SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 377/2009
Prishtinë/Priština
10 May 2011

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 10 May 2011 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Antoinette Lepeltier-Durel and Kosovo Supreme Court Judges Emine Mustafa, Marije Ademi and Nesrin Lushta as panel members

And with Ms. Valentina Gashi as Court Recorder,

In the presence of

The Kosovo Public Prosecutor Jusuf Mejzini, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsel B. K. for the defendant S B
Defense Counsels A A and Z J. for the defendant H. I.
Defense Counsel A. i. for the defendant B.B
Defense Counsel SH. P for the defendant F.A.
Defense Counsel S.M. tor the defendant F.A.1. and

Mr. R. B. as representative for the injured party, the company Bank Kosovo,

In the criminal case number AP-KZ No. 377/2009 against the defendants:

B B, born on in , Republic of Macedonia (FYROM) Kosovo Albanian, ,
fathers name Rr mother's maiden name H R , ID no.:
literate, secondary school education, married, father of two children, Chief of Security in the Pro Credit Bank in Ferizaj/Urosevac, average family income, no other criminal proceedings against him in progress, continuously in custody since 9 June 2008 in Dubrava Detention Centre;

H I, born on in the village of , municipality of Viti/Vitina, Kosovo Albanian, fathers name

N , mothers maiden name Z Sh , literate, Economics High School education, married, father of three children, unemployed, poor family income, no other criminal proceedings against him in progress, continuously in custody since 9 June 2008 in Dubrava Detention Centre;

F M , born or in , municipality of Viti/Vitina, , Kosovo Albanian, fathers name R mothers maiden name S Sh secondary school education, married, father ot unemployed, average family income, in custody from 9 June 2008 until 15 June 2010 in Dubrava Detention Centre;

F A , born on in , municipality of Viti/Vitina, , Kosovo Albanian, fathers name J , mothers maiden name B A , literate, primary school education, married, father of children, unemployed, average family income, no other criminal proceedings against him in progress, continuously in custody since 9 June 2008, currently in Gjilan/Gnjilane Detention Centre,

S , born on in in the Municipality of Viti/Vitina, Kosovo Albanian, fathers name D , mothers maiden name T A , basically literate, primary school education, married, father of children, farmer, poor family income, no other criminal proceedings against him in progress, in custody from 9 June 2008 until 08 December 2010 in Dubrava Detention Centre;

F A , born on , municipality of Viti/Vitina, Kosovo Albanian, fathers name M , mothers maiden name N H , literate, primary school education, married, father of children, unemployed, average family income, no other criminal proceedings against him in progress, continuously in custody since 10 June 2008 in Dubrava Detention Centre;

In accordance to the Verdict of the 1st Instance District Court of Prishtine/Pristina in the case no. P. Nr. 516/08 dated 16 March 2009 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, **the defendants**

[i] were acquitted from the charge of "organized crime" as defined by Article 274 (1) CCK;

[ii] were found guilty of the criminal act "robbery" contrary to Article 255 (2) in relation to (1) CCK in co-perpetration pursuant to Article 23 CCK for the accused B.B, H.J, F.M, F.A. **and** F.A.A **and with the assistance of** S.B. **, pursuant to Article 25 CCK;**

[iii] the accused B.B. was found guilty of the criminal act of "unauthorized possession and use of weapon" contrary to Article 328 (2) CCK;

And were convicted as follows:

The accused B.B. was sentenced for the criminal act of **Robbery,** committed in co-perpetration to a term of imprisonment of five (5) years and six (6) months [Article 38 CCK and Article 255 (1), (2) and 23 CCK] and for the criminal act of **Unauthorized Ownership, Control, Possession or Use of Weapons** to a term of imprisonment of one (1) year [Article 38 CCK and Article 328 (2) CCK]; The First Instance Court then built an aggregate sentence of six (6) years according to Article 71 CCP;

The accused H.i. was sentenced to a term of imprisonment of five (5) years, the accused F.M. was sentenced to a term of imprisonment of two (2) years and the accused F.A. and F.A.1 both were sentenced to a term of imprisonment of four (4) years and six (6) months, each of them pursuant to Articles 38 CCK and 255 (1) (2) and 23 CCK;

While the accused S.B. was sentenced to a term of imprisonment of two (2) years and six (6) months pursuant to Articles 38 CCK and 255 (1) (2) and 25 CCK.

The Judgment was finally drawn up and served to the parties between between 14 and 18 September 2009. Particularly Defense Counsels S.M. (for F.A.1), SH.P. for F.A.), B.K. (for S.B. i) and A.i (for B.B.) have received the drawn up Judgment on 16 September 2009, whilst Defense Counsel A.R. (for F.M.) has been served with the Judgment on 17 September 2009; the defendants F.A.1. F.M. and F.A. have been served with the Judgment on 16 September 2009, whilst defendants B.B. and H.i. have received it on 18 September 2009 and the receipt of S.B. is without reception date; the District Prosecutor's Office in Prishtine/Pristina was served with the Judgment on 16 September 2009 as well.

The Defense Counsels of the five out of the six accused timely have filed appeals against the Verdict, the Defence of S.B. dated 23 September 2009 and registered with the Registry of the District Court Prishtine/Pristina on 30 September 2009, the Defence of B.B. with filing date 28 September 2009, the Defence of F.A. dated 24 September 2009, the Defence of F.A.1. dated 24 September 2009 and registered with the Registry of the District Court of Prishtine/Pristina the following day, the Defence of H.i. dated 28 September 2009, whilst the Defense Counsel of F.M. dated 10 October 2009 just has replied to the appeal as filed by the District Public Prosecutor of Prishtine/Pristina.

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 accused was to be challenged. It was proposed to annul the challenged Verdict and return the case to the 1st Instance Court for re-trial or modify the Judgment and acquit the accused from all charges (Av. B.K. for S.B. , Av. A.A. and Ž.J. for **H.** I. , Av. A.I. for B.B. and Av. S.M. for F.A.1.), to annul the challenged Judgment and acquit the accused (Av. SH.P. for F.A.) or to refuse the appeal of the District Public Prosecutor and certify the 1st Instance Judgment (Av. A.R. for F.M.).

The District Prosecutor of Prishtine/Pristina, dated 24 September 2009 appealed the 1st Instance Judgment due to essential violation of the provisions of the criminal procedure and because of the sentence and proposed to quash the challenged Judgment and send the case back to the 1st Instance Court for re-trial or modify it and impose a sentence of imprisonment to the defendants, higher than the punishments found so far.

The Office of the State Prosecutor of Kosovo (OSPK), with a response dated 26 November 2009 and registered with the Registry of the Supreme Court of Kosovo the same day expressed the opinion that the appeals of the 1st Instance Judgment would be well grounded and therefore proposed to approve the appeals and annul the Judgment.

Based on the written Verdict in case P. Nr. 377/09 of the District Court of Prishtine/Pristina dated 16 March 2009 (filed with the Registry of that Court on the same day), the submitted written appeals of the Defense Counsels and the District Public Prosecutor of Prishtine/Pristina as well as the Opinion of the OSPK, the relevant file records and the oral submissions of the parties during the hearing session on 10 May 2011, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 10 May 2011, hereby issues the following:

RULING

The appeals filed by defence counsels Av. A.I. for defendant B.B. Av. A.A. and Av. Ž.J. for defendant H.I. , Av. SH.P. for defendant F.A. , Av. B.K. for detendant S.B. and Av. S.M. for defendant F.A.1 are GRANTED. The appeal filed by the District Public Prosecutor of Prishtinë/Priština is PARTIALLY GRANTED.

The judgment of the District Court of Prishtinë/Priština, P. No. 516/2008, dated 16 March 2009, is ENTIRELY ANNULLED and the case is RETURNED to the court of first instance for retrial.

REASONING

Procedural History

1. In the morning of 09 June 2008 between 08:06:07 hrs and 08:07:47 hrs, a green VW Golf car with Kosovo registration plate XXX, which later on was found to be the property of the defendant S.B. approached the branch of the XXX. Bank in Ferizaj/Urosevac and parked just in front of the entrance. A person with black clothes, wearing a mask and yellow gloves stepped out of the vehicle and entered the bank premises, while holding a gun. A second person with a red jumper, also wearing yellow gloves and holding a gun, stepped out of the car and entered as well into the bank premises, went straight to the office, where the money was located, took two bags containing money and exited the bank again. After this, also the first person left the bank premises and with high speed both perpetrators left the crime scene, thus using the respective VW Golf car.

2. Since already in late February 2008 Kosovo Police had received intelligence information that the defendant B.B., who at that time was working as a security supervisor for a company providing security assistance for the XXX Bank, together with other unknown persons was about to commit a bank robbery, his vehicle XXX XXX, red color, was searched at the same day immediately after the incident and 15 bullets of 15 mm caliber were found under the car mat at the drivers side and beneath the pedals. Moreover, as well on 09 June 2008 the defendant B.B. was contacted and picked up by Kosovo Police in the "XXX" restaurant in Ferizaj/Urosevac, where he allegedly had spent some time in the morning between 08:00 and 09:00 hrs.

3. Two days later, on 11 June 2011, police found a revolver of Ceska Zbrojevka brand, model VZOR 50of 7, 65x17 mm caliber, with serial number D-30238, Chechoslovak production, in the trash bin in the toilet of the restaurant "XXX".

4. Tracking down the movements of the defendant B.B., Police Officers finally followed the defendant to a bar in Viti/Vitina, where he met with the defendants F.M. and F.A. and on that occasion arrested them all.

5. Based on information given by the defendant F.M. police went to search the house of the latter in the village Terpeze and moreover identified S.B. and F.A. as alleged co-perpetrators of the respective criminal actions.

6. After investigations had been completed, the District Public Prosecutor of Prishtine/Pristina filed an indictment on 25 August 2008 (PP. no. 465-6/2008) and accused the defendants B.B, H.H, F.M, F.A., S.B. and F.A.1 of having committed an organized criminal act as per Article 274 paragraph 1 of the PCCK, related to Article 255 paragraph 2 as related to paragraph 1 of the PCCK; and the defendant B.B. in addition of having committed the

criminal act of Unauthorized Ownership, Possession or Use of Weapons as per Article 328 paragraph 2 of the PCCK.

7. The indictment has been confirmed on 20 October 2008 by ruling of the Confirmation Judge of the District Court of Prishtine/Pristina (KA. No. 495/2008).

8. On 15 January 2009 the Main Trial started in front of the District Court of Prishtine/Pristina and commenced through eight sessions on 26 January, 06 February, 24 February, 09 March, 10 March, 13 March and 16 March 2009, within which the defendants were examined and got the opportunity to plead, numerous witnesses have been heard, in particular Q.J. (waiter in the restaurant 'XXX'), A.L. (who accompanied the defendant H.I. on 09 June 2008 between 10:45 and 12:00 hrs for a trip from her village to Viti/Vitina), D.P. (who met the defendant H.I. on 09 Jnue 2008 around noon), N.H. (farmer from the village of Sllatinë e Epërme/Gornja Slatina in the Municipality of Viti/Vitina, where the defendant S.B. was residing at the time of the criminal offense in question), H.A. (shop owner, where the defendant S.B. used to buy), S.R. (Kosovo Police Officer/Forensics Department Ferizaj/Urosevac), Behar Ramadani (Kosovo Police Officer Ferizaj/Urosevac) and I.H. (Regional Police Commander of Ferizaj/Urosevac), the CD containing the records of the bank robbery was played, the defendants B.B, H.I, F.A, F.M, S.B. and F.A.1 got the chance to state and *"the documents to be considered as admissible evidence"* have been listed.

9. Based on its findings, on 16 March 2009, the District Court announced the verdict and found the accused guilty of the criminal offences listed above from items [i] through [iii]. Consequently, the Court imposed on the accused the punishments as specified above.

10. After the verdict was drawn up, it finally was served to the parties between 14 and 18 September 2009. Therefore, **the Defense Counsels of five out of the six defendants timely have filed appeals** against the 1st Instance Judgment, and the Defense Counsel of F.M. has replied to the appeal as filed by the District Public Prosecutor of Prishtine/Pristina, as pointed out before between 23 September 2009 and 10 October 2009 in accordance with Article 398, paragraph 1 and Article 399, paragraph 1 of the PCPCK-KCCP.

11. **The District Public Prosecutor of Prishtine/Pristina** also timely appealed on 24 September 2009 and **the OSPK** filed its opinion and proposal dated 26 November 2009 within this Court.

12. On 10 May 2011, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

13. The Defense Counsels confirmed their submissions and proposals.

14. The Public Prosecutor concluded to approve the appeals and annul the Judgment.

FINDINGS OF THE COURT

15. The Supreme Court of Kosovo establishes that the challenged Judgment contains a number of serious material and legal weaknesses and failures.

A. Admissibility of the appeals:

16. The Supreme Court of Kosovo at first finds that all appeals of the Defense as well as the one of the District Public Prosecutor of Prishtine/Pristina are admissible in the lights of Article 398 paragraph 1 of the KCCP, according to which *"authorized persons may file an appeal against a judgment rendered at first instance within fifteen days of the day the copy of the judgment has been served"*.

The Supreme Court in this context realizes that – although the challenged verdict was pronounced already on 16 March 2008, the drawn-up Judgment was served to the parties only between 14 and 18 September 2008, almost exactly six (6) months after the decision was announced.

Nothing can be said upon the question whether or not the Judgment was drawn up in compliance with Article 395 paragraph 1 of the KCCP, according to which a judgment *"shall be drawn up in writing within fifteen days of its announcement if the accused is in detention on remand and within thirty days in other instances"*.

Although in the case at hand it is of serious concern that during the whole critical period from the announcement of the decision on 16 March 2008 and until the Judgment was finally served to the parties between 14 and 18 September 2008, all six defendants continuously have been in detention on remand and thus have been deprived from any possibility to take advantage of their legal remidies as granted by the law, the case file provides no information, at what time the Judgment was drawn up in writing as required by the law.

However, the extreme delay in serving the Judgment to the parties can not be considered to the detriment of the defendants.

B. Substantial violation of the provisions of criminal procedure

17. All six Defense Counsels of the defendants B.B, H.I, F.A, S.B, and F.A.1. as well as the District Public Prosecutor of Prishtine/Pristina have challenged the 1st Instance Judgment because of essential violations of the criminal procedure pursuant to Article 403 paragraph 1 item 12 of the KCCP. The appeals have also been supported by the opinion of the OSPK. Particularly, the enacting clause of the challenged Judgment would be confusing, unintelligible, and

unclear and therefore not in compliance with Article 391 of the KCCP. The enacting clause would also be in contradiction with the reasoning and the evidence collected. Therefore, it would be incomprehensible as the entire Judgment as well, since it would not be able to understand which actions were undertaken by the accused during the commission of the criminal offense. The Judgment generally would not be grounded upon the relevant facts and moreover would not be drafted in compliance with Article 396 if the KCCP.

18. Moreover, the Defense of the defendant S.B. has challenged the Judgment, because the declarations of the defendant that he had been abused by the police during the pre-trial phase had not been taken into consideration by the 1st Instance Court at all.

19. As to the defendant B.B. the Defense has stressed that the Judgment in this regards would be based upon the statements of the co-defendant F.M. only, as given on 10 June 2008 in front of the police and on 17 July 2008 in front of the Public Prosecutor, which the latter both of them would be inadmissible pursuant to Articles 156 and 157 of the KCCP, since neither the defendant nor his Defense Counsel ever had had the chance to interrogate the witness as well. Therefore, the Judgment would be in contradiction to Article 403 paragraph 1 item 8 of the KCCP as well.

20. Also regarding the defendant F.A. the 1st Instance Court – despite considering the statements of the co-defendant F.M. - had not even tried to justify the facts it has relied upon, when it found the defendant guilty.

I. Alleged violation of Article 403 paragraph 1 item 12 of the KCCP:

21. The Supreme Court of Kosovo found that the challenged Judgment seriously violates provisions of the criminal procedure, particularly as per Article 403 paragraph 1 item 12 of the KCCP.

A comprehensible and internally consistent enacting clause, which finds the accused guilty like in the case at hand needs to meet the requirements of the law as defined by Articles 396 paragraphs 3 through 5 and Article 391 of the KCCP.

Article 396 paragraphs 3 and 4 of the KCCP, which are of relevance in the case given, stipulate as follows:

Article 396

(1)...

(3) The enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused or by which he or she is acquitted of the charge for that act or by which the charge is rejected.

(4) If the accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code, and if he or she was acquitted or the charge was rejected, the enacting clause shall contain a description of the act with which he or she was charged and the decision concerning the costs of criminal proceedigs and the property claim, if such claim was filed.

(5)...

Article 391 paragraph 1 of the KCCP, as relevant in the case at hand, stipulates as follows:

Article 391

(1) In a judgment pronouncing the accused guilty the court shall state:
1) The act of which he or she has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends;
2) The legel designation of the act and the provisions of the criminal law applied in passing the judgment;
3) ...

The enacting clause of the challenged Judgment – in contradiction to these requirements of the law – stipulates as follows:

DISTRICT COURT OF PRISHTINE/PRISTINA

P Nr. 516/08
Date 16 March 2008

IN THE NAME OF THE PEOPLE

The District Court of Pristina, in a trial panel composed of ...

In the criminal case against

B. B.
H. I.
F. M.
F. A.
S. B.
F. A. I.

Based on Article 391 (1) KCCP;

Pronounced in public and in the presence of the accused, their defense lawyers and the Public Prosecutor the following:

VERDICT

1) All the above mentioned accused

<u>are acquitted</u>

from the charge of " organized crime" as defined in Article 274 (1) CCK;

2) All the above mentioned accused

<u>are found guilty</u>

of the criminal act of " robbery" contrary to Article 255 (2) in relation to (1) CCK in co-perpetrationpursuant to Article 23 CCK for the accused B.B, H.I, F.M. F.A. ***and*** F.A.1. ***and with the assistance of Selami BEQIRI, pursuant to Article 25 CCK;***

3) The accused B.B.

<u>is found guilty</u>

of the criminal act of "unauthorized possession and use of weapon" contrary to Article 328 (2) CCK;

SENTENCE

<u>Burim BERISHA</u>

Pursuant to Article 38 CCK and Article 255 (1) (2) and 23 CCK is sentenced to imprisonment of 5 years and 6 months;

Pursuant to Article 38 CCK and Article 328 (2) CCK is sentenced to imprisonment of 1 year;

Pursuant to Article 71 CCK the aggregated sentence is imprisonment of 6 years;

H.I.
F.M. ..;
F.A. ..;
S.B. ..;
F.A.1. ;

For all the accused, the time spend in detention on remand is included in the amount of punishment imposed on all the defendants.

PROPERTY CLAIM ...
CONFISCATION ...
COST ...

The challenged Judgment then continues with the reasoning.

22. The Supreme Court of Kosovo finds that this enacting clause is not in compliance with the applicable law as quoted before.

Despite that contrary to Article 233 paragraph 1 of the KCCP the personal data of the defendants was not fully established as to their personal identification numbers, the question whether or not they are literate and if there are some other criminal proceedings in progress against them, which all in the case at hand can be healed considering that the identity of the defendants is not questionable, their school education level has been established and other pending criminal proceedings could be considered at a later stage, the Supreme Court of Kosovo finds that the enacting clause of the challenged Judgment does not meet the requirements of Article 391 paragraph item 1 of the KCCP.

23. In particular, no information is provided as to the facts and circumstances indicating the criminal nature of the act committed as well as justifying the application of pertinent provisions of criminal law. The only reference to these required facts and circumstances as made by the challenged Judgment can be found at p. 4-5 of the English version, where in the course of the reasoning the decision stipulates that *"[o]n 25th August 2008, the Public Prosecutor has filed the indictment [...] against the above mentioned defendants for the following criminal offences: I. B.B, H, i, F, M, F.A, S.B. and F.A.L. . Have committed aggravated crime as a part of the criminal organized group for the purpose of direct financial and material profit, in that manner that the defendants . B.B. and H.J. beforehand have made a plan to rob the branch of the " XXX Bank" in Ferizaj and after making the plan they have contacted the defendant F.M. by whom they have requested to find a trusted person who will enter the bank together with the defendant B. therefore defendant F. have contacted the defendant XH.A. , who is at large. [...] all four of them [...] have divided roles for each one [...] and other defendants [...] and [...] on 09th of June 2008, at 08.06 minutes, with the car "Golf 2", green color with the registration number XXX , property of the defendant S.B. , who after the agreement with the defendants [...] left the car at the yard of his house, opened, with the keys inside. [...]".*

This text, despite that it is barely understandable, but which then continues with a detailed description of all the aspects of the bank robbery and ends with the amounts of money allegedly taken and shared by the defendants, and finally also deals with the criminal responsibility of B.B. regarding Unlawful Possession and Use of

Weapons, clearly is a pure quotation of the indictment and obviously was copy-pasted from there into the reasoning of the challenged Judgment.

Of course, the Supreme Court of Kosovo on several previous occasions has pointed out its opinion that every judgment needs to be read as an entire document. Therefore, it may not necessarily impact the validity of the enacting clause or the respective entire judgment, if the borders between the introduction, the enacting clause, and the reasoning of a judgment are not precisely drawn, as long as the line of argumentation and the facts referred to are logical and clear and the position of the judge as the decision-making body can be understood clearly from the document.

However, this is not given in the case at hand. Although the challenged Judgment in the end basically finds the defendants guilty for Robbery pursuant to Article 255 of the CCK committed in co-perpetration and the defendant B.B. separately for Unauthorized Possession and Use of Weapons pursuant to Article 328 paragraph 2 of the CCK and thus in accordance with the accusations of the indictment, it can not be understood doubtlessly that the position of the Public Prosecutor as defined in the indictment is identical with the one taken by the Judge. In this regard particularly the fact is of relevance that the 1st Instance Court has acquitted all defendants from the charges regarding the commission of Organized Crime as per Article 274 of the CCK. On the backgrgound of this decision it illuminates that the 1st Instance Court did not share the Public Prosecutor's position to 100 %.

Therefore, the enacting clause of the challenged Judgment is incomplete and thus incomprehensible and internally inconsistent.

24. Moreover, the Supreme Court of Kosovo finds that the challenged Judgment in large parts is inconsistent and therefore unclear. The reasoning of the Judgment up to a huge amount of text consists of copy-pasted excerpts from several minutes as taken during the Main Trial and then comes to certain conclusions, but without reflecting on the contents of witness statements quoted or statements of defendants referred to as to the questions of reliability and credibility in the lights of other but different observations, statements or other evidence. Therefore, in these cases the conclusions of the reasoning can not be logically linked with the documents quoted.

As an example, in the context given reference is made to the assessment of the 1st Instance Court regarding the participation of the defendant B.B. in the bank robbery (p.14-15 of the English version), where at the end of the quotation of the minutes on the interrogation of B.B. by the Public Prosecutor it is said:

*" **Public Prosecutor:** A weapon has been found in the trash bin inside] XXX It is Czech made, is it yours?*
B.B. : It is not mine".

The 1st Instance Court, instead of reflecting on aspects of reliability and credibility of the defendant and his statement in this regards, then just continues stressing that "[a]*nother*

relevant inculpatory piece of evidence is constituted by the results of the metering of the phone calls, which have demonstrated that B.B. got in contact with H.I. on the afternoon and night before the critical day and the same day of the 9th of June 2008". Then a list of respective calls follows, but of course without giving any information upon their contents.

25. The same applies to the charge on Unlawful Possession and Use of Weapons pursuant to Article 328 paragraph 2 of the CCK against the defendant B.B. i. After quoting the respective minutes on the finding and property regarding the revolver again, the 1st Instance Court just continues with the conclusion that *"[t]hus, the material element (actus rei) is proved by the factual circumstance that the pistol used during the robbery and the fifteen (15) bullets were found respectively in the trash bin of the restaurant " XXX " and in his vehicle, the red Alfa Romeo, following a lawful search and confiscation activity by the police".*

In both regards, not a word is spent on the question, whether the respective 15 bullets from the vehicle of the defendant, which allegedly had a 15 mm calibre, were suitable to fit into the revolver from the trash bin, which the latter was a 'Ceska Zbrojevka' brand, model VZOR 50 of 7, 65 x 17 mm calibre. Also no attention was paid to the fact that according to the statement of the witness Q.J. who was working as a waiter in the " XXX " restaurant, when the defendant B.B. i stayed there on 09 June 2008, the latter always had stayed seated at his table and never went to the toilet and that the trash bins would be emptied twice a day, while the respective gun was found there two days after the defendant had visited the restaurant (p.12-13 of the English version).

Particularly this piece of evidence could have been used as corroborative evidence regarding the alleged participation of the defendant B.B. in the bank robbery, since based on the analysis of the video records from the bank alone it was not possible to personally identify the two robbers, which both of them allegedly were holding guns during the action (11-12 of the English version).

26. Last but not least it is worth mentioning that the quotation of telephone interception protocols, which the latter the challenged Judgment contains through about six (6) pages also in relation to other defendants, do not provide at least strong corroborative evidence, taking into consideration that the contents of these telephone contacts are not known and that amongst people in Kosovo it is quite common to communicate via mobile phones, much more that this may be the rule in many other countries. Therefore, not necessarily a conclusion can be drawn from these interception results regarding the alleged coordination of a bank robbery.

It is noteworthy that the 1st Instance Court almost solely has based its opinion and the whole Judgment upon the statements given by the co-defendant F.M. i in front of the police on 10 June 2008. Despite the question, whether or not this statement is admissible evidence (wich will be addressed afterwards) the reliability of the witness and the credibility of the statement never was analyzed and assessed in the lights of other statements in the case at hand.

27. Other weaknesses of the challenged Judgment in this regard will only be summarized in the interest of giving some guidance to the 1st Instance Court for the re-trial. So was the respective statement of F.M. as given on 10 June 2008 in front of the police, literally quoted three times in the challenged Judgment (p.16-17 of the English version in the context of the criminal responsibility of B.B., p.24-25 of the English version in the context of the criminal responsibility of H.I., and p.26-27 of the English version in the context of criminal responsibility of F.M. (himself) and as well used regarding the criminal responsibility of the defendant F.A., but without properly analyzing the statement and reflecting on it in the lights of other evidence.

28. The Supreme Court of Kosovo has not taken any advantage to figure out about the alleged statement of the defendant S.B., who according to his Defense has been abused by the police during the investigation phase, thus pressing him to go to the police station inside the trunk of the police car. However, the Supreme Court in this context notes that indeed the 1st Instance Court has not lort a word about the issue, which could be of high importance when it comes to the evaluation of the statements of the respective police officers as well as to the assessment of the statements of the defendant himself during the pre-trial and investigation phase.

II. Alleged violation of Article 403 paragraph 1 item 8 of the KCCP:

29. As to the general question of admissibility of the statement of the defendant F.M. in the lights of Articles 156 and 157 of the KCCP, the Supreme Court of Kosovo did not take advantage to go deeper into the relevant details, thus checking the whole case file for information on the issue, considering the already clearly established most serious violation of provisions of the criminal procedure under Article 403 paragraph 1 item 12 of the KCCP.

However, if it should turn out that indeed the Defense and the defendants never had an opportunity to interrogate F.M. regarding the questions and aspects as addressed in his statement dated 10 June 2008 (and also the one dated 17 July 2008), this evidence would have to be marked and treated as inadmissible evidence in the lights of Articles 156 and 157 of the KCCP.

C. Erroneous and incomplete determination of the factual situation

30. The Defense Counsels of the defendants BB, F.A, S.B, H.I and F.A.1 have challenged the 1st Instance Judgment as well for alleged erroneous and incomplete determination of the factual situation and thus for violation of Article 402 paragraph 1 item 3 as read with Article 405 of the KCCP. The Judgment would not consider the fact that all the defendants have denied their participation in the commission of the respective criminal offense of bank robbery.

31. Regarding the defendant B.B. the 1st Instance Court in particular had not established that the defendant did hold a weapon without authorization. Moreover, he he would not even know the co-defendants of the alleged robbery, X.H.A, F.M, S.B, F.A.

32. The 1st Instance Court had not taken into consideration that the defendant H.I. according to his statements and the testimonies of witnesses never had contacted the defendant F.M. at all and that in particular he did not give any instructions to the othet co-defendants with regards to the bank robbery. Instead, he had slept until 08:00 hrs on 09 June 2008 and stayed at home until 11:00 hrs, when he went out for coffees with the witnesses A.L. and D.P. . No other evidence would be contained in the case file.

33. Also regarding the defendant F.A. the Defense challenged that the 1st Instance Court had based its Judgment solely on the statement of the co-defendant F.M. and that telephone interception reports as quoted by the Court would not provide any sufficient evidence against the defendant.

34. Regarding the defendant F.A. the 1st Instance Court had not taken into consideration that the name of the defendant never was mentioned by the other co-accused in the course of their interrogations. Moreover, the Court in its Judgment had not taken any stand regarding a possible intention of the defendant to commit the respective crime.

35. Also the Defense of S.B. has stressed that the 1st Instance Court had not sufficiently taken into consideration that according to the defendant himself he never spoke to anyone of the other defendants and that a possible intention of the defendant to participate in the commission of the crime never was assessed upon.

36. The Supreme Court of Kosovo in this regard refers to what already was elaborated upon under point A. of this Judgment concerning the fact that the almost sole evidence stressed by the 1st Instance Court is the statement of F.M. as given to the police on 10 June 2008 and that the records of telephone interceptions as quoted by the Court are at least not very strong corroborative evidence considering the fact that the contents of the respective telephone conversations are not known. The Supreme Court moreover establishes that indeed the 1st Instance Court in its challenged Judgment has not analyzed at all contradictory statements and evidence, but – obviously solely arguing on the ground of the allegations as raised in the indictment – was only interested to find any alibi as possible exculpation for the defendants. Only twice the 1st Instance Court has given some reasons why to believe or not to believe a certain statement. With regards to the witness statements of A.L. and D.P. the Court stated that there was *"no reason to doubt about the reliability of the witnesses [...] as their testimonies have been fully consistent"*, but nevertheless and without further reasoning found the defendant H.I. *"guilty not for having entered the bank but for having organized and supported the robbery"* (p.22 of the English version). As well, a second statement of the

defendant F.M. as given on 17 July 2008 in front of the Public Prosecutor, was considered as not credible (p.28-29 of the English version), but was not challenged in the situation at hand.

37. The Supreme Court of Kosovo finds that the assessment and analysis of evidence as carried out by the 1st Instance Court and laid down in the challenged Judgment is not as careful and detailed as it could be expected in accordance with European standards and best practises. Therefore, also violation of Article 405 of the KCCP is established.

38. However, as already pointed out in several cases, as there is the case against S.K. etc., the Supreme Court of Kosovo finds that it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again. In the case *Runjeva, Axgami and Dema (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, the Supreme Court of Kosovo in this context has pointed out that *"appellate proceedings in the PCPCK rest on principles that is for the trial court to hear, assess and weigh the evidence at 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 to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous' "*. Therefore as a rule, this Court will not elaborate on the collection of evidence and based on this on the details of the findings of the First Instance Court.

39. Since in the case at hand the challenged Judgment of the 1st instance gives the impression that the Court did not properly and fully assess all evidence available and needed, a proper assessment of evidence will have to be conducted regarding all available admissible evidence. However, this will have to be done in the course of the re-trial proceedings, thus by the Trial Court.

D. Substantial violation of the criminal law

40. The Defense Counsels of the defendants S.B, H.I, B.B, and F.A. moreover have challenged the 1st Instance Judgment for alleged violation of the criminal law, pursuant to Article 402 paragraph 1 item 2 as read with Article 404 of the KCCP. In all cases the Defense claimes that the 1st Instance Court would not have established any proofs for a participation of their clients in the respective criminal offenses as addressed by the indictment.

41. The Supreme Court of Kosovo indeed finds that the 1st Instance Court has reversed the principle of presumption of innocence upside down, when it concluded that a defendant is guilty just because he does not have an alibi. In particular regarding the defendant H.I. (p.22 of the English version) the 1st Instance Court – after having quoted parts of the statements of the witnesses A.L. and D.P. who both have stated that they met the defendant, but quite some time after the bank

robbery had happened – established that "[t]*he Court has no reason to doubt about the reliability of the witnesses [...] as their testimonies have been fully consistent* [and that] *the circumstance that* H. I. *did spend some time from 11:00 until 14:00 in their company does not constitute an alibi with respect to the charges against him. The Court finds the defendant guilty not for having entered the bank but for having organized and supported the robbery*". Despite the statement of the co-defendant F. M. as already referred to, no further reasoning is given regarding the question, why the Court was convinced about the guilt of the defendant. Instead, the Court indulges in speculations concerning the alleged contents of the telephone conversation between S. B. and H. I. stating that "[i]*t is clear, on the contrary, that the phone calls which took place during the evening of the 8th of June 2009 between* H. I. *and* S. B. *were related to the car to be provided by the latter for the bank robbery of the following day*" (p.24 of the English version). It does not illuminate from the reasoning nor from the case file, how the 1st Instance Court was able to know about the contents of the respective telephone conversations. Therefore the Supreme Court finds that the line of argumentation as conducted by the 1st Instance Court in the context given represents a most serious violation of the material law.

42. Regarding other possible violations of the criminal law, the Supreme Court of Kosovo refers to what already was pointed out under points A. and B. of this Ruling, when it was established that the 1st Instance Court did not properly assess all evidence needed or at least has not laid down its findings in the Judgment in a way that would comply with the law and with European standards and best practises. Therefore, the Supreme Court in the situation given can not take a stand on the question whether or not any other violation of the criminal law was committed by the 1st Instance, since the results in this regard depend on a complete and non-erroneous establishment of the facts by the Trial Court and – based on this – a proper legal assessment of the facts by that Court.

E. Decision on the punishment

43. All Defense Counsels as well as the District Public Prosecutor as confirmed by the opinion of the OSPK have challenged the 1st Instance Judgment also for the decision on punishment regarding all the defendants. Whilst the Defense claims that only an acquittal of the defendants would be the appropriate decision, the Prosecution asks for a more serious punishment in all cases.

44. Also in this regard the Supreme Court of Kosovo can not take a stand in the situation given, since the imposement of a proper punishment depends on the findings regarding the criminal responsibility of each of the defendants and the latter – as already pointed out - on the factual findings as mistakenless to be established by the 1st Instance Court.

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

Supreme Court of Kosovo
Ap.-Kž. No. 377/2009
10 May 2011
Prishtinë/Priština

Members of the panel:

Antoinette Lepeltier-Durel
EULEX Judge

Marije Ademi
Supreme Court Judge

Nesrin Lushta
Supreme Court Judge

Emine Mustafa
Supreme Court Judge

Presiding Judge:

Gerrit-Marc Sprenger
EULEX Judge

Recording officer:

Holger Engelmann
EULEX Legal Officer