DISTRICT COURT OF MITROVICË/MITROVICA

P 27/2011

29 August 2012

IN THE NAME OF THE PEOPLE

The District Court of Mitrovicë/Mitrovica, in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding Judge, EULEX Judge Nikolay Entchev and EULEX Judge Roxana Comsa as Panel Members, assisted by EULEX Recording Officer Beti Hohler in the criminal case against S.H., charged with the criminal offence of *Murder* pursuant to Article 47 Paragraph (2) Item 1 of the of the Criminal Code of the Republic of Serbia ("CCRS") pursuant to the *Indictment of the District Prosecution Office KT Nr.25/97* dated 28 October 1997;

After having held the Re-Trial Hearings open to the public on 23 August 2012 and 29 August 2012, in the presence of the Accused S.H., his Defence Counsel Gani Rexha, EULEX Public Prosecutor Elisa Moretti, the Injured Party H.S. and his Legal Representative Miodrag Brkljac;

After the Trial Panel's deliberation and voting held on 29 August 2012,

Pursuant to Article 345 of the Law on Criminal Proceedings ("LCP"),[1] on 29 August 2012 pronounced in public and in the presence of the Accused, his Defence Counsel, EULEX Public Prosecutor and the Injured Party the following:

[1] Law on Criminal Proceedings, Official Gazette no. 26/1986.

VERDICT

The Accused **S.H.**, father's name , mother's name , maiden name , born on 1957 in , Municipality of Mitrovicë/Mitrovica, residing at street , village , Mitrovicë/Mitrovica Municipality, Kosovo-Albanian,

, unemployed, of poor economic status, with no proved criminal record, in detention on remand from 05.11.2007 until 23.11.2010, serving the punishment imposed by the judgment in case K. 26/1997 from 05.04.2011 until 08.09.2011, thereafter in detention on remand since 09.09.2011;

is

FOUND GUILTY

because on 18 August 1997, at around 20:20, in Save Kovacevica Street, village of Shipol, Municipality of Mitrovicë/Mitrovica (at that time Kosovska Mitrovica) in an insidious manner with direct intent he deprived B. Sh. of his life due to prior feuds between the children of the two families. The Accused was driving his vehicle Zastava 101 with plate number KM 153-47 on the road from Mitrovica to Srbica, direction Srbica and in Shipol village in front of the house number 301 he drove onto the pavement and intentionally hit B. Sh. from behind, while the latter was walking there with his seven year old grandson, Be. . The victim fell on the bonnet while the Accused continued driving for another 10-15 meters and stopped only after the victim had fallen on the ground and the accused tried to run over his legs. When passers-by tried to help the victim to get out from below the car, the Accused stepped out of the vehicle and approached B. Sh. who had suffered injuries from the hit from behind by the car and the fall on the ground. When the Accused saw that the victim was still alive, he stabbed him with a knife twice in the chest area, once in the area of the right upper

arm and once in the back inflicting multiple injuries, slashes in the neck area, chest area and three in the left arm area. The victim died as a result of internal and external bleedings caused by lacerations of vitally important organs (cardiac muscle, liver, kidney, lungs) and of the right forearm artery.

By doing so, the Accused S.H. committed and is criminally liable for the criminal act of *Murder* pursuant to Article 30 Paragraph (1) and (2) Subparagraph 1) of the Criminal Law of the Socialist Autonomous Province of Kosovo ("CLK") as made applicable by UNMIK Regulation 1999/24.

Therefore the Accused S.H. is

SENTENCED

to **13 (thirteen) years of imprisonment** pursuant to Article 34 Paragraph (2), and Article 38 Paragraph (1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("CCY") as made applicable by UNMIK Regulation 1999/24.

The time spent in detention on remand between 05.11.2007 and 23.11.2010, the time spent in execution of the punishment in case K 26/1997 between 05.04.2011 and 08.09.2011, and the time spent in detention on remand since 09.09.2011 are to be credited pursuant to Article 50 Paragraph (1) of the CCY.

The Accused shall pay a lump sum of 200 (two hundred) Euros to cover part of the costs of criminal proceedings pursuant to Article 98 Paragraph (1) in connection with Article 95 paragraph (2) Item 6 of the LCP within 30 days after this judgment becomes final. He is relieved of the duty to reimburse the remaining part of the costs of the criminal proceedings according to Article 98 paragraph (4) of the LCP and Article 95 Paragraph (5) of the LCP.

REASONING

1. BACKGROUND OF THE CASE

1. The current criminal proceeding constitutes a re-trial, as ordered by the Judgment of the Supreme Court of Kosovo no. PKL 72/2011 dated 12 August 2011. The initial trial was held in January 1998 by the then District Court of Kosovska Mitrovica.

2. The Indictment against the Accused S.H. (hereinafter also: *the Accused*) was filed by the District Public Prosecution Office in (then) Kosovska Mitrovica on 28 October 1997.[2] The Accused was charged with the criminal offence of *Murder* pursuant to Article 47 Paragraph (2) Subparagraph 1) of the CCRS. The Accused was tried *in absentia* in January 1998. The (then) Court on 21 January 1998 issued a verdict in the case, finding the Accused guilty of *Murder* pursuant to Article 47 Paragraph (2) Subparagraph 1) of the CCRS and sentencing him to 14 years of imprisonment.[3]

3. In 2007 the District Public Prosecutor filed the Indictment PP No. 338/2007 against the Accused for the same criminal act for which, as it became clear during the proceedings, the Accused had already been tried and convicted on 21 January 1998. The criminal case ran before the District Court of Mitrovica/ë under the number P 320/2007. The Court, having satisfied itself of the identity of the criminal charges and the finality of the Judgment issued in 1998, on 1 December 2010 rejected the charge against the Accused on the basis of the longstanding criminal principle of *ne bis in idem* (Article 4 KCCP). This in effect concluded the proceeding in the criminal case P 320/2007.

4. Thereupon Defence Counsel of the Accused on 7 March 2011 filed the *Request for the Review of Criminal Proceedings* in accordance with Article 410 Paragraph (1) of the LCP. Pursuant to the latter *"[a] criminal proceeding in which a person has been convicted in absentia and it has become possible for him to be retried in person, the proceedings shall be reopened […] if the convicted person od defence counsel files a*

[2] Indictment no. KT 25/97 of 28.10.1997, Court Binder 1, p. 45 ff.
[3] Verdict, dated 21 January 1998, Court Binder 1, p. 73 ff.

petition for the reopening of the proceeding within one year from the day when the convicted person learned of the verdict whereby he was convicted in absentia." The Supreme Court of Kosovo on 12 August 2011 issued its Judgment no. PKL 72/2011 with which it granted the request of the Defence Counsel for re-opening of the criminal proceeding held in 1998 and ordered a Re-Trial to be held in the case. The Supreme Court accordingly returned the case for a Re-Trial to the District Court of Mitrovica/ë. The criminal case was taken over by EULEX with the decision of the President of the Assembly of EULEX Judges dated 10 February 2012.[4]

5. The Re-Trial was held on 23 and 29 August 2012 by a Trial Panel of District Court of Mitrovica/ë composed of EULEX Judges.[5]

2. APPLICABLE PROCEDURAL LAW AND OTHER PROCEDURAL ISSUES

6. Pursuant to Article 550 of the current law governing criminal procedure in the courts of Kosovo – the Kosovo Code of Criminal Procedure (KCCP) – criminal proceedings at first instance in which the Indictment, Summary Indictment or Private Charge was filed before the entry into force of the KCCP but which have not been completed by that date are to be continued according to the provisions of the previous applicable law until […] the judgment rendered at the main trial becomes final. The Indictment in the case was filed on 28 October 1997 and the proceedings to date were not completed, thus in accordance with the said Article, the Re-Trial was held pursuant to the provisions of the LCP.

7. Pursuant to Article 7 Paragraph (2) of the LCP the Parties in the criminal case have the right to use their own language in the course of criminal proceedings. If the proceeding is

[4] Decision no. no. JC/EJU/OPEJ/0078/ff/12 of the President of the Assembly of EULEX Judges.

[5] The Court notes that it was faced with the obstacle of not possessing or having any formal way of accessing the original case file which during or after the armed conflict in Kosovo in 1998/1999 was moved to Serbia. There is no judicial cooperation in place between Serbia and Kosovo, thus accessing the original case file through the International Legal Assistance was not possible. The Court through the assistance of the Injured Party and the District Public Prosecutor and with the agreement of the Defence in August 2012 obtained copies of documents contained in the original case file through the assistance of the Injured Party. The Injured Party's Legal Representative travelled to Serbia and obtained copies of the case file that were then also served to the Defence in order to prepare for the Re-Trial.

not conducted in their language, the translation must be provided, including translation of official documents and other written pieces of evidence. Evidence and official documents originating in the period 1997-1998 appear in the case file in the Serbian language. The mother tongue of the Accused and his Defence Counsel is Albanian. However, the Accused during the Main Trial on 23 August 2012 clearly stated that he speaks and writes the Serbo-Croatian language and waived his right to have the written documents translated into Albanian, pursuant to Article 7 Paragraph (3) LCP.

8. District Court of Mitrovica/ë is vested with jurisdiction and competence in this case, including territorial jurisdiction pursuant to Article 26 Paragraph (1) LCP.

9. Pursuant to Article 23 Paragraph (1) LCP, considering the charge in this case and the proscribed punishment for that charge, the provision envisages a Panel of 5 judges, i.e. 2 professional judges and 3 lay judges. However, this rule was in effect derogated by UNMIK Regulation 2000/64, which entered into force on 15 December 2000 and which prescribed that the international judges will sit in panels of 3 judges (Section 2.1.).

10. It is also noted that the current Kosovo Code of Criminal Procedure adopted the same structure, namely panels of three judges at the District Court level, notwithstanding the charge.

11. Accordingly, the Panel in this proceeding was composed according to the law, of three judges, all of them EULEX judges assigned to the District Court of Mitrovica/ë. During the proceedings no objections were raised by the Parties as to the composition of the Panel.

3. THE GUILTY PLEA

12. The Accused, after being instructed of his rights pursuant to Article 316 LCP, during the Re-Trial on 23 August 2012 gave a statement in which he confessed to the killing of B. Sh. (hereinafter also: the victim) on 18 August 1997 as charged by the Public

Prosecutor in the Indictment no. KT 25/97 of 28 October 1997. The Accused confirmed that he had discussed the full legal implications of his confession with his Defence Counsel and that he decided to confess to the criminal offence by his own free will.[6]

13. Notwithstanding this declaration, the confession by the Accused during the Main Trial (or in this case Re-Trial), pursuant to Article 323 LCP, however complete it might be, does not relieve the Court of the duty to present other evidence as well. Accordingly and mindful of the fact that the Accused did not give a detailed statement as to the criminal offence, the Panel in the case conducted a full evidentiary procedure with all available evidence.

4. EVIDENCE CONSIDERED AND ANALYSIS OF EVIDENCE, CONCLUSIONS OF THE PANEL REGARDING THE COMMISSION OF THE CRIMINAL OFFENCE

4.1. List of Evidence presented during Re-Trial

14. The following evidence was presented during the Re-Trial[7]:

- **S**tatement of the Injured Party H.Sh., interviewed in the capacity of a witness before the Investigative Judge of the District Court in Kosovska Mitrovica on 9.10.1997(Court Binder 1, p. 35 ff);
- Statement of Witness B.X., given before the Investigative Judge of the District Court in Kosovska Mitrovica on 9.10.1997 (Court Binder 1, p. 25 ff);
- Statement of Witness V.A., given before the Investigative Judge of the District Court in Kosovska Mitrovica on 9.10.1997 (Court Binder 1, p. 41 ff);
- Statement of Witness F.O., given before the Investigative Judge of the District Court in Kosovska Mitrovica on 9.10.1997 (Court Binder 1, p. 31 ff);
- Statement of Witness F.S. given before the Court during initial Trial on 20.01.1998 – Minutes of Main Trial, Session 20.01.1998 (Court Binder 1, p. 57)

[6] Record of the Re-Trial, Minutes of Hearing of 23 August 2012, p. 8.
[7] In accordance with Article 333 Paragraph (2) LCP, with the agreement of the Parties, the witness statements and findings were considered read.

- Statement of expert witness Dr. T.G., given before the Court during initial Trial on 20.01.1998 – Minutes of Main Trial, Session 20.01.1998 (Court Binder 1, p. 57 ff)
- Minutes of (initial) Main Trial, 20.01.1998 and 21.01.1998 (Court Binder 1, p. 54 ff)
- Autopsy Report of the Forensic Medicine Institute of the Medical Faculty in Pristina, no. 127/97 dated 19.08.1997 (Court Binder 1, p. 95 ff)
- Minutes of the Crime Scene Investigation, compiled by the Investigative Judge of the District Court of Kosovska Mitrovica on 18.08.1997 (Court Binder 1, p.1 ff)
- Criminal Report, KU nr. 773/97 dated 25.8.1997 (Court Binder 1, p. 5 ff)

4.2. Summary of Evidence

15. The evidence presented can be categorized as follows:

a.) Statements of witnesses B.X., V.A. and F.O., all present at the crime scene on 18 August 1997: the witnesses gave their account of the events. Witness B.X. in particular was able to describe the criminal act in great detail.

b.) Statement of witness F.S.: this witness did not see the actual criminal offence being committed, so his testimony proved to be of limited relevance;

c.) Injured Party H.Sh., interviewed in the capacity of a witness: the Injured Party predominantly gave a statement on what may be the underlying motive for the criminal act, he was not present at the time of the commission but only arrived at the crime scene later.

d.) Statement of expert witness dr. T.G.: the expert witness commented on his findings, encompassed in the Autopsy Report dated 19.08.1997 and answered specific questions;

e.) Documentary evidence: Autopsy Report of the Forensic Medicine Institute of the Medical Faculty in Pristina, no. 127/97 dated 19.08.1997 and Minutes of the Crime Scene Investigation, compiled by the Investigative Judge of the District Court of Kosovska Mitrovica on 18 August 1997.

4.3. Analysis of Evidence and Conclusions of the Panel as to the death of B… Sh.

16. The Indictment alleges that the Accused on 18 August 1997, at around 20:20 hrs, in Save Kovacevica Street, village of Shipol, Municipality of Mitrovicë/Mitrovica deprived B. Sh. of his life due to prior feuds between the children of the two families. The Accused, it is stipulated, on the said day drove his vehicle onto the pavement and intentionally hit B. Sh. from behind, continued driving for another 10-15 meters and stopped only after the victim had fallen on the ground and the Accused tried to run over his legs. Thereupon the Accused stepped out of the vehicle and approached B. Sh. , stabbed him with a knife twice in the chest area, once in the area of the right upper arm and once in the back inflicting multiple injuries, slashes in the neck area, chest area and three in the left arm area.

17. Firstly, the Panel notes that the Accused confessed to the charge as alleged in the Indictment. However, as stipulated above, the confession does not absolve the Panel to evaluate and analyse all available evidence in order to determine whether the latter corroborates the Accused's confession.

18. The most detailed account of the critical event was provided by witness B.X.. The latter was on the critical day present on the Save Kovacevica Street in Shipol where the criminal offence happened. Witness B.X. was conversing with a street seller when he saw a white-coloured vehicle of Zastava make rapidly move from the asphalt to the clay part of the road and in that moment he saw his neighbour B. Sh. on top of the engine cover of that vehicle. The witness stated that the vehicle carried B. for about 15 meters, whereafter B. fell off and landed in front of the wheels of the vehicle. The vehicle ran over him while he remained on the ground under the vehicle. The witness further stated that at that point several persons in the vicinity ran to help B. to get him out from under the vehicle. They also urged the driver to move the vehicle, but the driver kept sitting in the vehicle. Several of them then lifted the car so that B. could get out. The witness was on the right side of the vehicle, the driver being seated on the left. The

witness noticed that the driver then stepped out of the vehicle and that all persons on the left side of the vehicle ran away so he did the same. He ran about 15-20 metres away. When he looked back he saw the driver bent over B. punching him. The witness could not see whether the driver was holding anything in his hand. He also could not precisely state how many times he saw the driver 'punch' the victim. The driver, according to this witness' statement, then got into his car and quickly drove away in the direction of Skenderaj/Srbica. After he had left, the witness and others approached B.. The witness testified that he saw the victim's body all covered in blood and injuries. The witness also noticed a long slash under the victim's chin in the area of the throat. The witness further stated that B. was alive when he and others pulled him from under the vehicle, but that he was not showing signs of life when they returned to him for the second time. The witness recognized the driver as S.. He knew him 'by sight' but did not know him 'personally'.

19. B.X.'s account of events is corroborated by two other witnesses, also present at the scene, namely V.A.and F.O..

20. Witness V.A. was in front of his house on Save Kovacevica Street. He saw his neighbour B. Sh. with his grandchild Be. coming from the Mitrovica/ë direction; Be. walking in front of him a few metres away. The two of them were on the side road when a car, Zastava make, white in colour, came behind them and hit B. . B. was on the hood of the car and the driver continued carrying him some 10 more metres. The witness stated that he saw B. falling under the car and the driver running over him 3-4 times. Little Be. in the meantime started screaming and crying. A crowd of people surrounded the vehicle and the witness saw them trying to lift the vehicle, a couple of them taking B. from underneath the wheels. The witness did not go any closer as he was scared. He also could not see the driver nor could he see whether the driver stepped out of the vehicle or not. He only saw people running away from the scene and the driver soon thereafter heading in his white vehicle towards Skenderaj/Srbica direction.

21. F.O. was standing in front of a shop in Save Kovacevica street when about 300m away he noticed a brawl and heard a person say "Let's get him out from under the car". He then went closer to the car and stopped when he saw that everybody from the crowd was running away.

22. The Panel finds that these witness statements accurately reflect the course of events on the critical day. The witness statements correspond in all material facts, all witnesses described the incident in the same sequence of events and there are no discrepancies between them. The witnesses were present at the scene that evening and they gave their statements soon after the event, namely on 9 October 1997. Further, the witnesses reiterated their testimonies also before the Court in the initial trial as evidenced by the Minutes of the Main Trial of 20 January 1998.[8]

23. The statement of witness B.X. is the most detailed due to the fact that he was the closest of the three to the victim and that he was one of the persons trying to help the victim, whereas witnesses V.A. and F.O. observed from several metres away.

24. Witnesses B.X. and V.A. both unequivocally confirmed that the vehicle of Zastava make hit the victim from behind and for some 10 metres carried the victim on the hood of the engine, before the victim fell on the ground. Both of them also witnessed that a number of persons were trying to help B. Sh., to lift the car and get him from underneath the car. Witnesses V.A., B.X. and F.O. all saw persons gathered running away; witness B.X. indicating this happened when the driver stepped out of the car. The witness did not see whether the driver had anything in his hand, but the reaction of the persons indicates that they were suddenly afraid of the driver and immediately dispersed. The Panel notes that the driver must have carried a weapon, namely a knife or similar tool with a blade; this stemming from the injuries inflicted on the victim.

25. The Panel does note that no weapon was ever recovered in the case; however the Autopsy Report and the testimony of expert witness dr. T.G. show that the victim was

[8] Main Trial Minutes held on 20.01.1998, C 26/97, Court Binder 1, p. 54 ff.

stabbed multiple times. Witness B.X. stated that he saw the Accused 'punching' the victim with his fist multiple times. The witness did not see if the Accused had anything in his hand. However, the Panel considers it proven that the Accused indeed had a weapon – likely a knife and in any case a tool with a blade – with which he stabbed the victim. This is corroborated by witness B.X. who, after seeing the Accused 'punching' the victim and then leaving the crime scene, again approached the victim and saw that B. had injuries all over his body, including a long slash under his chin in the area of the throat.

26. The Autopsy Report compiled by dr. T.G. found that the death of B. Sh. was a violent one, resulting from internal (slower) and external (faster) bleedings caused by lacerations of vitally important organs (cardiac muscle, liver, kidney, lungs) and blood vessels (brachial artery of the right arm). The lacerations, as stated in the Autopsy Report, were inflicted by a spike and a blade of a strongly swung mechanical tool. That the victim had been stabbed is also corroborated by the Minutes of the Crime Scene Examination, where the Investigative Judge conducting the examination observed stabbing wounds on the victim.[9]

27. Witnesses B.X. and V.A. also stated that after the victim fell on the ground the driver ran over the victim. The Panel accepts that this was indeed what both witnesses saw, however the Autopsy Report did not reveal any injuries that could be attributed to a vehicle passing over the body of the victim. Expert witness dr. T.G. unequivocally excluded such possibility, referring to lack of any fractures or damage to deeper layers like muscles and others.[10] However, given the identical testimony of the eye witnesses, the Accused clearly did move the car back and forth even when the victim was on the floor. The Panel observes that the victim however seemed to be positioned between the wheels under the car, therefore preventing the wheels to run across his body.

28. With regard to the perpetrator, the Panel reiterates that witness B.X. recognized him as S.. He indicated he knew him 'by sight', but not 'personally'. This is to be interpreted

[9] Minutes of the Crime Scene Examination , Court Binder 1, p. 2.
[10] Autopsy Report, Court Binder 1, p. 58.

so that the witness knew who the person was, but they have never been formally introduced nor had other dealings with each other.

29. The vehicle of the perpetrator has been described by the witnesses as a white car of Zastava make. At the crime scene, only several hours after the incident, during the Crime Scene Examination performed by the Investigative Judge, a registration plate of white colour with the marking KM 153-47 was recovered.[11]

30. On 20 August 1997 a white Zastava 101 vehicle was found with registration number KM 153-47 and a missing licence plate in the front.[12] The Panel is satisfied this is the vehicle which the Accused used on 18 August 1997 to run B. Sh. off the road. The Criminal Report filed on 25 August 1997 stipulates that the vehicle had dents on the front part of the engine cover. Inside the vehicle, the investigators found the Decision on the Use of Annual Leave issued on 18.06.1997 by the Employment Service of Kosovska Mitrovica for the Employee S.H.. The latter has also been identified as the owner of the vehicle.

31. With regard to the motive of the Accused to kill B. Sh., the Panel refers to the statement of the Injured Party questioned in the capacity of a witness on 9 October 1997. The Injured Party referred to previous conflicts between the families of the Accused and the victim, outlining that there have been recurring quarrels between the children of both families and other incidents involving the Accused have taken place prior to 18 August 1997. The Panel reiterates that establishing a motive for the criminal offence is not an element of the crime the Accused is charged with. However, the panel does note that the conflicts between the families were likely the underlying cause that led to the actions of the Accused.

32. Based on the analysis of the evidence presented and taking note of the confession of the Accused, the Panel is satisfied that the Accused had committed the criminal offence as stipulated in the Indictment. The Accused hit B. Sh. with his car on 18

[11] Minutes of the Crime Scene Examination , Court Binder 1, p. 2.
[12] See photographs in the case-file, Court Binder 1, p. 115 ff.

August 1997, then tried to run over him when he was on the ground and eventually stabbed him multiple times. The lacerations caused extensive bleeding that resulted in B. Sh.'s death.

5. LEGAL QUALIFICATION OF THE CRIMINAL OFFENCE

5.1. Determination of the law most favourable for the accused

33. The criminal offence will, as a general rule, be qualified (and adjudicated) pursuant to the law in effect at the time when the criminal offence was committed. However, if the law is modified before the final decision is rendered, the law considered most favourable for the accused will apply. When determining the most favourable law, the Court is called to consider not only the criminal law in force at the time the offence was committed and the one in force at the time the proceedings are conducted but also any and all criminal laws that have been in force in-between, namely after the criminal act but whose effect had ceased before rendering the final decision. The application of law most favourable for the Accused is a well-established principle of criminal law, regulated also in Article 2 of the Criminal Code of Kosovo.

34. On the day when the criminal offence was committed – 18 August 1997 - the applicable criminal law in Kosovo was the Criminal Code of the Republic of Serbia (CCRS) in conjunction with the Criminal Code of Socialist Federal Republic of Yugoslavia (CCY). However, following the commission of the criminal offence, the criminal law of the territory has been subject to several changes.

35. On 12 December 1999 the Special Representative of the UN Secretary-General, pursuant to the authority given to him under UN SC Resolution 1244 (1999) passed Regulation no. 1999/24 on the applicable law in Kosovo with retroactive effect since 10 June 1999. The Regulation in Article 1.1 determined the applicable law in Kosovo as the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and the law in force in Kosovo on 22 March

1989. The Regulation also abolished the death penalty (Article 1.5.). On 27 October 2000 UNMIK passed an amendment to the said Regulation, namely Regulation 2000/59. Article 1.6. of the latter stipulated that for each offence punishable by 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. This provision however applied only with regard to crimes committed *after* the Regulation had entered into force (i.e. after 27 October 2000). On 6 July 2003 UNMIK passed Regulation no. 2003/25 – Provisional Criminal Code of Kosovo (now referred to as the Criminal Code of Kosovo), which entered into force on 6 April 2004 and is still in force today.

36. Accordingly, the Panel in this criminal proceeding had to determine which of the following criminal laws is the most favourable for the Accused:

- Criminal Code of Republic of Serbia in conjunction with the Criminal Code of Socialist Federal Republic of Yugoslavia (applicable criminal law at the time the offence was committed and until 10 June 1999) *or*
- Criminal Law of the Socialist Autonomous Province of Kosovo in conjunction with the Criminal Code of Socialist Federal Republic of Yugoslavia, as made applicable by UNMIK Regulation 1999/24 (applicable criminal law from 10 June 1999 until 27 October 2000) *or*
- Criminal Law of the Socialist Autonomous Province of Kosovo in conjunction with the Criminal Code of Socialist Federal Republic of Yugoslavia, as made applicable by UNMIK Regulation 1999/24 and amended with UNMIK Regulation 2000/59 (applicable criminal law from 27 October 2000 until 6 April 2004) *or*
- UNMIK Regulation no. 2003/25 - Provisional Criminal Code of Kosovo (applicable criminal law after 6 April 2004 – present).

37. In establishing which law constitutes the most favourable law for the Accused, the Panel was guided by two principles. First, the assessment had to be made *in concreto* as opposed to *in abstracto*, meaning that the Panel had to compare the provisions that it will

actually rely on in the circumstances of the respective case.[13] Further, the Court had to determine which law *as a whole* is more favourable for the Accused. The Court namely cannot apply provisions of different criminal codes interchangeably, but only one law in its entirety.

38. In the respective proceeding, the Panel at the outset notes that the elements of the criminal offence itself are essentially the same in all three laws under consideration, although the wording may differ. The CCRS and CLK contain identical definitions, using terms »brutal or insidious manner«, whereas the CCK uses the terms »ruthlessly and violently«.[14] Further, also the provisions of the general part on criminal responsibility remain identical in all Codes considered. The main issue upon which the most favourable law was to be determined was therefore the prescribed punishment for the charged criminal offence.

39. The CCRS criminalized the respective criminal offence as a qualified form of *Murder* in Article 47 Paragraph (2) Subparagraph 1), prescribing the punishment of at least ten years or the death penalty. The CCY in Article 38 Paragraph (1) regulated the general minimum and maximum imprisonment imposed. The general maximum imprisonment was set to 15 years. Paragraph 2 of the same provision further stipulated that the Court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for death penalty. Pursuant to the law valid in Kosovo at the time the offence was committed, the Accused could therefore be sentenced to any term of imprisonment between 10 years and 15 years *or* to 20 years of imprisonment *or* the death penalty could be pronounced.

40. The respective criminal act in the Criminal Code of Socialist Autonomous Province of Kosovo as made applicable by UNMIK Regulation 1999/24 was criminalized in Article 30 Paragraph (2) Subparagraph 1) in the same terms as in CCRS, also carrying the punishment of at least 10 years or the death penalty. Pursuant to Article 2 CLK the

[13] In other words, whilst one law may generally be considered more lenient than another, this may not necessarily be the case when assessing the law in light of the particular criminal offence and/or Accused.
[14] Article 47 Paragraph 2 Item 1 CCS and Article 30 paragraph 2 Item 1 CLK: Article 147 Paragraph 1 Item 5 CCK

criminal law applied towards anyone who committed a criminal act, as stipulated by the law, on the territory of Kosovo. Again, the federal law – the CCY - prescribed the maximum punishment, i.e. 15 years of imprisonment. The UNMIK Regulation 1999/24, however, when making the CLK applicable (the law in force on 22 March 1989), abolished the death penalty. The abolishment of death penalty resulted in (just) the general maximum being applied, namely the applicable punishment for *Murder* pursuant to Article 30 Paragraph (2) Subparagraph 1) being any term of imprisonment between 10 years (special minimum) and 15 years (general maximum).

41. Until UNMIK Regulation no. 2000/25 entered into force on 27 October 2000, death penalty had not been replaced with another punishment but simply abolished. Following the mentioned Regulation, however, the death penalty had been replaced with the sentence of imprisonment of up to 40 years. However, this provision only applied to criminal acts committed *after* 27 October 2000 pursuant to the explicit final provision of the said Regulation.

42. The Criminal Code of Kosovo, current law in force, criminalizes the respective criminal offence as *Aggravated Murder* in Article 147 Paragraph (1) Subparagraph 5). The punishment prescribed is at least 10 years or long-term imprisonment. The general maximum prescribed by the CCK is 20 years (Article 38 CCK) and the long-term imprisonment is defined as the imprisonment for a term of 21 to 40 years (Article 37 CCK). Accordingly, should the Accused be tried pursuant to this law and found guilty, the sentence imposed on him could be any term of imprisonment between 10 and 20 years *or* between 21 and 40 years.

43. The minimum punishment prescribed in all laws for the respective criminal offence therefore amounts to at least 10 years of imprisonment while the maximum punishment varies. The law that prescribes the most lenient maximum punishment is the one most favourable for the accused. As the analysis above shows, the Criminal Law of the Autonomous Province of Kosovo read in conjunction with the CCY, as made applicable by the UNMIK Regulation 1999/24, prescribes the lowest maximum punishment.

Pursuant to this law, the maximum term to which the Accused could be sentenced if found guilty is between 10 and 15 years of imprisonment. Accordingly, pursuant to Article 2 CCK,[15] the Panel found that the Criminal Law of the Autonomous Province of Kosovo read in conjunction with the CCY, as made applicable by the UNMIK Regulation 1999/24 is the applicable law in the respective case.

5.2. Legal Qualification of the Criminal Act

44. The criminal offence of *Murder* is criminalized in Article 30 Paragraph 1 CLK, whereas Article 30 Paragraph (2) Subparagraph 1) entails the definition of a qualified form of *Murder*, namely that committed in a brutal or insidious manner.

45. The Panel found that the way in which the Accused deprived B. Sh. of his life is to be qualified as brutal *and* insidious. The Accused namely firstly hit the victim from the back with his car while the victim was walking next to the street with his grandchild. The victim could not anticipate this sudden violent act of the Accused. Further, the Accused continued driving with the victim still on the hood. When the victim fell from the car onto the ground, the Accused tried to run him over with his car. Two witnesses saw the vehicle moving back and forth while the victim lay on the ground, thus the Accused was clearly trying to run over the victim since he fully realized the victim was on the ground. Moreover, when people on the street gathered and helped the victim from underneath the vehicle, the Accused did not stop. He exited the vehicle and with a knife or other tool with a blade inflicted several stab wounds upon B. Sh., which eventually resulted in his death. The use of various modes to kill Sh. – hitting with the car, trying to run over him while on ground and stabbing him – in the view of the Panel amount to a brutal death. The victim was conscious when the Accused approached him with the knife and stabbed him several times. Also the fact that the Accused inflicted lacerations even to the victim's throat shows the brutality of the manner of killing.

[15] The same principle is also included in the CCY under Article 4.

46. The Panel therefore found that the Accused by depriving B. Sh. of his life in the manner charged, committed the criminal offence of *Murder* pursuant to Article 30 Paragraph (1) and (2) Subparagraph 1) CLK as made applicable by the UNMIK Regulation 1999/24.

6. CRIMINAL LIABILITY OF THE ACCUSED

47. Pursuant to Article 11 Paragraph (1) CCY an offender is considered criminally liable if he is responsible and if he has committed a criminal act with premeditation or by negligence. Article 12 CCY deals with situations when responsibility may be excluded, whereas Article 13 CCY defines premeditation.[16]

48. The Panel is satisfied that the Accused is responsible for the criminal offence and that he committed the criminal act with premeditation (direct intent). The Accused was fully capable of understanding the significance of his act and was in complete control of his actions. There is nothing in the case-file that would point to a different conclusion.

49. As for acting with direct intent, this conclusion amongst other stems from the manner in which the Accused committed the criminal offence. The Accused namely first hit the victim with his car and tried to run over him with his car. When persons gathered to help the victim, the Accused remained in the car and thereafter stepped out with a knife or other blade and stabbed the victim several times. The Accused therefore clearly intended to deprive B. Sh. of his life and stopped only when this objective was completed. The Accused was clearly aware of his actions and realized that hitting a person with a car and in particular inflicting multiple stab wounds to critical areas of his body will result in his death. Before stepping out of the car, the Accused had some moments to consider his further actions. That he chose to step out and stab the victim is further evidence of the intended nature of the offence. At that point the victim was alive and was being helped but the Accused was determined to proceed with his plan to

[16] Premeditation is defined in the following terms: "A criminal act is premeditated 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" (Article 13 CCY)

deprive him of his life. Further, the fact that the Accused had with him a knife or other tool with a blade with which he inflicted lethal injuries upon B. Sh. is a further indication that he acted with direct intent.

50. Accordingly, the Panel found the Accused criminally responsible and in accordance with Article 351 LCP pronounced the Accused guilty of *Murder* pursuant to Article 30 Paragraph (2) Subparagraph 1) of the CLK as made applicable by UNMIK Regulation 1999/24.

7. SENTENCING

51. In determining the suitable punishment, the Court must bear in mind both the general purpose of the punishment – i.e. to suppress socially dangerous activities by deterring others from committing the same offences, and the specific purpose - i.e. to prevent the specific offender from re-offending. Two other sentencing objectives, commonly referenced by criminological and penal experts, are retribution and rehabilitation. The Panel took all these objectives into account when determining the punishment in the respective case.[17]

52. For the criminal offence of which the Accused has been found guilty, the CLK in conjunction with CCY, as made applicable by UNMIK Regulation 1999/24, prescribed the punishment of imprisonment of at least 10 years and maximum of 15 years (see analysis above).

53. During the initial trial, the Accused was sentenced to 14 years of imprisonment.

54. Pursuant to Article 409 Paragraph (4) LCP read in conjunction with Article 378 LCP, since the reopening of proceedings (Re-Trial) was ordered on behalf of the Accused, the (new) verdict cannot be rendered to his detriment in view of the legal assessment or penal sanctions.

[17] In similar terms the purpose of punishment is also outlined in Article 33 LCP.

55. Pursuant to Article 409 Paragraph (4) LCP and Article 41 CCY the Panel sentenced the Accused to 13 (thirteen) years of imprisonment. In deciding upon the sentence the Panel considered the following mitigating and aggravating circumstances.

56. As the first mitigating circumstance the Panel considered the fact that the Accused confessed to committing the criminal offence and expressed his remorse in open court, in particular addressing also the Injured Party. Secondly, the Panel also took into consideration (as a mitigating circumstance) that over 15 years had passed since the criminal offence was committed. The Panel is mindful that much of the delay in rendering the verdict is to be attributed to the Accused since he absconded after he committed the offence, nonetheless 15 years is a very long period and it must be taken into consideration as a mitigating circumstance.

57. As for the aggravating circumstances, the Panel took into account the following:

(i) the persistency of the Accused to commit the criminal act – namely the Accused was determined to deprive B. Sh. of his life and was not deterred even by the fact that there were many persons present and that the latter tried to help the victim when the Accused hit him and injured him with his car;

(ii) the fact that the Accused committed the criminal act in the presence of the victim's grandchild, who at the time was only 7 years old and was himself endangered by the act;

(iii) the Accused's conduct after the commission of the act, namely the fact that the Accused fled the crime scene and the jurisdiction and was only apprehended ten years later, in 2007;

(iv) the motive from which the criminal offence was committed, namely the fact that the Accused took justice into his own hands in reacting to the quarrels between the children of the two families.

58. The Panel at this point also remarks that the question of a previous criminal record of the Accused had been raised during the Re-Trial, primarily on the basis of information on

past convictions, included in the initial Judgment dated 21 January 1998. However, the case file does not contain any documents that would enable the Panel to reach a conclusive answer. Therefore the Panel considered that the Accused does not have prior criminal convictions.

59. Considering that the aggravating circumstances outweigh the mitigating ones and considering all purposes of punishment the Panel determined that a sentence of 13 years imprisonment is the appropriate punishment for the criminal offence committed.

60. Pursuant to Article 50 Paragraph (1) CCY the Panel accredited the time thus far spent in custody to the sentence to be served by the Accused, namely: the time spent in detention on remand between 05.11.2007 and 23.11.2010, the time spent in execution of the punishment in case K. 26/1997 between 05.04.2011 and 08.09.2011, and the time spent in detention on remand since 09.09.2011.

8. COSTS

61. Since the Accused was found guilty, the Panel ordered him to pay a lump sum of 200 (two hundred) Euros to cover part of the costs of criminal proceedings pursuant to Article 98 Paragraph (1) LCP in connection with Article 95 paragraph (2) Item 6 of the LCP. The Accused was ordered to make the payment no later than within 30 days after the judgment becomes final. Due to the poor economic status of the Accused the Panel relieved him from the duty to reimburse the remaining part of the costs of the criminal proceedings according to Article 98 paragraph (4) of the LCP and Article 95 Paragraph (5) of the LCP.

9. COMPENSATION CLAIM

62. At the beginning of the Re-Trial the Injured party was advised of his right to file a motion to realize a compensation claim within the respective criminal proceeding pursuant to Article 313 Paragraph (2) LCP. The Injured party did not file any such claim

and indeed expressly declared he does not seek compensation. Therefore, in the absence of such a claim, no pronouncement was made in the verdict. Nonetheless, the Injured Party is reminded that he is entitled to seek compensation according to the provisions of civil litigation.

Prepared in English, an authorized language.

Presiding Judge

_____

Hajnalka Veronika Karpati
EULEX Judge

Recording Officer

_____

Beti Hohler
EULEX Legal Officer

LEGAL REMEDY

The Parties may file an Appeal against this verdict to the Supreme Court of Kosovo through the District Court of Mitrovicë/Mitrovica within fifteen days from the day of being served with a certified copy of the judgment. (Article 359 Paragraph (1) of the LCP.)