IN THE NAME OF THE PEOPLE

SUPREME COURT OF KOSOVO, in the panel composed of EULEX Judge Martti Harsia as Presiding Judge, EULEX Judges Maria Giuliana Civinini and Anne Kerber and Kosovo Supreme Court Judges Marije Adomi and Nesrin Lushta as members of the panel, in the criminal case P nr 97/2001 of the District Court of Prishtine/ Prishtina against the defendant:

B.B., Date of birth.., Kosovo Albanian in detention initially from 03 August 1999 to 20 March 2000, currently in detention since 27 August 2008 (when deported from France).

Charged through the indictment of the District Public Prosecutor filed on 22 November 1999 at the District Court of Prishtinë/Priština for the criminal acts of Murder from Article 30 paragraph 2 item 3 of the Criminal Code of Kosovo and Illegal Deprivation of Liberty, Article 63 paragraph 4 as read with paragraph 1 of the Criminal Code of Serbia which was subsequently amended on 24 November 2009, 26 November 2009, 11 December 2009 to include the criminal act of Exposure to Danger in violation with article 42 paragraph 2 of the Criminal Law of Kosovo read together with Article 22 of the Criminal Code of the Socialist federal Republic of Yugoslavia (1977), and on 11 December 2009 orally amended by the EULEX public prosecutor to reflect that the arrest date is 3 August 1999 and not 2 August 1999.

Convicted by the District Court of Prishtine/Prishtina on 16 December 2009 for the criminal offence of Exposure to Danger contrary to Article 42 par 2 of the Criminal Law of the Socialist Autonomous Province of Kosovo (CL SAPK) read together with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (C'C SFRY), with a sentence of six (6) years of imprisonment.

Deciding upon the appeal filed by the District Public Prosecutor of Prishtine/Prishtina and the joint appeal filed by defence counsels Y.O. and M.S. on behalf of the defendant **B.B.**, both against the Judgment of the District Court of Prishtine/Prishtina P nr 97/2001 dated 16 December 2009,

Pursuant to Article 420 of Kosovo Code on Criminal Procedure (hereafter "KCCP"), after a hearing and a session on deliberation and voting held on 26 April 2011, the Supreme Court of Kosovo publically announces this:

JUDGMENT

To reject the appeal filed by the District Public Prosecutor of Prishtine/a against the Judgment of the District Court of Prishtine/Prishtina, as UNFOUNDED and to accept the joint appeal filed by defence counsels Y.O. and M.S. on behalf of the defendant **B.B.**, as GROUNDED. The challenged Judgment of the District Court of Prishtine/ Prishtina P nr 97/2001 dated 16 December 2009 is hereby modified and the defendant **B.B.** is ACQUITTED.

Pursuant to Article 103 paragraph I of KCCP, costs of criminal proceedings under Article 99 paragraph 2, subparagraph 1 through 5 of the present Code, the necessary expenses of the defendant and the remuneration and necessary expenditures of defence counsel shall be paid from budgetary resources.

In accordance to Article 426 paragraph 3 of KCCP due to the modification of the judgment of the court of first instance, the detention on remand against the defendant is hereby cancelled and through a separate ruling the defendant's immediate release shall be ordered.

REASONING

I. Procedural background

1. On 02 August 1999 four men had assaulted M.M. and his family members (his daughter J, his son S and his granddaughter V - now A) in the evening of that day in their residence in P. As a result of the attack during which the intruders also robbed the family, M.M. was seriously injured and consequently died before the KFOR intervention.

2. The following day on 03 August 1999, five Kosovo Albanian men were apprehended by Italian KFOR soldiers in Decan/Decani area. On that day J.M. identified **B.B.** (who during the identification used a false identity since his real name is B.D.) as one of the men entering the house a day before on 02 August 1999.

3. Upon conclusion of the investigation on 22 November 1999 the Public Prosecutor filed an indictment with the District Court of Prishtine/Prishtina against **B.B.** for having committed the criminal offence of Murder contrary to Article 30 (2), item 3 of the Criminal Law of the Socialist Autonomous Province of Kosovo (hereafter CLK) and Unlawful Detention contrary to Article 63 of the Criminal Law of the Socialist Republic of Serbia (hereafter CLS).

4. On 20 March 2000 a panel composed of five judges of the District Court of Prishtine/Prishtina acquitted the defendant of all charges and the detention on remand against the defendant was consequently terminated

5. On 17 April 2001, upon deciding on the appeal of the public prosecutor, the Supreme Court of Kosovo annulled the judgment of the first instance court and remanded the case for retrial.

6. On 03 July 2001 the retrial procedure commenced before a panel composed of five judges of the District Court of Prishtine/Prishtina and continued on 10 September 2001 but was postponed for an indefinite time due to absence of the defendant. Same date an order for arrest of the defendant was issued by the presiding judge. On 07 February 2002 another arrest order was issued against the defendant.

7. On 24 December 2004 the United Nations Special Representative of the Secretary General (SRSG) issued an International Wanted Notice against the defendant. The defendant was extradited from France and taken into custody by UNMIK Police on 27 August 2008.

8. On 12 May 2009 the Vice President of the Assembly of EULEX Judges issued a decision assigning the case to the EULEX Judges of the District Court of Prishtine/Prishtina. The decision was made upon a written request filed by the President of the District Court of Prishtine/Prishtina dated 17 April 2009.

9. The retrial started on 28 July 2009 before a mixed panel composed of two EULEX Judges and a Kosovo Judge.

10. On 16 December 2009 the District Court of Prishtine/Prishtina by Judgment P-97/01 found the defendant **B.B.** guilty of the criminal offence of Exposure to Danger contrary to Article 42 (2) of the CL SAPK as read in conjunction with Article 22 of the CC SFRY and sentenced him to six years of imprisonment.

11. The judgment rendered in the court of first instance has been challenged by appeals of the District Public Prosecutor and of the defence on behalf of the defendant.

12. The prosecution argues violation of the law only in the part of the decision on criminal sanction. The defence challenges the judgment on all legal grounds claiming a number of violations as shall be further elaborated.

II. Appeal of the district public prosecutor

13. In the appeal, the district public prosecutor submits that the first instance court imposed very lenient punishment.

14. The Office of State Prosecutor of Kosovo agrees with conclusion of the district public prosecutor maintaining that decision on punishment is far too lenient with the seriousness and gravity of the crime. Prosecution submits that the First Instance Court during the retrial had indicated that the defendant didn't deserve to be treated leniently but the court then had made a mistake when taking into consideration firstly the defendant's youth and secondly the passing of time since the moment of the incident. Prosecution maintained that the defendant's youth at that time of committing criminal offence offers not much if anything of mitigation. The criminal offence was committed and planned in cold manner and that this was not the action of a hot headed, foolish, high spirited young man, whose youth contributed to an unrestricted manner of behaving. With regard to elapse of time, prosecution opines that the defendant was fugitive from 10th September 2001 when the arrest was issued by the presiding judge. He was deported from France in 27th August 2008. The delay in the determination of this case was brought up by the defendant and that he should not benefit by his own misconduct and avoidance from the jurisdiction. This serious case demanded a serious sentence because an old man was tied by his neck and later on died as a result; an 8 year old girl was traumatized. Therefore prosecution maintains that the sentence should be at the top of the scale and not at the three quarters level.

15. Prosecution argues that even if the first instance court found existence of mitigating circumstances this does not necessarily justify the lenient punishment imposed on the defendant and therefore moves the Supreme Court of Kosovo to modify partly the first instance judgment proposing the increase of the punishment

III. Joint Appeal filed on behalf of the Defendant

16. Defence challenged the verdict on all legal grounds claiming essential violations of the law on criminal procedure, an erroneous and incomplete establishment of the facts, violations of the criminal code and a disproportionately severe punishment. The Appellants sought an acquittal from charges or a cancellation of the verdict together with an order remanding the case for re-trial as well as to terminate the measure of detention rendered against the accused so that he could defend himself at liberty. Defence counsels in their appeal list a number of issues which led the first instance court to an erroneous determination of the tactual situation and violation of the procedure and criminal law. In particular defence contended the following:

A. ESSENTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE:

17. Use of inadmissible evidence since it had been rendered inadmissible during the first trial.

Defence contended violation of Article 364 (1), item (8) in conjunction to Articles 83 and 84 of the Law on Criminal Procedure of Yugoslavia (LCP) and of UNMIK Reg 2000/17 of March 2000, claiming that the evidence collected by KFOR in the days following the criminal events should have been rendered inadmissible and separated from the case file. Defence maintained that witnesses should have been interrogated by the

investigating judge and not by KFOR personnel. The statements collected by KFOR had been rendered inadmissible by a final decision during the course of first trial proceedings therefore according to the defence any further reference constitutes a violation of the *res judicata* principle, Lastly defence maintained that the statements had been originally collected in the Italian language and later on translated into English and domestic languages by persons that had not been certified to perform such service and who did not give an oath as required by Article 224 par 3 of LCP.

18. Failure to comply in accordance to Article 233 of the LCP.

In the appeal the defence claimed an essential violation of the provisions of the criminal procedure namely Articles 233 and 364 par 1 of the LCP. Defence counsels argue that the witness J.M. who was asked to identify a person should have been asked first to give a description of that person and then make the identification.

19. Incomprehensibility of the enacting clause- the reasons are unclear and contradictory.

The appellants maintained that the challenged judgment contains substantial violations of the provisions of the criminal procedure as described in Article 364 (1), item 11 of the LCP, due to the fact that the enacting clause of the challenged judgment is confusing and incomprehensible, contradictory with the reasons provided in it and fails to give sufficient grounds for decisive facts.

B. ERRONEOUS ESTABLISHMENT OF THE FACTUAL SITUATION

20. Failure to consider the *alibi*- time of the arrest of the defendant

The Defence just as throughout the criminal procedure maintained the position that the defendant was not present at the scene on 02 August 1999 when the M family was attacked since at that time he had been arrested by Italian KFOR. In support to the *alibi* the defence indicated the absence of the defendant's fingerprints at the crime scene. Defence argue that the UNMIK "Fingerprint Expert Report" prepared by K.M. of the Royal Canadian Mounted Police had concluded that fingerprints on the inside of a wardrobe door at the crime scene did not match the fingerprints of the defendant.

21. Lack of causal link- the result of an autopsy could not determine exact cause of the death.

The Defence counsels argue that the autopsy conducted could not with certainty determine the exact cause of the death. According to the defence counsels there is a proof that the now deceased had been suffering since 1991 from many illnesses and had survived a hard heart attack and that the victim was hospitalized from time to time at the hospital.

22. The fact that the injured party V.A. did not recognize the defendant at the main trial.

The Defence counsel pointed out that the witness V.A. did not recognize **B.B.** at the main trial as one of the intruders of the M residence on 02 August 1999.

C. ALLEGED VIOLATIONS OF THE PROVISIONS OF CRIMINAL LAW

23. Violation of the law on part of the decision on criminal sanction.

With regard to the decision on criminal sanction, the defence submitted that it is unlawful since their client did not commit the criminal offences for which he was found guilty by the court of the first instance. Nevertheless the defence differs with the public prosecutor that the period of six years of imprisonment is too lenient when taking into the account that the criminal offence for which the defendant is found guilty is punishable with a maximum of 8 years of imprisonment.

D. OTHER ISSUES

24. Detention on remand against the defendant.

Finally the defence raised the issue of detention on remand arguing violation of the rights of the defendant since he was kept in detention on remand by KFOR from the moment of the arrest until 27 August 1999. The Defence counsels asserted this is as a violation of Article 196 (1) and (3) of the LCP.

IV. Supreme Court findings

25. In assessing the appeal filed by the District Public Prosecutor of Prishtine/Prishtina and the appeal filed by defence counsels Y.O. and M.S. on behalf of the defendant **B.B.**, the Supreme Court of Kosovo established the following:

a. The appeals from parties to the proceedings, namely filed by the prosecutor and by defence are admissible. The Appeals are filed with the competent court pursuant to Article 398 par 1 and within the deadline pursuant to Article 407 of the KCCP.

b. The Supreme Court of Kosovo decided after a session on deliberation and voting following a hearing held on 26 April 2011 as prescribed by Article 413, 411 and 420 of the KCCP.

c. The appeal filed by the District Public Prosecutor of Prishtine/Prishtina District Court is **UNFOUNDED.**

d. The appeal filed jointly by defence counsels Y.O. and M.S. on behalf of the defendant **B.B.** is **GROUNDED.**

26. Before evaluating the parts of the judgment which is challenged by the appeals, the panel considered ex officio whether the challenged judgment is in compliance with the legal requirements pursuant to Article 415 of the KCCP.

27. The Supreme Court of Kosovo has found that the conviction against the defendant is based on an incorrect and incomplete evaluation of the evidence with the implicit inaccurate establishment of facts (Article 366 LCP). In making this determination this panel, considered numerous discrepancies and inconsistencies found in the incriminating evidence relied upon by the trial court which undermine the overall tactual foundation of the charges. Therefore the need to discuss the alleged procedural violations has clearly become unnecessary.

28. As indicated by the court of the first instance, with which this panel respectfully agrees it is not contested that on 02 August 1999 at around 18:00 hrs someone had knocked on the residence door of M family, located in P. The men spoke in the Serbian language and demanded from the members of M family to leave the house by 20:00 hrs.

29. It is neither contentious that at around 20:45 of the same day, the four men went to the mentioned house demanding that the door to be opened or else they would open the door by three. Seemingly the latter ones were the same persons that had appeared earlier that day. As the family of M did not agree to open the door voluntarily, the four men broke in. J.M. and V.A. were separated in one of the rooms while M.M. was taken forcibly to the kitchen. M.M. was beaten up and his neck was tied with a tablecloth. After the assailants left the scene J.M. went to the kitchen and untied the victim M.M. The victim's blood started to run out from his nose and mouth of the victim. M.M. was leaning against the sink and out of sudden he fell down bleeding a lot. J.M. then called for help and KFOR appeared at the spot. The body of M.M. was found and the scene of the crime was video recorded by KFOR. The body was conveyed to the mortuary of the University Hospital in Prishtine/Pristina. The autopsy was not carried out and the body of the deceased was handed over to the family for the burial.

30. After the incident when assailants had left, apparently J.M. supplied KFOR with the details of the incident together with the detailed account of the assailants based on which the KFOR apprehended four men a day after on 03 August 1999. The examination of the case file however allows finding out that such statement given by J.M. is not available. It is therefore unclear what kind of description J.M. made of assailants when giving a statement to KFOR.

31. Next day on 03 August 1999 J.M. identified **B.B.** (who during the identification used a false identity since his real name is BD) as one of the men entering the house a day before on 02 August 1999. In her statement she mentioned following:

"....this man had a plaster on the rights arm as it seemed to me. Four of his fingers were tied together with the plaster, while thumbs were within separate plaster.... ".

32. Except a plaster which as matter of fact **B.B.** had on his left arm and not on right arm as mentioned by the witness, other distinguishing figures of the defendant clearly differ from those explained by the witness. **B.B.** was around 19 years old and relatively well built at the time of incident. The photos taken from **B.B.** which are part of the case file clearly show discrepancy between description provided by the witness and the appearance of the defendant.

33. The court of first instance court acknowledged the presence the contradiction and discrepancies as justifiable with the following explanation:

> "*…It has to be emphasized that on this critical day, the witness was exposed to extreme stress, in life threatening situation, so any possible confusion as the side of the injury is not crucial. This comprehensive account of this witness corresponds with medical records of the defendant that makes J.M.'s testimony even more credible,,,".*

34. The Supreme Court concedes with the District Court that inconsistencies and contradictions in witness evidence can result from natural psychological processes of human perception, especially in witnesses who had undergone traumatic events and who due to procedural circumstances had to give their account of the same event before the authorities. In that sense the presence of contradictions or inconsistencies does not by *automatism* disqualify the statement given by the witness, provided that it is obtained in compliance with the provisions of the criminal procedure. In general the court should not treat minor discrepancies between the facts and the statement of a particular witness as discrediting their probative value as a whole where that witness has nevertheless recounted sufficiently the essence of the incident in a satisfactory detail. However irrespective of the level of the contradictions and discrepancies,

where the main issue determinant for the question of responsibility is the identification of the accused in the criminal event, contradictions pertaining to factual elements must not be easily disregarded. In such case the identification must be explained to such a degree that the evidence eventually leaves no doubt as to the presence of these elements. Otherwise, the court must act in accordance with the principle of construction in favor of the accused (favor rei) conceived also as a standard governing the *appraisal of evidence.*

35. The Supreme Court finds that the District Court failed to sufficiently prove affiliation of **B.B.** with the criminal of acts committed, especially in the light of the circumstances mentioned above.

V. Conclusion of the Supreme Court of Kosovo

36. For the reasons above, pursuant to Article 420 (4) of KCCP the Supreme Court of Kosovo decided as in the enacting clause.

SUPREME COURT OF KOSOVO
Pn-Kz 176/10, 26 April 2011

Presiding judge:	**Recording clerk:**
Martti Harsia EULEX Judge	Adnan Isuti Legal Advisor
Maria Giuliana Civinini, EULEX Judge	Anne Kerber EULEX Judge
Marije Ademi Supreme Court Judge	Nesrin Lushta Supreme Court Judge