SUPREME COURT OF KOSOVO
Ap – Kž – 67/2011
29 May 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, and with EULEX Judge Horst Proetel and Supreme Court Judges Salih Toplica, Nebojša Boričić and Marije Ademi as panel members, assisted by EULEX Legal Officer Noora Aarnio as the recording clerk,

In the criminal case against defendant D N

convicted by the District Court of Pejë/Peć for the criminal offences of **Murder** in co-perpetration [Article 30 paragraphs 2 items 1 and 4 of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLK) as read with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY)], because in Ure e Jakes in the village of Marmullë, municipality of Pejë/Peć, on 19 March 2004 the defendant together with A N and S N shot at D A and T A thus resulting to their deaths.

Acting upon the joint appeal of the defendant through his Defence Counsels Zenel Mekaj and Haxhi Cekaj on 30 December 2010, and

the appeal of the injured party through his Defence Counsel Haxhi Millaku on 5 January 2011,

against the Judgment of the District Court of Pejë/Peć, P.nr 112/2010, dated 15 October 2010 whereby the District Court found the defendant guilty and sentenced him to imprisonment.

After having held a session on 29 May 2012 open to public, in the presence of the State Prosecutor Jusuf Mezini, the defendant and Defence Counsels Haxhi Cekaj and Nushe Kuke Mekaj substituting Zenel Mekaj, and after a deliberation and voting held on the same day,

On 29 May 2012 pronounces the following

JUDGMENT

D N no nickname, name of father , name of mother and maiden name of mother , place of birth village of , municipality of Pejë/Peć where he is also currently residing, date of birth , Kosovar, no known previous convictions, in detention in Switzerland from 10 July 2007 to 28 May 2008 when the defendant was extradited to Kosovo and from 29 May 2008 onwards in Kosovo,

The appeal filed on behalf of the defendant and the appeal filed on behalf of the injured party against the judgment of the District Court of Pejë/Peć, P.nr 112/2010, dated 15 October 2010 are hereby rejected as ungrounded.

The Judgment of the District Court is affirmed.

The cost of the criminal proceeding in the second instance shall be paid by the defendant pursuant to Articles 99, 100 and 103 of the Kosovo Code of Criminal Procedure (KCCP).

REASONING

I PROCEDURAL HISTORY

1. The judgment was served to the defendant on an unspecified date. The defence counsels Zenel Mekaj and Haxhi Cekaj filed a joint appeal against the verdict of the District Court on 30 December 2010. To guarantee the defendant his right to an effective legal remedy as stipulated in the Article 398 of the KCCP the appeal must be presumed timely filed.

2. The judgment was served to the representative of injured party on an unspecified date between 15 October and 21 December 2010. The legal representative Haxhi Millaku filed an appeal against the verdict of the District Court on 5 January 2011. To guarantee the injured party right to an effective legal remedy as stipulated in the Article 398 of the KCCP the appeal must be presumed timely filed.

II THE APPEALS AND THE RESPONSE OF THE PROSECUTION

1. The Appeal of D N

3. The appeal of N claims that the Judgment of the first instance contains essential violations of the criminal procedure and of the criminal code, that the factual state has been established erroneously and incompletely, and the criminal sanction is imposed unlawfully.

4. The Defence Counsels request that the Judgment be altered by acquitting the defendant pursuant to Article 390 paragraph 1 item 3 of the KCCP. Failing that the Judgment should be annulled and the case sent back to the District Court for retrial.

5. The presented grounds for the appeal are summarized as follows:

6. Firstly, the appealed Judgment is based on inadmissible evidence – more specifically on the statements of M B , M B and P H given in the other trials. They are inadmissible because the Defence Counsel has not had the opportunity to cross examine and challenge the witness. Also the statement of N is inadmissible due to its bias.

7. Secondly, the factual situation was not established correctly because it is based on partial and non-objective statements. The former Prosecutor of the case and L A have not saved any means and methods to place the guilt on D N V N , Gj N and Gj P are keen to support the injured party because of their relationship. The witnesses A V N , Gj N , M B and M B were trying to unify their statements. The statements of V N , Gj N and Gj P are in contradiction to the statements of A N , Z D , R D P H and others. Further, some of the statements were not examined at all. Also, the ballistic expertize "cannot be treated as an absolute truth.."[1]. Further, the long delay in gathering the evidence proofs that the accusations are a fabrication. Also, some of the witnesses were threatened. In conclusion, there in not evidence to prove beyond a reasonable doubt the guilt of D N

8. Thirdly, from the erroneous determination of the factual situation stems a violation of the criminal law. Even if D N was present and even if he shot at the victims, it cannot be established that his actions caused the deaths. Further, the intention of A N was to kill D A but there was no intention to kill T The Judgment does not give reasoning for the "brutality" as simply using many bullets does not constitute brutality.

9. Lastly, the sentence is not measured correctly as the involvement or the contribution of Danil Nokaj is not expressed in the Judgment. As he did not cause the deaths he should not be punished as severely as the two other defendants.

[1] Appeal of Danil Nokaj, dated 28.12.2010, fourth page of the English version

2. The Appeal of the injured party

10. The appeal of the Injured Party challenges the first instance judgment in relation to the imposed criminal sanction.

11. The Injured Party requests that the Judgment be modified by imposing a more severe punishment for the defendant. The sentence is not proportionate to the degree of the criminal liability of the defendant and the damages cause by his actions. The act was well planned and prepared. The defendant clearly intended the deaths as he celebrated his achievement by shooting in the air. As a result two young men, heads of families with children, were killed.

12. Court did not pay enough attention to the fact that D N s actions not only threatened the victims but also maintains a primitive tradition of the region to supposedly maintain the reputation of family in such a way and thus falsely presenting it as respectable or prestigious act. It should be noted that D. N tried to evade the criminal responsibility by fleeing Kosovo.

13. The sentence imposed by the District Court does not achieve the purpose of the punishment as described in the Article 34 of the CCK.

3. The Opinion of the Public Prosecutor

14. The Public Prosecutor did not file an opinion.

4. The Opinion of the State Prosecutor

15. The State Prosecutor proposes that Supreme Court approves the appeal of the injured party and rejects the appeal of the defendant as ungrounded.

16. There has been no violation of Criminal procedure. The Judgment was not based on inadmissible evidence, or bias and non-objective testimonies. Further, all the testimonies are evaluated. The Court did not rely to any single evidence but numerous pieces of evidence. The defence was given the chance to challenge all the evidence in the main trial.

17. The District Court had reasoned the establishing of facts clearly and comprehensively. First the Judgment describes the statements. Then it assesses these statements and explains the facts derived from these statements. The Judgment clearly explains the corroborative elements, as well as why it found some statements to be true and some not to be true.

18. The facts have been established correctly.

19. The criminal law was applied correctly.

20. However, the District Court failed to properly and completely assess the overall circumstances when measuring the punishment. The mitigating facts, that the defendant has not been sentenced before and that he was a father, were overestimated. The Court failed to apply the aggravating circumstance of the social risk the crime created – the aggravated relationship between the two families – and the serious consequences of the criminal offence. Also, the place and the circumstances of the criminal act are further aggravating factors. Lastly, the number of the bullets fired shows that the perpetrators were determined to kill the victims.

III COURT FINDINGS

A. Permissibility of the appeal

21. The Supreme Court finds that the appeals were filed within the limit of 15 days as prescribed in Article 398 of the KCCP and they were thus timely and permissible. The appeals were filed by the Defence Counsels and the authorized representative of the injured party, thus authorized persons.

22. The Panel will now assess each of the arguments raised in the appeals of the Defence.

B. Alleged violations of criminal procedure code

23. The appeal claims that the statements of M B , M B and F H are inadmissible because they were given in the other trials and the Defence Counsel has not had the opportunity to cross examine and challenge these witnesses.

24. As to the statement of M B the Supreme Court notes that the District Court has stated that "*The Court chose not to rely on the evidence of M B in reaching verdict. The Defendant had not had an opportunity to challenge the evidence of M B at his first trial and was denied the opportunity to challenge that evidence, the Court concluded it would not be in the interest of justice to rely upon it.*"[2] Thus the Supreme Court deems it unnecessary to state further on the admissibility of this witness as it is a purely academic question irrelevant to the case.

[2] Judgment dated 15 October 2010, page 21 of the English version

25. As to the statement of M B , the Supreme Court notes that this witness was heard at the trial so the defence had the chance to challenge all this statements. Thus this claim is ungrounded.

26. As to the statement of P H the Supreme Court notes that he was heard at the first main trial of the defendant, on 13 May 2009, so the defence has had a chance to challenge all his statements. Thus this claim is ungrounded.

27. The appeal also claims that the statement of Nikolla is inadmissible due to its bias. The Supreme Court reiterates that it is the prerogative of the trial panel to assess the evidence presented. This assessment includes the existence of the alleged bias.

C. Alleged lack of evidence and false or inadequate assessment of evidence presented

28. As is stated above it is the prerogative of the trial panel to assess the evidence presented even when it is contradictory. This is because the District Court, having directly heard the evidence is in the best position to assess the credibility of the witnesses and/or expert witness. It is the duty of the Supreme Court to determine if the trial Court has done this assessment properly. The Supreme Court's revision of the District Courts assessment is thus restricted to the questions as to whether the facts have been explored carefully, whether the evidence presented was admissible and whether the evaluation was plausible, logical and comprehensible. The First Instance Court has discretion over the assessment of the evidence that the Supreme Court will not interfere with so long as the appealed Judgment does not infringe rules of logic and common sense. The Supreme Court only reassesses the evidence if it finds that the trial Court's assessment is faulty.

29. The appeal claims that the ballistic expertize *"cannot be treated as an absolute truth.."*[3] The Supreme Court is not persuaded by this allegation. The ballistic expert worked for forensic in Pristina, where he at the time of the trial had worked for two years. He also clearly admitted that some examinations could not be done or were out of their object of examination.[4] Thus he admitted the limits of the forensics in this case. As a result, there is no reason to question the ballistic report which states that there were bullets from three different weapons in the crime scene.

30. The appeal also claims that since long time has passed from the commission of the crime the witnesses have been influenced. The first information is always the most accurate. The Supreme Court notes that the report on crime scene inspection from the day of the murder states that *"According to the police sources, it is suspected that the perpetrators of this crime are A N ... and 3 accomplices given the number of shells from the automatic gun that were recovered at the crime scene..."*[5] So even the first day of the investigation it was clear that there were more than one perpetrator. Also,

[3] Appeal of Danil Nokaj, dated 28.12.2010, fourth page of the English version
[4] Minutes of main trial of A N and R B dated 2 March 2005, pages 3-7
[5] Report on Crime Scene Inspection, drafted on 19.3.2004

Luz Allakaj was first heard by the Investigative judge on 14.4.2004, Gj N on 26.4.2004, A N on 19.3.2004 and on 6.4.2004, P H on 27.4.2004 and R D on 29.4.2004. Thus they were all heard quite soon after the shooting.

31. The first statement of Z D in the case file is dated 6.4.2005 and the one of Gj P on 8.8.2005 so there is a delay in questioning them. However, the Supreme Court notes that it is possible that they have been heard earlier in relation to the other defendants but that those statements are not in this case file. Also, V N was heard on 23.2.2005 by the prosecutor so there is a delay in questioning him. The Supreme Court further notes that D N could not be heard since he was out of Kosovo and could thus not be reached.

32. In conclusion the Supreme Court finds that the District Court has, as is stipulated in the Article 387 of the KCCP, conscientiously examined each item of evidence separately and in relation to others and on the basis of such assessment reached a conclusion as to the establishment of particular fact. Thus the evidence has been properly assessed. The evaluation of the facts made by the District Court and the deductions made from them are based on common sense and on the rules of logic. They are plausible, reasonable and convincing. There are no contradictions in the reasoning.

D. Alleged violations of criminal code

33. The appeal avers that from the wrong determination of the factual description stems a violation of the criminal code. Supreme Court notes that since it found the factual description to be determined correctly there is no violation criminal code.

34. The appeal also avers that the intention of A N was to kill D A but he had no intention to kill T A Thus even if it is found that A N and D N acted in co-operation D N cannot be held criminally liable for the death of Tunë Allakaj. The appeal further avers that even if it was proven that D N shot at the victims, it cannot be established that his actions caused the deaths. Thus he cannot be held criminally liable for their deaths.

35. According to Article 11 paragraph 1 of the CLSFRY "*An offender is considered criminally liable if he is mentally competent*[6] *and if he has committed a criminal act with* ***intent***[7] *or by negligence.*" Also, according to Article 13 of the CLSFRY "*A criminal act is intended if the offender is conscious of his deed and wants its commission; or when* ***he is conscious*** *that a prohibited consequence* ***might result*** *from his act or omission* ***and consents*** *to its occurring.*" Further, according to Article 25 paragraph 1 of the CLSFRY

[6] Mentally competent: përgjegjëshëm (in albanian), uračunljiv (in Serbian)
[7] Intent: dashje (in albanian), umišljaj (in Serbian)

"The co-perpetrator shall be criminally ***responsible within the limits set by his own intent*** *or negligence, ... "*

36. The Supreme Court recalls that D. N has been found to *"... armed with automatic weapons ambushed D A who was travelling ... together with his brother T A and fired indiscriminately into the said motor vehicle ..."*

37. The Supreme Court opines that a person must understand that firing indiscriminately into a vehicle can result to the death of any or indeed all of the persons inside the vehicle. If a person chooses to fire into the vehicle he disregards this possible result and thus accedes to the deaths of all the passengers. Therefore firing indiscriminately towards a vehicle fulfills the requirements of premeditation as is stipulated in the CLSFRY. Thus D. N acted with premeditation and he is therefore criminally liable for the deaths of both D. A and T A .

38. The appeal also avers that the Judgment does not give reasoning for the "brutality" as simply using many bullets does not constitute brutality.

39. The Supreme Court recalls that the District Court found that the perpetrators ambushed the victims as they went about their everyday activities and describes the actions of D. N as *"...within the context of a blood feud.."* and *"... public execution."*[8]

40. The Supreme Court agrees with the District Court that the combination of the number of shots fired (indicating determination to kill), the indiscriminate manner of shooting at the vehicle, the manner in which the act was committed (ambush and public execution) and the motive of the act amount to brutality.

E. Sentencing

41. According to Article 22 of the CLSFRY *"If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."*

42. The Supreme Court recalls that D N. has been found to *"...together with A N and S. N as well as other persons currently unknown or at large, ... ambushed ... and fired ..."* The Supreme Court opines that D. N has jointly committed a criminal act by participating in the act of commission and shall thus be punished as prescribed for the act.

43. According to Article 30 paragraph 2 of the CLK the term of imprisonment of at least ten years or a death penalty shall be pronounced to a person whose acts qualify under the items 1 to 6 of the same Article. However, according to Article 25 paragraph 2 of the Constitution of Kosovo *"Capital punishment is forbidden."* Also, UNMIK regulation

[8] Judgment, dated 15 October 2010, page 50 of the English version

UNMIK/REG/2000/59 Section 1 subsection 5 stipulates that *"Capital punishment is abolished."* and subsection 6 further clarifies that *"For each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years."* Thus the range of punishment is 10 to 40 years of imprisonment.

44. Considering that the Court of First Instance found the defendant guilty for two counts of Murder committed out of a blood feud and in brutal manner under Article 30 items 1 and 4 of the CLK and in conjunction with Article 22 of the CLSFRY as well as Article 30 item 3 of the CLK the imposition of punishment of long-term imprisonment of 25 years is just. The imposed sentence is at the middle of the scale of 10- 40 years stipulated. The District Court has correctly balanced mitigating and aggravating circumstances.

45. The Supreme Court deems that there is no justification to reduce or to raise the punishment. The imposed sentence is proportionate to the seriousness of the criminal offence and the concrete circumstances in this specific case.

IV CONCLUSION

46. The Supreme Court finds that the appeals are ungrounded.

47. The Supreme Court did not recognize *ex officio* any violations of law (Article 415 paragraph 1 of the KCCP) which were not the subject of appeal by the defense.

48. Based on all of the above stated reasons it is decided as in the enacting clause.

Dated this 29 May 2012.
Ap.-Kž. No. 67/2011

Prepared in English, an authorized language.

Presiding Judge

Martti Harsia

Recording clerk

Noora Aarnio

Member of the Panel

Horst Proetel

Member of the Panel

Salih Toplica

Member of the Panel

Nebojša Borićić

Member of the Panel

Marije Ademi