Ap-Kz. 238/2010
28 June 2011

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Charles Smith as Presiding Judge, and Supreme Court Judges Marije Ademi and Salih Toplica as panel members, with the assistance of EULEX Legal Officer Olivia Debaveye, as recording clerk,

In the criminal case against defendant **R.V.**, Kosovo Serb, born on in municipality, father's name U. V. , mother's name O. M. , residing in municipality, in detention since 21 June 2008, currently detained in Mitrovica detention center,

Convicted by the District Court of Mitrovice/a on 22 April 2010 for the criminal offence of Murder committed in a State of mental distress contrary to Article 148 of the Kosovo Criminal Code and Unauthorized ownership, control, possession or use of weapons contrary to Article 328 of the Kosovo Criminal Code, for the murder of T. D. in Veliko Rudare village, municipality of Zvecan on 20 June 2008 with an AK-47 which the defendant possessed without a valid authorization card,

Acting upon the appeal of the defendant filed through his Defence Counsel Ljubomir Pantovic on 21 June 2010 and on the appeal of S. D. filed on 16 June 2011 against the judgment of the District Court of Mitrovice/a in case no. K.nr. 32/2009, dated 22 April 2010, whereby the court found the defendant guilty and sentenced him to 7 years of imprisonment.

After having held a session on 28 June 2011 open to public, in the presence of the State Prosecutor represented by EULEX Prosecutor Gabrielle Walentich, Defence Counsel Nebosja Vlajic and the defendant himself, and after a deliberation and voting held on the same day 28 June 2011,

Pronounces the following

JUDGMENT

The appeal filed on behalf of the defendant R. V. against the Judgment of the District Court of Mitrovice/a in the case K.nr. 32/2009, dated 22 April 2010, is hereby REJECTED as unfounded.

The appeal filed by the injured party S. D. against the Judgment of the District Court of Mitrovice/a in the case K.nr. 32/09, dated 22 April 2010, is hereby dismissed as inadmissible.

The Judgment of the District Court of Mitrovice/a is affirmed in its entirety.

REASONING

I. PROCEDURAL HISTORY

The Indictment PP.nr 75/08 was filed on 05 June 2009 by the District Prosecutor of Mitrovica against **R. V.** for the criminal offence of *Aggravated Murder* contrary to Article 146 and 147 (3) together with Article 23 of the KCC and *Unauthorized ownership, control, possession or use of weapons* contrary to Article 328 of the KCC. A Motion for Punishment PPM 10/08 was filed against D.V. (son of **R.**, a juvenile) charging him with co-perpetration of *Aggravated Murder* in violation of Article 147 (3) of the KCC together with Article 23 of the KCC and *Unauthorized ownership, control, possession or use of weapons* contrary to Article 328 of the KCC. On 17 February 2010, the two cases were joined**.**

The Indictment against **R. V.** was confirmed on 14 December 2009 by a EULEX judge.

The main trial held in District Court of Mitrovice/a on 23, 24 February, 22, 24, 25 March and 22 April 2010. The trial was closed to the public as one of the two defendants D.V was a juvenile. The trial panel composed of three EULEX judges heard the testimony of 10 witnesses.

The verdict was rendered on 22 April 2010 whereby the defendant was found guilty of *Murder committed in a state of mental Distress* contrary to Article 148 of the KCC and *Unauthorized ownership, control, possession or use of weapons contrary to Article 328 of the KCC*. He is sentenced to an aggregated sentence of 7 years of imprisonment. The co-defendant D.V. is acquitted of all charges.

The defendant through his defence counsel Ljubonir Pantovic filed an appeal on 21 June 2010 and the injured party S. D. filed an appeal on 16 June 2010

The defence counsel filed a response to the appeal of the injured party on 28 June 2010 within the legal time frame.

The OSPK filed its opinion on 14 October 2010 proposing to reject the appeal of the defendant as ungrounded and to dismiss the appeal of the injured party as belated.

II. THE APPEALS OF THE DEFENCE AND THE INJURED PARTY

II.1 The appeal of the defendant

The defence counsel Ljubomir Pantovic filed an appeal on 21 June 2010 against the judgment of the District Court of Mitrovice/a dated 22 April 2010 because of the decision on punishment asserting that the punishment pronounced was too severe and is therefore not appropriate. The defence counsel requested that the Supreme Court amend the verdict of the District Court of Mitrovice/a and pronounce a less severe sentence.

The defence counsel alleged that the District Court of Mitrovice/a based its decision on punishment on seven mitigating circumstances: the family status of the defendant, his health, the fact that he has never been convicted before, the fact that he entered a guilty plea as to the weapons charge, his admission of having deprived of life the victim, his attempt to peacefully resolve the problem created by the victim and his efforts to remain clam and overcome a shameful event. The District Court of Mitrovice/a considered one aggravating circumstance: the fact that the victim had 6 children.

According to the Defence counsel, the District Court of Mitrovice/a should have also taken into account the sincere remorse of the defendant about what had happened and should not have considered the fact that the victim has 6 children, as Article 64 of the KCC does not list the family circumstances of the injured party as circumstances to be taken into account.

II.2 The appeal of the injured party

The injured party filed an appeal against the judgment of the District Court of Mitrovice/a on 16 June 2011 alleging an erroneous determination of the factual situation, a violation of criminal law, a wrong decision on the punishment and on the decision on the property claim.

The injured party proposes that the Supreme Court annuls the verdict and sends the case back for re-trial or amend the verdict so as to convict the defendant of *Aggravated Murder* and sentence him with a more sever punishment as well as to cover the expenses for the car which has been destroyed as a result of the shooting and the trauma.

The main points of the appeal are as follows:

- The court of first instance refused to hear the witnesses proposed by the injured party.
- The court of first instance re-qualified the criminal offence from *Aggravated murder* to *Murder in a state of Mental Distress*. However, in order to do so, the Court should have called at least three expert witnesses in neuropsychiatry to assess the diminished mental capacity. The psychologist called to testify was not qualified.

- The evidence in this case clearly showed that the criminal offence was *aggravated murder*, as the defendant had planned the murder, had killed the victim after an ambush and in a ruthless way.
- The injured party is not satisfied with her property claim: She was awarded 3950 Euros to cover the costs of the funeral and the related ceremonies and grave tomb. But the costs of the destroyed vehicle and the reparation for the mental distress and trauma caused to the family of the victim were not taken into account by the court. The Court advised the injured party to continue the claim through civil proceedings as the proper determination of all costs would slow down the criminal proceedings. However, the injured party had provided the Court with all the receipts as to the car and amounts requested as to the mental distress and trauma.
- The punishment is too lenient: The Court should have assessed more aggravating circumstances and less mitigating circumstances.

III COURT FINDINGS

III.1. Admissibility of the appeal

The Supreme Court finds that the appeal filed on behalf of the defendant is timely announced and filed and is therefore admissible. The appeal was announced on 27 April 2010, thus within the limit of 8 days as prescribed in Article 400 of the KCCP. The appealed verdict was served to the defendant on 7 June 2010 and the appeal was filed on 21 June, thus within the limit of 15 days as prescribed in Article 398 of the KCCP. The appeal was filed by the Defence Counsel, an authorized person.

However, the Supreme Court finds that the appeal filed by the injured party is inadmissible due to the fact that the injured party did not announce her appeal, as prescribed under Article 400 paragraph 1. Article 400 paragraph 2 of the KCCP further states that "*If a person entitled to appeal fails within the legally stipulated interval to announce an appeal, he or she shall be deemed to have waived the right to appeal, except in instances from paragraph 4 of the present Article*".

The panel carefully analysed the exception provided under Article 400, paragraph 4 to verify whether an unannounced appeal from the injured party could be considered as admissible. Article 400 paragraph 4 states that: "*If the accused has been punished by imprisonment and no appeal has been announced, the written judgment shall nevertheless contain a statement of the grounds and the audio record of the main trial shall be transcribed*." Considering that this provision lacks clarity on whether it applies to all persons entitled to appeal or only to the accused, the panel also took into account the general provision contained in Article 3 paragraph 2 of the KCCP which provides that doubts regarding the implementation of a certain criminal law provision shall be interpreted in favour of the defendant and his rights under the KCCP. The panel considers that it is logical to read this exception as applying only to the accused who would be unjustly penalised if after having been sentenced to imprisonment term, his

appeal would be considered inadmissible only because of the non-announcement of the appeal. Considering the principle IN DUBIO PRO REO, the panel concluded that this provision is only meant to be read to the benefit of the defendant. Therefore, if the defendant does not announce his or her appeal and has been sentenced to an imprisonment term, he or she should still be entitled to appeal as he or she would suffer important consequences as a result. However, the other parties (who are not in detention) should be obliged to comply with the provisions of Article 400 paragraph 1 of the KCCP and cannot rely on the exception provided by Article 400, paragraph 4. If they do not announce the appeal they should be deemed to have waived their rights to appeal. To rule otherwise would render this paragraph completely meaningless: what was the reason of the legislator to impose an obligation to announce an appeal if the exception would then apply to all parties? To allow all parties to be the exception makes one wonder of the reasons of this announcement procedure in the code. In such a situation, the exception would become the rule. The panel does not believe that the legislator aimed to include all parties in the exception under Article 400 paragraph 4 but only the defendant who has been sentenced to imprisonment term.

As there is no evidence in the case files and in the minutes that the injured party S. D. announced her appeal, she should therefore be considered as having waived her right to appeal.

The Supreme Court also took into account the opinion of the Defence Counsel and the OSPK who both stated that the appeal of the injured party should be rejected as inadmissible as the injured party has waived her right to appeal.

Hence as foreseen under Article 422 of the KCCP, the appeal of the injured party S. D. is dismissed as it was filed by a person who has renounced the appeal.

The Supreme Court finds, however that the appeal filed on behalf of the defendant is not founded. The Panel will now assess the arguments raised in the appeal of the defence counsel.

III.2 As to the punishment

The panel has considered whether the District Court of Mitrovice/a has failed to determine the punishment correctly pursuant to Article 406 paragraph 1 of the KCCP, having regard to the circumstances relevant to the level of the punishment, as alleged by the defence counsel in his appeal.

The criminal offence of *Murder committed in a state of mental distress* is punishable by imprisonment of one (1) to 10 years according to Article 148 of the KCC. The District Court of Mitrovice/a imposed a term of imprisonment of six (6) years, which is within the limits provided by law.

The criminal offence of *Unauthorized ownership, control, possession or use of weapons*, i.e. no valid Weapon Authorization Card pursuant to Article 328 par.2 of the KCC is punishable by imprisonment of one (1) to 8 years. The District Court imposed a term of imprisonment of two (2) years, which is within the limits provided by law.

Article 64 of the KCC prescribes that the court should consider all the circumstances that are relevant to the mitigation and the aggravation of the punishment. There is a list of circumstances that the court should in particular consider but the list is not exhaustive. Therefore, the District Court of Mitrovice/a did not violate Article 64 when it took into account the personal circumstances of the victim as aggravating circumstances, i.e. the fact that the victim had 6 children. Furthermore, the panel noted that one of the listed circumstances which the Court can consider is the injury to the protected value. In this case, the fact that Mr. **V.** killed a man whose family was quite well known to him, leaving that family without a father and support is a circumstance that can be considered by the court when establishing the appropriate sentence. Finally, the Supreme Court notes that the District Court of Mitrovice/a considered seven mitigating circumstances and only one aggravating circumstance.

The Supreme Court also considered whether the rules of mitigation of punishment of concurrent criminal offences, pursuant to Article 71 of the KCC have been adequately applied and concluded that the aggregation of the two sentences was made in accordance with the law as the aggregate punishment is higher than each individual punishment but it is not as high as the sum of both punishments.

Therefore, the Supreme Court finds that the punishment imposed for each offence and the aggregate punishment is in line with the legal provisions and is appropriate taking into account the circumstances of this case.

III.3. The *ex officio* assessment of any violations pursuant to Article 415 of the KCCP

The Supreme Court has not identified ex officio any other violation under Article 415 paragraph 1 of the KCCP.

IV. CONCLUSION

It is therefore decided as in the enacting clause.

Prepared in English, an authorized language.

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Dated this 28th of June 2011

Presiding Judge	**Recording Officer**
Charles L. Smith III	Olivia Debaveye
Member of the Panel	**Member of the Panel**
Marije Ademi	Salih Toplica