SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 283/2009
Prishtinë/Priština
19 April 2011

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 19 April 2011 in the Supreme Court building in a panel composed of International Judge Gerrit-Marc Sprenger as Presiding Judge and Kosovo National Judges Nesrin Lushta, Emine Mustafa, Emine Kaçiku and Salih Toplica as panel members

And with Nexhmije Mezini and Jacqueline Ryan as Court Recorder,

In the presence of the

Chief State Prosecutor of Kosovo Mr. Johannes Van Vreeswijk and Deputy State Prosecutor of Kosovo Ms. Linda Heaton, Office of the State Prosecutor of Kosovo (OSPK)

Defence Counsel Bajram Tmava for the defendant F
Defence Counsel Bahtir Troshupa, replacing Defence Counsel Fazli Balaj for the defendant H G
Legal Representative Bajram Maraj for the injured party E F
Legal Representative Xhafer Maliqi for the injured party G B

In the criminal case number AP-KZ 283/2009 against the defendants:

F G.

H G.

In accordance with the Verdict of the 1st Instance District Court of Prishtine/Pristina in the case no. P. Nr. 10/2007 dated 27 March 2009 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, **the defendants were found guilty of the following criminal offenses:**

The defendant F. G

[i] Of committing the criminal offence of **Aggravated Murder** of [illegible] and A [illegible] on 22 April 2006 in Tirana str. in Shtime/Stimlje, at the same time endangering the lifes of [illegible] as well as of other persons in the same location and apartments nearby this location, contrary to Article 147 paragraph 1 sub-paragraph 4 and 11 of the Criminal Code of Kosovo (CCK); and

[ii] Of committing the criminal offence of Unauthorized Possession and Use of Weapons, contrary to Article 328, paragraph 2 of the CCK;

The defendant H. G.

Of **Incitement to commit the criminal act of Aggravated Murder**, contrary to Articles 24 and 147 paragraph 1, sub-paragraph 4 and 11 of the CCK;

And were convicted as follows:

The accused **F. G.** was sentenced for the criminal act of **Aggravated Murder** to a term of imprisonment of twentyfive (25) years [Article 37 paragraph 1 and 2 of the CCK and Article 147 paragraph 1, sub-paragraphs 4 and 11 of the CCK] and for the criminal act of **Unauthorized Possession and Use of Weapons** to a term of imprisonment of one (1) year [Article 38 and Article 328 paragraph 2 of the CCK]. The First Instance Court the built an aggregate sentence of twentyfive (25) years and six (6) months according to Article 71 paragraph 1 and 2 items (2) of the KCCP.

The accused **H. G.** was sentenced for the criminal act of **Incitement to commit the criminal act of Aggravated Murder** to a term of imprisonment of tweny (20) years [Articles 38 and 24 in connection with Article 147 paragraph 1 items 4 and 11 of the CCK].

The Defence Counsels of the two accused each timely filed an appeal, for **F. G.** 09 July 2009 and for **H. G.** dated 14 July 2009, against the Verdict. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the two accused was to be challenged. It was proposed by the Defence of the accused **F G** to annul the 1st Instance Judgment and return the case to the 1st Instance Court for re-trial, while the Defence of the accused **H. G.** proposed to amend the challenged Judgment and acquit the defendant from all charges.

In addition, **the two accused** have filed a joint appeal, but without offering legal arguments other than those pointed out in the appeals of the Defence Cousels.

Moreover, **the injured parties** E. F. and G. B. timely filed separate appeals against the 1st Instance Judgment through their respective legal representatives, thus particularly challenging the decision on punishment and proposing to modify the Judgment and impose long-term imprisonment upon both accused.

The OSPK, through an opinion dated 30 April 2010 and registered with the Supreme Court of Kosovo the same day, objected the appeals as being without merits and unfounded. The Public Prosecutor therefore proposed reject the appeals as unfounded and affirm the Judgment of Prishtine/Pristina P.No. 10/07 dated 27 March 2009.

Based on the written Verdict in case P, Nr. 10/2007 of the District Court of Prishtine/Pristina dated 27 March 2009, the submitted written appeals of the defendants and their Defence Counsels, the relevant file records and the oral submissions of the parties during the hearing session on 19 April 2011, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 19 April 2011, hereby issues the following:

JUDGMENT

Pursuant to Article 420, paragraph 1, points 2, Article 423, Articles 391, and 392, paragraph 1 of the KCCP the appeals of Defence counsels filed on behalf of the accused **F. G. and H. G.** as well as the appeals of the injured parties regarding the accused **H. G.** against the Verdict of the District Court of Prishtine/Pristina dated 27 March 2009 (P.No.10/2007) are hereby **rejected** and the 1st Instance Judgment is fully affirmed for the accused H. G.

Pursuant to Article 420, paragraph 1, point 4, Articles 391, and 392, paragraph 1 of the KCCP the appeals filed on behalf of the injured parties E. F. and G. B. on the decision on the punishment against the accused F. G. are **granted** and the judgment of the first instance is **MODIFIED;** for the criminal act of **Aggravated Murder** a term of imprisonment of twenty nine (29) years [Article 37 paragraph 1 and 2 of the CCK and Article 147 paragraph 1, sub-paragraphs 4 and 11 of the CCK] and for the criminal act of **Unauthorized Possession and Use of Weapons** to a term of imprisonment of two (2) years [Article 38 and Article 328 paragraph 2 of the CCK] are imposed instead; an aggregate sentence of thirty (30) years is built upon the separate punishments according to Article 71 paragraph 1 and 2 items (2) of the KCC.

REASONING

Procedural History

1. On 22 April 2006, based on a civil execution case concerning a piece of land which includes the "Cami"premises, a shooting occurred in Shtime/Shtimlje in "Tirana" Str., within which two persons, the victims Vezir Bajrami and Aziz Xhelili, were killed and and a number of others were hurt. Fiftyseven rounds of ammunition were fired from an automatic gun out of the "Cami" premises, while the gunfire was responded by the use of hand guns as well. Several suspects were arrested afterwards, in particular F. and H. G., I. or I. B., S. G., K. B., B. B., E. F. and R. L. or Y. , all of them under the allegation of having participated in the respective shooting, either on the sides of the Bajrami and Ferati family or on the sides of the Gashi family.

2. On 25 April 2006 the Public Prosecutor filed a Ruling on Initiation of Investigation (PP No. 239-1/06 against the accused F. G. for the criminal acts of Aggravated Murder, Attempted Agravated Murder, Unlawful Possession and Use of Weapons and Causing General Danger and against the accused H. G. for the criminal act of Threat. On this same occasion investigations as well were initiated against the suspects I. B. for the criminal offence of Unlawful Possession of Weapons, S. G. for the criminal act of Causing General Danger, K. B. for the criminal acts of Unlawful Possession of Weapons and Obstructing Official Persons in Performing Official Duties, as well as against B. B. E. F. and R. I. for the criminal act of Unlawful Possession of Weapons.

3. On 21 September 2006 the Public Prosecutor expanded the investigation against Hysni G. and included the criminal offence of Incitement to commit the Criminal Act of Aggravated Murder to the investigation.

4. On 20 October 2006 the Pre-Trial Judge of the District Court of Prishtine/Pristina extended the investigation for additional six months against all suspects included to the Ruling of Initiation of Investigation.

5. On 10 January 2007 the Public Prosecutor terminated the investigation against the suspects I. [illegible], I. [illegible] B. [illegible], S. G. [illegible], B. G. [illegible], E. F. [illegible] and R. [illegible] concerning the criminal offences as mentioned in the Ruling of Initiation of Investigation.

6. On the same day, the Public Prosecutor filed an indictment at the District Court of Prishtine/Pristina against the accused F. [illegible] for the criminal acts of Aggravated Murder and Unauthorized Ownership, Control, Possession or Use of Weapons and against the accused H. [illegible] G. [illegible] for the criminal act of Incitement to Commit the Criminal Act of Aggravated Murder.

7. On 06 March 2007 the Confirmation Judge of the District Court of Prishtine/Pristina, after conducting a Confirmation Hearing, confirmed the indictment against both accused for the criminal acts as listed in the indictment.

8. The Main Trial commenced in front of a full Kosovo Judges panel on 18 June 2007 and was set forth through altogether eight session also on 10 September 2007, 15 October 2007, 26 November 2007, 08 January 2008, 25 Februar 2008, 27 March 2008 and 21 April 2008.

9. During the last session on 21 April 2008 the Presiding Judge scheduled a crime scene visit for 15 May 2008 and a further trial session for 23 June 2008. However, the latter never was held and a new Presiding Judge was assigned to the case.

10. Following a letter of the accused F. G. [illegible] asking the case to be tried by EULEX Judges, the Presiding Judge on 03 December 2008 requested in writing the taking over of the case by EULEX. Dated 12 December 2008 the President of the Assembly of EULEX Judges issued a ruling, thus assigning EULEX Judges to the case.

11. The Main Trial then commenced on 11 February 2009 before a trial panel, presided by a EULEX Judge. On that occasion the indictment was read by the Public Prosecutor and the two accused, who have been accompanied by their respective Defence Counsels, both pleaded not guilty on all counts of the indictment. The Court as well heard the testimonies of witnesses and injured parties R. [illegible] J. [illegible] and Y. [illegible] S.

12. On 12 February 2009 the witnesses B. [illegible] ii, R. [illegible] and H. [illegible] were heard, while on 19 February 2009 witnesses K. B. [illegible] ii, F. [illegible] i, L. [illegible] F. and A. M. [illegible] iu were taken, all of them in open session.

13. Also in open sessions, the witness N. T. [illegible] as well as Medical Forensic Expert Dr. Tefik Gashi and Ballistic Expert Police Sergeant Lutfi Rraci were examined.

14. On 05 March 2009 the Court heard the testimony of witness Sh. M . and entered the following evidence into the record:

- Crime Scene Report
- Sketch of crime scene with explanations
- Recommendation (Rekomandimi, in Albanian, as attached to the Police Report)
- Document with description of pictures 1-376
- Report of the Police Unit Ferizaj/Urosevac
- Autopsy Report
- Description of photographs from the autopsy
- Photo album of autopsy with 91 pictures
- A further Crime Scene Report
- Sketch dated 27 April 2006
- 2nd Report on Chain of Custody
- Further list of pictures dated 27 April 2006
- Recommendation
- Criminality Report dated 22 April 2006
- Further list of pictures dated 27 April 2006
- 33 pictures
- Medical Report written by Dr. Tefik Gashi, dated 18-20 June 2007
- Ballistic Report dated 25 August 2006
- Statement of Besnik Ferati
- Court decisions and documents related to the civil claim regarding the property.

15. In the same session the Court proceeded with the examination of the accused **Feriz** and H. G. , who both requested the public to be excluded, pursuant to Article 329 paragraph 4 of the Kosovo Code of Criminal Procedure (KCCP). The request was granted within the limits of Article 330 of the KCCP. H. G. stated, while Feriz Gashi decided to remain silent, due to the assumed insufficiency of the respective measures. The examination of H. G. continued on 12 March 2009.

16. On 24 March 2009 the Court heard the final speeches. At the end of the hearing the accused F. G. requested to be excused from being present at the announcement of the Judgment, which the latter was granted by the panel.

17. The Judgment was announced publicly on 27 March 2009 and the Judgment was communicated to the accused Feriz GASHI, due to his permitted absence, into the detention center, where he was kept.

18. The Defence Counsels of the two accused each timely filed an appeal, for F G. 09 July 2009 and for H. G. dated 14 July 2009, against the Judgment od 1st Instance.

The Defense of the accused H G. particularly challenged substantial violation of the criminal procedure as per Article 403 paragraph 1 item 12 of the KCCP. Because, the enacting clause would be inconsistent in itself ad moreover would not be fully

supported by the factual findings of the Court as reflected in the reasoning of the Judgment. Moreover, the Judgment was challenged for violation of the criminal law, since the 1st Instance Court had wrongfully applied Article 24 of the CCK, due to the fact that the conditions for Incitement would not be met regarding the actions of the accused Hysni GASHI. Also the factual situation had been determined erroneously by the 1st Instance, since not all relevant evidence had been collected and assessed properly.

The Defense of the accused F. G. has challenged the 1st Instance Judgment for violation of the criminal law, thus taking the opinion that Article 147 of the CCK was applied wrongfully, since the Court had not considered that the accused H. G. was acting under the conditions of necessary defense.

Also the two accused have filed a joint appeal, but which does not have any other contents than the ones of the Defence Counsels. The accused F. G. particularly has stressed that the 1st Instance Court had failed to conduct additional forensic tests.

All the four of them, the two Defense Counsels as well as the accused, have challenged the punishment decision as met by the 1st Instance Court.

Therefore, the Defense has proposed in the case of the accused F. G. to annul the 1st Instance Judgment and return the case to the 1st Instance Court for re-trial, and in the case of the accused H. G. to amend the challenged Judgment and acquit the defendant from all charges.

19. The injured parties E. F. and G. Z. timely filed separate appeals against the 1st Instance Judgment through their respective legal representatives, thus particularly challenging the decision on punishment and proposing to modify the Judgment and impose long-term imprisonment upon both accused.

20. The OSPK, through an opinion dated 30 April 2010 and registered with the Supreme Court of Kosovo the same day, objected the appeals as being without merit and unfounded. The Public Prosecutor therefore proposed rejecting the appeals as unfounded and affirming the Judgment of the District Court of Prishtine/Pristina P.No. 10/07 dated 27 March 2009.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

Violation of the criminal procedure as listed in Article 403 paragraph 1 item 12 of the KCCP:

21. The Defence Counsel of the accused H. G. has stressed that the 1st Instance Judgment had essentially violated the Criminal Procedure Law, since its enacting clause would be incomprehensible and contradictory in its content and towards the reasoning.

Therefore, Article 403 paragraph 1 item 12 of the KCCP would be violated. In particular, the enacting clause as such would read *"... intentionally he incited his son F. G. [...] to commit the criminal offence of Aggravated Murder in the circumstances described in count 1 of the lsit of counts of this indictment..."*, while it was supposed to make reference to the Judgment instead. Moreover, the reasoning – if not completely missing – would be unacceptable and in contradiction to the minutes of the case file, since there was no evidence for any incitement being carried out by **H. G.**

22. The Supreme Court of Kosovo finds that the 1st Instance Judgment does not essentially violate Article 403 paragraph 1 item 12 of the KCCP. The enacting clause with regards to the accused **H. C.** reads a follows:

"1)...
2) H. G. 's found guilty

Of Incitement to commit the criminal act of Aggravated Murder contrary to Article 24 and 147, par. 1, subpara. 4 and 11 of the CCK.

Because the two accused have been found guilty of the criminal acts as charged in the indictment filed by the Public Prosecutor and specifically: ...

H. G.

2. On 22 April 2006 in the morning hours, "Tirana" str. in Shtime, in the houose where he was living with his family he intentionally incited his son, F. G. (now the defendant) to commit the criminal act of "Aggravated Murder" as in all circumstances described in count 1 of the charge of this indictment, and he has done all this being motivated by a disagreement that he had with the parties, K B. and E! F who had earlier bought legally a part of his immovable parcel from a Serb owner, in which there are two business facilities at the name "Cami", and which have been usurped by the defendant H. ..and a house in which the defendant H. was living with his family members since 1999, in that way that while K. B. and E. F. on 22.04.2006 around 09:30 hrs had organized the activities of demolishing these two facilities that are located along "Tirana" str.in order to have space for them and use this for their needs, and when the defendant Hysni was back from the Police Stationof Shtime, some times before, and being aware of the fact that these two shops were goiong to be demolished that morning, has persuaded his son, the defendant F. G. that if the family members of K B and E F attempted to demolish the mentioned facilities, to shoot with automatic gun and in no way to allow the demolition of them, for the sole reason as to not release the said parcel and facilities from his factual possession, and that was how it really happened, when on the same day, 22.04.2008 around 09:30 hrs the defendant F. G. has deprived from life with his automatic gun, the now deceased, V. B. and A. Y. and also has attempted to deprive from life all the injured parties as mentioned in count 1 of the charge of this indictment causing them body injuries.

For the above mentioned reasons the Panel issues the following

SENTENCE

1) ...
2) H. G.

Pursuant to article 38 and article 24 of CCK in connection with article 147 paragraph 1 items 4 and 11 of CCK ***is sentenced to imprisonment of 20 (twenty) years.***

..."

The enacting clause therefore clearly states the legal qualification and the acts of which H. G. has been found guilty as well as the punishment imposed.

23. The Supreme Court of Kosovo realizes that indeed there are some – minor – mistakes in the enacting clause as quoted before, as there is particularly the date of *"22.04.2008"*, which of course in fact was the 22 April 2006 as well as a reference to *"count 1 of the charge of this indictment"*.

However, despite some stylistic issues of building only one extreme long sentence, but which may be founded also in the translation, these mistakes are clearly just typos, which do not have any impact on the validity of the enacting clause as such.

24. The same argument applies to the fact that indeed the 1st Instance Court – as challenged by the Defence – has wrongfully quoted Article 147 of the CCK under it's "paragraph 1", which does not exist. Nevertheless, since Article 147 of the CCK has only one paragraph, this incorrect quoting of the law does not have any negative impact onto the validity of the encacting clause or the entire Judgment, after ther can be no misunderstanding, which provision of the law the Court has referred to.

25. The Supreme Court moreover finds that the enacting clause is also fully supported by the factual findings and the assessment of evidence as given in the reasoning of the challenged Judgment.

In this regard, reference is made to the general findings of the 1st Instance Court as pointed out at p.8-10 of the Judgment (English version) as well to the assessment of witness statements and physical evidence one by one as laid down on p. 11-13 of the Judgment (English version). With regards to the accused H. G., reference is made particularly to the Court findings a listed on p. 17-24 of the challenged Judgment, where the 1st Instance Court has thoroughly analized all aspects of a possible responsibility of H. G.

B. Violation of the Criminal Law

I. Alleged wrongful legal qualification of the acts of the accused F. G. as Aggravated Murder pursuant to Article 147 of the CCK:

26. The Defence Counsel of the accused F. G. as well the accused himself have challenged that the 1st Instance Court had violated the Criminal Law to the detriment of F. G., since he was found guilty for the criminal offence of Aggravated Murder pursuant to Article 147 paragraph 1, sub-paragraph 4 and 11 of the CCK as well as for the criminal offense of Unauthorized Possession and Use of Weapons pursuant to Article 328 paragraph 2 of the CCK. There was no consideration of the fact that the accused had acted under the conditions of necessary defence as per Artilce 8 paragraphs 1 and 2 of the CCK. Moreover, although not authorized by the accused F. G., the Defense Counsel of H. G. has made reference to F. G. claiming that Article 147 of the CCK would only be a provision on the punishment.

27. The Supreme Court of Kosovo in the first first place hereby clarifies that Article 147 of the CCK contains both, a qualified criminal offence as well as a provision on punishment. Particularly Article 147 items 4 and 11 of the CCK, as applied by the 1st Instance Court, stipulates as follows:

> *"A punishment of imprisonment of at least ten years or of long-term imprisonment shall be imposed on any person who ...*
>
> *4) deprives another person of his or her life and in doing so intentionally endangers the life of one or more persons; ...*
> *11) Intentionally commits two or more murders, except for the offences provided for in Article 148 and 150 of the present Code; ..."*

The 1st Instance Court therefore has correctly applied Article 147 of the CCK.

Despite that the question of similar provisions of the previous law being just punishment rules or qualifications of a criminal offence, was discussed earlier, in particular with reference to Article 47 of the Criminal Code of Serbia *(Srzentic, Nikola; Stajic, Dr. Aleksandar; Kraus, Dr. Bozidar, Lazarevic, Dr. Ljubisa; Djordjevic, Dr. Miroslav; Commentary on the Criminal Laws of Serbia, SAP Kosovo and SAP Vojvodina; 1981 in: "Savremena Administracija"; Belgrade; (Article 47 of the CCS; item 11),* the commentaries on the newer version of Article 47 of the CCS underline that *"this criminal act exists only when at least two or more persons have been deprived of life. If only one person has been deprived of life and there has been an attempt to deprive of life another person, that shall not amount to the attempted murder from item 6) if the perpetrator premeditated the murder of several persons; if opposite is the case, that shall be considered a real concurrence between a committed and an attempted murder" (Srzentic, Nikola; Ljubisa Lazarevic; Commentary ot the Criminal Code of Serbia 1995; 3rd Edition in: "Savremena Administracija"; Belgrade; (Article 47 of the CCS; item 9)*

The latter is given in the case at hand. The Supreme Court understands that even when the CCS was still applicable there was at least a tendency to handle the respective provision as a qualification of the criminal offence of Murder.

28. As to the concern of the Defence that the accused F. G. was acting under the conditions of necessary defence, reference is made to the findings of the 1st Instance Court as laid down on p. 8-10, 11-12 and 14-16 of the challenged Judgment (English version). The 1st Instance Court has thoroughly assessed the evidence, in particular as given by the witnesses and expert witnesses, but also the forensic evidence administered during the Main Trial. Based on all the evidence the Court has found that it was F. G. who has opened the fire, thus armed with an automatic gun and that he has fired several bursts without the injured parties being able to react at all and moreover has thrown three hand grenades, which luckly did not explode. The 1st Instance Court moreover has found that finally the injured parties have acted under the conditions of necessary dfence, when they started to respond to the fire of the accused F. G., thus using their hand guns.

29. The Supreme Court of Kosovo in particular shares the legal assessment of the 1st Instance Court as carried out on p.17-18 of the challenged Judgment *(English version)*, according to which the accused F. G. has confessed his perpetratorship in front of the Public Prosecutor during the investigation phase and this statement is admissible evidence in court, pursuant to Article 156 of the KCCP. In addition it is noteworthy in the context given that in the course of his final statement at the end of the appeal session the accused stated: *"I did everything I could so it would not come to these murders. And the commander of the police told me they would be there. How can I act differently than I did by trying to protect my family as I did before with the people. I was a soldier of the KLA" (appeal session minutes, p.8 of the English version).*

30. Finally, the Supreme Court of Kosovo in this regard refers to its adjudication as established in the case *Runjeva, Axgami and Dema (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, p.20 (English version)*, according to which "Appellate proceedings in the PCPCK rest on the principles that it is on the trial court to hear, assess and weigh the evidence at the trial. [...] Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings it substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact, or where its evaluation has been 'wholly erroneous'". This adjudication was repeated and further developed in other cases, in particular in the case against Florim Ejupi *(Supreme Court of Kosovo, Pkl-Kzz 71/09 dated 10 October 2009)* and against Jetom Kiqina *(Supreme Court of Kosovo, Ap.-Kz. No. 84/2009 dated 03 December 2009).*

II. Alleged wrongful application of Article 24 of the CCK/interpretation of "incitement" in the case of the accused H. G. ;

31. The Defence Counsel of the accused **H. G.** also is alleging that the 1st Instance Court has wrongfully applied Article 24 of the CCK, when finding the accused guilty of Incitement regarding the Aggravated Murder as committed by the accused **F. G.** The accused **H. G.** had not committed any incitement. Last but not least the accused had been lacking the needed mental state to commit an Incitement on Aggravated Murder. In addition to that it needs to be kept in mind that in the course of the appeal session the accused **H. G.** has stated: *"I am sorry for what happened in Shtime because what happened there is incomprehensible for normal people. A crime has taken place; normal people do not commit such a crime. My family has nothing to do with that crime at all" (appeal session minutes, p.5 of the English version).*

However, Article 24 of the CCK stipulates as follows:

> *Whoever intentionally incites another person to commit a criminal offence shall be punished as if he or she committed the criminal offence if the criminal offence was committed under his or her influence.*

32. The Supreme Court of Kosovo finds that the law does not contain any definition of what an incitement can be in legal terms. However, the figure of incitement or instigation was regulated also under the old law. Particlularly Article 23 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), which was commented upon, has stipulated regarding *"*[a]*nybody who intentionally instigates another to commit a criminal act...".*

Commentaries have arrived to an *"almost uniform understanding of instigation as forming of a decision in another person to commit a certain criminal act or strengthening of such a decision".* Therefore, two conditions would be needed, as firstly the future perpetrator must not have formed a sufficiently strong decision to commit a criminal act and secondly the instigator with premeditation must have undertaken certain activity to have the perpetrator arrived to the decision of commiting the respective criminal act *(Ljubisa Lazarevic; Commentary of the Criminal Code of FRY 1999; "Savremena Administracija", Belgrade; Article 23; item 1).*

33. On this background, reference is made to p.20-24 of the challenged Judgment (English version), where the 1st Instance Court has thoroughly analyzed the situation and elaborated its grounds to believe that the accused **H. G.** has incited his son to commit the crime in question.

The 1st Instance Court – although only in parts referring to clearly specified witness statements as there are the statements of B B. and H i F , but also the statement of the accused **H. G.** himself dated 24 March 2009 – has relied upon several witnesses, who doubtless have confirmed that **H. G.** on several occasions has expressed his intent to have members of the B 1 [illegible]

killed. The Court in particular has found *that "B[illegible] and H[illegible] and other witnesses (and the same H[illegible] has not confuted the circumstances) the episode that took place in the clinic of V[illegible] B[illegible], in the course of which Hysni threatened the victim with the words (B[illegible] hearing 12.2.09): 'I've opened two graves ready and waiting. One is for you and [illegible] is for someone of the F[illegible] family'. Analogous threat against those who were menacing to execute the decision of the Municipal Court of Ferizaj, had be expressed by the same accused Hysni to R[illegible] Ir[illegible] whn the last had visited his (of Hysni) workshop to have some piece of cloth adjusted" (p.23 of the English version).*

34. The Supreme Court of Kosovo, in the course of re-examination of the case file, went through all the minutes of the main trial and found that despite B[illegible] P[illegible]i and H[illegible] H[illegible]i, particularly K[illegible] B[illegible] has stated on 19 February 2009 that he had met **H[illegible] G[illegible]** on several occasions personally, since he had had no previous disputes with him. "[O]*n one of these meetings [...] there were some other persons present with some authority. We met at H[illegible] G[illegible]'s house that was located at the place usurped. During that meeting, three older people (village elders), were present; they were A[illegible] Em[illegible]i, Sh[illegible]p M[illegible], and A[illegible] Xh[illegible] I was present as well. Also present were the father of E[illegible] F[illegible], I[illegible] F[illegible] and H[illegible] G[illegible]*". The result of the meeting "*...was zero because H[illegible] G[illegible] in the presence of these people said to me the following words: 'I will kill anyone who will come into this land'. I replied that I cannot talk to people willing to kill even after the war. I went outside and after a short period the other people present came out ... This meeting took place in 2004*". After the description of two other meetings with **H[illegible] G[illegible]**, at least one of them under the participation of the aforementioned *"village elders"*, which took place in 2006, the witness K[illegible] B[illegible] pointed out that, since all these negotiations had had no success, he had gone to the police station in Shtime/Shtimlje and talked to the Deputy Commander. During the last of these meetings, which took place *"one day before the incident"*, the witness stated that *"I participated, my nephew A[illegible] E[illegible], **H[illegible] G[illegible]** and his son F[illegible] G[illegible] [...] It is worth pointing out that even during this meeting Hysni GASHI threatened us directly. [..] The threats were the same as before, 'I will kill you, or V[illegible] B[illegible]i or I[illegible] F[illegible]'"* (main trial minutes dated 19 February 2009, p.4-6).

35. Moreover, the witness A[illegible] M[illegible] on 19 February 2009 has stated in front of the Court that one week before the incident he had brought a pair of pants to the accused **H[illegible] G[illegible]** to have them shortened, since he always would go to his shop for tailoring. On this occasion during a conversation the Accused **H[illegible] G[illegible]** had said: *"I will kill V[illegible] the doctor [...] he came to me with court officials and police from Ferizaj and forsed me to take belongings out of the house" (main trial minutes dated 19 February 2009, p.33).*

36. Finally, the witness Sh[illegible] M[illegible], who has participated in the numerous negotiations between the families of K[illegible] B[illegible]i and **H[illegible] C[illegible]** in the function of a *"village elder"* has stated that on the day after the shooting the accused **H[illegible] G[illegible]** had called him on the telephone and asked him to "*'please keep all the words we have discussed before in relation with the other party'*" and that during this telephone conversation the

had *"said that 'the person with you who didn't have interest in this he is already killed or will be next'. This person is A V He said 'you are the only person that was in the middle of this with no personal interest whatsoever, and please stand behind everything we talked about in our conversations'"* (main trial minutes dated 05 March 2009, p.4 and 6).

37. The Supreme Court of Kosovo finds that unfortunately the 1st Instance Judgment with regards to the responsibilities of the accused H G is quite speculative, if not even hypothetical, when it comes to the assessment of what has happened before the incident and how H G may be linked to it. The latter particularly refers to the elaborations of the 1st Instance Court on a possible causality between the shootings as conducted by the accused F G and an alleged instigation/incitement by his father, the accused H G I, as laid down p. 21 of the challenged Judgment.

Moreover, as already addressed, the Court is not very precise regarding the evidence used for the conclusions reached.

Article 396 paragraph 7 of the CCK stipulates that [t]*he court shall state clearly and exhaustively which facts it consideres proven or not proven, as well as the grounds for this. The court shall also [...] make an evaluation of [...] the reasons by which the court was guided in setteling points of law and [...] in establishing the existence of a criminal offence and the criminal liability of the accused, as well as in applying specific provisions of the criminal law to the accused and his or her act.*

38. However, the Supreme Court of Kosovo finds that the 1st Instance Court in some way has addressed all relevant points as listed before in its challenged Judgment.

It has addressed that despite B B and H I also other witnesses have confirmed that the accused F G has threatened family members of the B and F families (p.23 of the English version), thus referring to the statements of K Ba A Al and S M as mentioned before. Moreover, the long lasting and complicated negotiations under participation of three *"village elders"* have been addressed and therefore reference was made to the statements of K i and Sh M during the main trial again.

39. From all these statements it becomes clear why the 1st Instance Court has assessed that H G was playing a decisive role in the upcoming of the shooting and its results on 22 April 2006.

40. Last but not least the 1st Instance Court has also addressed the fact that at one occasion the son of E G , the co-accused F G was present, when H G finally stated that *'I will kill you, or V B or I F '*. Thus, reference was made to the statement of the witness Kadri Bajrami in front of the Court.

41. Much can be said about the question, whether or not the assessment of the 1st Instance Court on the motives of the perpetrator, F G are correct on the background of

alleged traditional family structures within the Kosovo-Albanian society. It is not at all compelling to believe that F G I would not have had any motive for the killings without the interference of his father. Even considering traditional family structures within the GASHI family (and indeed the involvement of three *"village elders"* as negotiators is argument for this), I G . as the oldest son of the family would have become the heir and successor of his father as head of the family, as soon as the latter would have become too old to properly lead the family business. Therefore of course he could have had a motive to commit the killings also by his own decision.

42. However, the Supreme Court of Kosovo does not replace the assessment of evidence as carried out by the 1st instance as already decided in a large number of cases. In the case at hand, the presence of F G during a meeting of his father H with K B ii and others one day before the shooting happened and the fact that he was aware of the threats as expressed by H C I to kill members of the other families, in case they would dare to destroy the premises in question is sufficient reason to believe that **Feriz GASHI** at least was strengthened in his decision to take a gun and shoot against the B ii and F family the other day.

43. Of course question could be raised, whether this situation represents more an action of H G that could be evaluated as assistance to F G . (pursuant to Article 25 of the CCK), who the latter already may have had the idea of killing members of the other families, or if H and F G even had to be seen as co-perpetrators, pursuant to Article 23 of the CCK. Both variations can be committed by premeditation, and co-perpeptration could even be committed by negligence, if the situation at hand would provide for such an assessment *(Ljubisa Lazarevic; Commentary of the Criminal Code of FRY; 1995; 5th edition; "Savremena Administracija" Belgrade; Article 25, item 1.(a)).*

44. However, despite that the evidence collected during the main trial session may not provide sufficient information regarding the subjective side of both aforementioned variations of collaboration in criminal offences, the situation described fulfills the requirements of incitement/instigation as *"forming of a decision in another person to commit a certain criminal act or strengthening of such a decision" (Ljubisa Lazarevic; Commentary of the Criminal Code of FRY 1999; "Savremena Administracija", Belgrade; Article 23; item 1).* Moreover, the continuous repetition of murder threats as always expressed exclusively by H G previous to the shooting incident since 2004 makes it quite likely that he as the head of the G family has had the role of a "mastermind" of the shooting and killing.

45. As to the mental state of the accused H G to have his son instigated to commit the respective murders, Article 24 of the CCK requires that the inciter *"...intentionally incites another person to commit a criminal offence..."*.

In this regard, reference can be made again to the commentaries on the old law, in particular Article 23 as well as Article 25 of the CC SFRY. The latter, as of relevance for the case at hand, stipulates as follows:

(1) The co-perpetrator shall be criminally responsible within the limits set by his own intention or negligence, and the inciter and the aider – within the limits of their own intention".
(2) ...

Commentaries explain that, while "[f]*or the accomplice both forms of guilt are possible – both premeditation and negligence, [...] the instigator and the abettor are criminally liable only if they participated in the commission of the act with premeditation" (Ljubisa Lazarevic; Commentary of the Criminal Code of FRY; 1995; 5th edition; "Savremena Administracija" Belgrade, Article 25, item 1.(a)).*

46. After the findings of the 1st Instance Court it is non-disputable that H G wanted to establish an example and have certain members of the B i and F family killed as well as those who have supported them. This becomes clear considering the witness statements as pointed out before in this Judgment. H G even has mentioned the name of the now late V B as a preferred victim of murder as well as has made reference to the late A X, when he threatened the other *"village elder"*, the witness Sh M , with having him killed.

47. The Supreme Court of Kosovo therefore arrives to the opinion that the evaluation of the mental state of the accused **Hysni GASHI** as carried out by the 1st Instance Court is closely linked to the evidence collected and can be locally followed.

48. As to the intension of H G to have his son F G motivated for the shooting and killing, the Supreme Court of Kosovo refers to the interpretation as given by the 1st Instance Court in this regard. The presence of F G during the last threat of H G makes it quite likely that F G was well aware of the plans of his father. Moreover, the fact that after the shooting H G just has taken the smoking gun out of the hands of his son shows makes it likely to believe that an internal agreement has ex ted between the two accused regarding the shooting incident.

49. The Supreme Court of Kosovo therefore shares the opinion of the 1st Instance Court that the mental state of the accused H G and his intent to have the shooting and the murders carried out is almost of the same quality as the one of the main perpetrator F G

C. Erronneous or incomplete determination of the factual situation

I. Alleged incomplete presentation of evidence to prove the guilt of the accused H

50. The Defence Counsel of the accused H moreover has pointed out that on his opinion the 1st Instance Court had not administered or presented sufficient evidence to establish any guilt of the accused. Therefore, in violation of Article 402 paragraph 1 item

3 of the KCCP the factual situation has been erroneously or incompletely established. In particular, the civil law and property related background of the situation had not been properly assessed.

51. The Supreme Court of Kosovo finds that the 1st Instance Court has made a very thorough assessment of all evidence available with regards to the case, as well generally as in detail regarding each peace of evidence seperatly. Reference is made particularly to p. 8-10, 11-12 and 16-17 as well as 19-21 of the challenged Judgment (English version) as well as to what was pointed out before in this Judgment under point B.II.

The respective concern particularly was already raised by the accused H. G. during the Main Trial session on 24 March 2009, when the accused after the final speech of the Public Prosecutor stated: *"The indictment filed against me and my son was the easiest way for the Public Prosecutor to do it, instead of bringing the Mayor, N. Is li, to court, his brother A. Is and H. Is [...] In my opinion, there are missing some statements from those people. Now I am a bit surprised by the Public Prosecutor, because he is accusing me of Incitement. [...] I have been denied from my basic rights to defend myself and I beg you to go to the crime scene to be convinced of what happened on the critical day ..." (Main Trial minutes dated 24 March 2009, p.13).*

Reference is made to what was pointed out before under point B.II. of this Judgment (p. 10-14). Moreover, neither the Defence Counsel not the accused have specified, to which extent the examination of the crime scene or the interrogation of the referred persons would have lead to any other result of the criminal prceedings at hand.

II. Alleged failior to conduct additional forensic testing and other analysis of physical evidence to the detriment of the accused F. G.

52. The accused F. G. within the joint appeal he has filed together with his father, the accused H. G., finally has challenged in the context given that to his detriment the 1st Instance Court had failed to conduct additional evidence and to analyse other physical evidence, since *"... [f]rom the obstacles situated between the parties it was even theoretically impossible to shoot the two unfortunate persons who were killed the critical day"*.

53. The Supreme Court of Kosovo in this regard finds that this concern of the accused is without merits and therefore unfounded. As already mentioned before, the 1st Instance Court has assessed all available evidence in detail, as well generally as one by one, and clearly based its findings and decision upon this evidence. Since these findings and evaluation are not fully unacceptable or wholly erroneous, the Supreme Court – as also already pointed out before – will not replace the assessment of evidence as carried out by the 1st Instance Court. Moreover it is worth mentioning that the accused has failed to say, which additional examinations/evidence assessments he suggests to be undertaken and which extent.

D. Wrongful decision on the criminal sanction:

54. Last but not least, both Defence Counsels and both accused as well as the injured parties E' F and C P through their respective legal representatives have challenged the 1st Ins. ce Judgment with regards to the decisions on criminal sanctions. While the Defense and the accused of course are aiming to receive an acquittal from all charges, the injured parties have expressed their opinion that only long-term imprisonment could match the seriosity of the crimes committed.

55. The Supreme Court generally finds that regarding both accused the 1st Instance Court properly has considered the limits on punishment as provided by the applicable provisions of the CCK for the respective criminal offences as realized by the accused. It has made elaborate reference to the acts of the accused **F G** as being odious, heinious and vile as has given proper explanation regarding these aspects.

56. Moreover, the exceptional brutality of the commission of the crime has been evaluated.

57. Also mitigating circumstances as there are psychological aspects, particularly regarding the interrelationship between **H** and **F G** as well as the fact that no previous criminal record exists against **F G** , were taken into consideration.

58. However, the Supreme Court of Kosovo also finds that the punishment imposed to the main perpetrator **F G** is too lenient, considering the fact that **F G** not only has killed two innocent people in the streets, but moreover has endangered the lives and seriously hurt the healt of numerous others being around in the spot, when the shooting started. Moreover, he has thrown three hand grenades, which luckily did not explode, but generally seriously have endangered the lives and bodily health of many people in the scenary and which would have caused much more merely a massacre, if ever they had exploded as intended by the accused. Therefore, the Supreme Court has modified the 1st Instance Judgment regarding the punishment as imposed to the accused Feriz GASHI and replaced the 1st Instance Decision by a separate punishment for the **Aggravated Murder** of 29 years [Article 37 paragraph 1 and 2 of the CCK and Article 147 paragraph 1, sub-paragraphs 4 and 11 of the CCK] and for the criminal act of **Unauthorized Possession and Use of Weapons** of two (2) years [Article 38 and Article 328 paragraph 2 of the CCK]; an aggregate sentence of thirty (30) years was built upon these separate punishments according to Article 71 paragraph 1 and 2 items (2) of the KCC.

59. With regards to the accused **H G** the Supreme Court finds that the 1st Instance Court correctly has considered all circumstances of the criminal offence committed in order to set up a punishment. All this was done in accordance with Article 64 of the CCK.

E. Conclusions of the Supreme Court of Kosovo:

60. For the abovementioned reasons, the Supreme Court concludes that the Appeals against the Judgment of the 1st Instance Re-Trial Court (P 526/2009) are to be rejected as unfounded and therefore the 1st Instance Judgment is affirmed.

SUPREME COURT OF KOSOVO
Ap.-Kz. No. 283/2009
PRISHTINË/PRIŠTINA

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Panel Member

Emine Mustafa

Presiding Judge

Gerrit-Marc Sprenger

Panel Member

Nesrin Lushta

Panel Member

Salih Toplica

Panel Member

Emine Kaciku

REPUBLIKA E KOSOVËS
GJYKATA SUPREME E KOSOVËS-PRISHTINË
VRHOVNI SUD KOSOVA-PRIŠTINA
REPUBLIKA KOSOVO

Legal Remedy

Pursuant to Articles 399, 400 and 430 paragraph 1 item 1 of the KCCP defendant, Defense Counsel, injured parties and Public Prosecutor are entiteled to file an appeal against this Judgment as far as long-term imprisonment was imposed. The appeal needs to be addressed to the Supreme Court of Kosovo and may be filed within 15 days from the day when a copy of the Judgment has been served to the parties.