the charge in the current proceedings. The place, the time, the victim and the way the latter was deprived of his life match completely apart from an insignificant time difference of 20 minutes easily to be explained by the ten years that had passed in between. The place of the incident is identical also with regard to the street; only the name of the street had changed in the meantime.

There is no doubt that the judgment dated 21 January 1998 relates to the same person that is accused in the current proceedings. The personal data of the Accused provided by himself in the current proceedings are absolutely identical with the personal data of the accused in that judgment. The allegation of the Accused that his personal data would have been attributed to another person is meaningless.

d) The judgment of the District Court of Mitrovica dated 21 January 1998 is final. An appeal was filed by the *ex officio* appointed Defence Counsel Kapllan Baruti, but was rejected by judgment No. Kz. 1077/98, dated 11 February 1999, of the then competent Supreme Court of the Republic of Serbia in Belgrade.

This is proven by the testimony of the witness K. B. in connection with the letter from the Serbian Ministry of Justice to the EULEX Liaison Office in Belgrade, dated 5 November 2010, which the Court received on 22 November 2010, and the attached uncertified copy of the Supreme Court judgment.

Witness K. B. stated that he had filed an appeal against the judgment of the District Court of Mitrovica and he had attended the trial session before the Supreme Court held in Belgrade on 11 February 1999. The session ended on that day and he was told the judgment would be announced in written form. However, due to the war[4] he has never received the Supreme Court's Decision and has no information about it.

With regard to the credibility of this statement, the Court refers to the reasoning provided under 2.b).

The letter from the Serbian Ministry of Justice says that the Serbian Ministry of Justice can provide the EULEX Regional Liaison Officer only with the attached plain copy of the Supreme Court judgment Kz. 1077/98.

Certainly, the Court would have preferred to receive a certified copy of that judgment. Nevertheless, the Court is convinced that the then competent Supreme Court of Serbia rendered that judgment. Its content refers to the judgment of the Mitrovica District Court, not only as to the case number and the date, but also with regard to details of the reasoning, as well as to the appeal filed by Defence Counsel Kaplan Baruti and the arguments raised therein. Thus, it is obvious that only someone in possession of the judgment of the Mitrovica District Court and the appeal document could draft such judgment. The Supreme Court of Serbia had held a session on that appeal and was ready to issue the judgment. Moreover, the plain copy was received from the Serbian Ministry of Justice and the Court does not see any possible reason why the latter should provide false information related to this case.

The judgment of the Supreme Court became final immediately with its issuance on 11 February 1999. The then applicable Law on Criminal Proceedings *(Official Gazette No. 26/86)* determines in Article 135 Paragraph 2 that a judgment becomes final when it may no longer be contested by an appeal or when no appeal is allowed.[5] An appeal against the judgment of the Supreme Court of Serbia was not allowed. Article 391 of that Law on Criminal Proceedings stipulates that an appeal against a verdict of a court in the second instance is permitted only under specified conditions, which obviously do not apply to

[4] NATO bombing started on 24 March 1999.

this case.[5] The fact that the judgment of the Supreme Court of Serbia has not been delivered to any of the parties yet, is of no relevance with regard to the judgment becoming final.

The judgment of the District Court of Mitrovica, dated 21 January 1998, became final at the moment the judgment of the Supreme Court of Serbia became final, i.e. on 11 February 1999.

3.

The fact that this Court is not in possession of the original judgment of the Supreme Court of Serbia or a certified copy of that judgment does not justify an exception from the principle *ne bis in idem*. Whether the principle is to be applied, even when an accused was previously convicted of the same act by a final judgment which is permanently not executable, need not be decided by this Court, because it cannot be determined that there would be fundamental or permanent obstacles to the execution of the judgment of the District Court of Mitrovica, dated 21 January 1998. There is no legal provision in the currently applicable law in Kosovo preventing the execution of judgments rendered at that time. Such judgments are executed in Kosovo, when the formal requirements are met. Although it cannot be proven by official documents, it is known at the District Court of Mitrovica, that court files to be returned from the Supreme Court of Serbia after appeal proceedings were at that time sent to the District Court of Kraljevo and that court files of the District Court of Mitrovica are still being kept at the Serbian courts in Kraljevo and Niš. Due to the current political situation, this court at this moment is not in the position to receive files or certain documents from such files from the Serbian courts. However, this does not mean that access to these files would be impossible permanently and in general.

4.

The fact that the judgment of the District Court of Mitrovica, dated 21 January 1998, was rendered in a trial held in absence of the Accused (*"in absentia"*), does not prevent the application of the principle *ne bis in idem* either. The principle *ne bis in idem* is meant to protect the human rights of defendants. It would be changed to the opposite, if it was

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[5] The CPCK contains the same provision in its Article 135 Paragraph 1.
[6] Death penalty or a prison sentence of 20 years, state of facts differently established by the second instance, conviction in the second instance after an acquittal in the first instance.

applied to a previous conviction contrary to basic human rights standards. However, the conviction of the Accused in his absence does not violate basic human rights standards, although in most European countries a conviction of a person *in absentia* is not permitted or limited to low sentences and the Criminal Procedure Code of Kosovo adopted this view and abolished the possibility of holding trials *in absentia*, which is foreseen in Article 300 paragraph 3 of the previously applicable Law on Criminal Proceedings. That law counterbalances the restrictions of the rights of a person convicted *in absentia* by the possibility to file a petition for the reopening of the proceeding within one year from the day when the convicted person learned of the verdict whereby he was convicted *in absentia* (Article 410 paragraph 1 and 2). In that case the verdict cannot be modified to his detriment in view of the legal assessment of the act and the penal sanctions (Article 409 paragraph 4 read with Article 378).

The Accused still has this possibility, although it is not expressly mentioned in the Criminal Procedure Code of Kosovo. However, this is obviously an unintentional omission of the legislator, whose intention was to safeguard the procedural rights of defendants by abolishing trials *in absentia*. Not to maintain the right of persons convicted *in absentia* under Article 300 paragraph 3 of the previous applicable law to have proceedings reopened would be contradictory to that intention – and to basic human rights standards. A supplementary interpretation of the Criminal Procedure Code of Kosovo is therefore required, which leads to the further application of the previous applicable law with regard to reopening of proceedings in case of convictions *in absentia* under the previous applicable law.

Tàra Khan
Recording Officer

Christine Lindemann-Proetel
Presiding Judge

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.