SUPREME COURT OF KOSOVO
Api-Kži no. 2/2012
24 September 2012

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of Judge Tore Thomassen as Presiding Judge, and Judges Elka Filcheva-Ermenkova, Nesrin Lushta, Cornelie Peeck and Avdi Dinaj as members of the panel, in the presence of Chiara Rojek, Legal Officer acting in capacity of recording clerk,

In the criminal proceeding against the Defendants

B.H., known as , born on , of Kosovo citizenship, last residence in the village of , father's name , mother's name , , in detention on remand since 21 January 2008,
And **S.Q.**, father's name , mother's maiden name , born on , of Kosovo citizenship, last residence in the village of , in detention on remand since 21 January 2008,

Convicted in first instance by Judgment P no. 459/2007 of the District Court of Prishtinë/Priština dated 7 February 2011 for the criminal offences of Aggravated Murder in co-perpetration pursuant to Article 147 items 3 and 11 in conjunction with Article 23 of the Criminal Code of Kosovo (CCK), Attempted Aggravated Murder in co-perpetration pursuant to Article 147 item 3 and 11 in conjunction with Articles 20 and 23 of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the CCK and sentenced to aggregated punishments of thirty-three (33) years of long-term imprisonment each,
Confirmed in second instance by Judgment Ap-Kz no. 264/2011 of the Supreme Court of Kosovo dated 12 October 2011,

And **N.C.**, father's name , mother's maiden name , born on , of Kosovo citizenship, residence in the village of ,
Acquitted in first instance by the same Judgment of the criminal offences of Aggravated Murder in co-perpetration pursuant to Article 147 items 3, 8 and 9 in conjunction with Article 23 of the CCK and Attempted Aggravated Murder in co-perpetration pursuant to Article 147 item 3 in conjunction with Articles 20 and 23 of the CCK,
Confirmed in second instance by the same Judgment of the Supreme Court of Kosovo dated 12 October 2011,

Deciding upon the Appeals filed on 1 December 2011 by Defence Counsel Tahir Rrecaj on behalf of Defendant B.H., on 7 December 2011 by Defence Counsel Avni Ibrahimi on behalf of Defendant S.Q. and on 7 December 2011 by the Special Prosecutor of the Republic of Kosovo (SPRK) against the Judgment Ap-Kz no. 264/2011 of the Supreme Court of Kosovo dated 12 October 2011, and considering the Replies to the Appeals filed on 28 December 2011 by Defence Counsel Azem Vllasi on behalf of N.C. and on 20 February 2012 by Defence Counsel Mahmut Halimi on behalf of Defendant B.H. and the Opinion and Motion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 16 March 2012,

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After having held two public sessions on 18 and 21 September 2012 in the presence of Defendant B.H. and his Defence Counsel Tahir Rrecaj, Defendant S.Q. and his Defence Counsel Avni Ibrahimi, Defence Counsel Azem Vllasi representing N.C., Prosecutor Jusuf Mezini representing the Office of the State Prosecutor of Kosovo (OSPK) and the Injured parties M.B., H.B., I.B., B.B and S.B., and having deliberated and voted on 24 September 2012,
Pursuant to Articles 420 and following of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

1. The Appeal filed by the SPRK against the Judgment Ap-Kz no. 264/2011 of the Supreme Court of Kosovo dated 12 October 2011 related to the acquittal of N.C. is **DISMISSED** as impermissible.
2. The Appeal filed by the SPRK against the Judgment Ap-Kz no. 264/2011 of the Supreme Court of Kosovo dated 12 October 2011 related to the conviction of Defendants B.H. and S.Q. is **REJECTED** as ungrounded.
3. The Appeals filed on behalf of Defendant B.H. and on behalf of Defendant S.Q. against the Judgment Ap-Kz no. 264/2011 of the Supreme Court of Kosovo dated 12 October 2011, are **REJECTED** as ungrounded.
4. The Judgment Ap-Kz no. 264/2011 of the Supreme Court of Kosovo dated 12 October 2011 and the Judgment P no. 459/2009 of the District Court of Prishtinë/Priština dated 7 February 2011 related to Defendants B.H. and S.Q. are hereby **AFFIRMED**.

REASONING

I. Procedural background

1. On 02 November 2009 the Special Prosecutor filed the Indictment PPS no. 41/09 with the District Court of Prishtinë/Priština charging the Defendants B.H., S.Q., N.C. (and others defendants) with one count of Aggravated Murder contrary to Article 147 Paragraph 1 items 3, 8 and 9 read with Article 23 of the CCK, two counts of Aggravated Murder contrary to Article 147 Paragraph 1 item 3 read with Article 23 of the CCK, two counts of Attempted Aggravated Murder contrary to Article 147 Paragraph 1 item 3 read with Articles 20 and 23 of the CCK. B.H. and S.Q. were in addition charged with the offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of the CCK.

2. On 19 January 2010, the Indictment was confirmed by Ruling KA no. 414/2009 for the charges of Aggravated Murder of N.B., Aggravated Murder of U.B. and S.B. against B.H., S.Q. and N.C., and of Unauthorized Possession, Ownership, Control and Use of Weapons against B.H. and S.Q. The Indictment was dismissed in its remaining parts.

3. The Main Trial commenced in June 2010 until February 2011. On 07 February 2011, the District Court of Prishtinë/Priština found B.H. and S.Q. guilty of the criminal offences of Aggravated Murder in co-perpetration contrary to Article 147 Paragraph 1 items 3 and 11

read in conjunction with Article 23 of the CCK (count a),[1] Attempted Aggravated Murder in co-perpetration contrary to Article 147 Paragraph 1 items 3 and 11 read in conjunction with Articles 20 and 23 of the CCK (count b)[2] and Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 Paragraph 2 of CCK (count c).

4. The Defendants were sentenced to thirty-three (33) years of long-term imprisonment under count (a), ten (10) years of imprisonment under count (b) and two (2) years of imprisonment under count (c).[3] The District Court imposed an aggregated punishment of thirty-three (33)-year long-term imprisonment against the Defendants each. They were also condemned to pay cumulatively and jointly the sum of 25.000 Euros to each of the Injured Parties. N.C. was acquitted pursuant to Article 390 item 3 of the KCCP because it was not proved that he committed the criminal offences he had been charged with.[4]

5. In May and June 2011, the Defence Counsels of B.H., the Defence Counsel Avni Ibrahimi of S.Q. and the Special Prosecutor filed four appeals against the First Instance Judgment P no. 459/2009. On 12 October 2011, the Supreme Court of Kosovo acting as second instance court, issued the Judgment Ap-Kz no. 264/2011 by which all the appeals were rejected as ungrounded and the First Instance Judgment affirmed.[5]

6. Against the Second Instance Judgment, Defence Counsel Tahir Rrecaj filed an appeal on behalf of B.H. on 1 December 2011, and Defence Counsel Avni Ibrahimi filed an appeal

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[1] "Because between 00.10-00.15 of the night between 27 and 28 September 2007 they murdered N.B, U.B. and S.B. in a deceitful manner at the Lepenc Bridge (located on the road that from the Pristina-Skopje Highway leads to the village of Soponica). In particular the defendants ambushed the car Golf 2 with license plates 469KS117 on which N.B, U.B. and S.B. (together with B.B. and S.B.) were travelling towards the village of Dubrave. When the car reached the Lepenc Bridge, B.H. and S.Q. (who were waiting on the right side of the road) opened fire against the car with two AK 47 automatic rifles. N.B. was hit by many bullets on the right part of the body and one bullet hot him on the right part of the head, penetrating the brain and causing his death. U.B. died of damages caused to his heart, lungs and liver by the bullets and S.B. died as a result of injuries caused by the bullets to the right part of his head."

[2] "Because between 00.10-00.15 of the night between 27 and 28 September 2007 they attempted to murder B.B. and S.B. in a deceitful manner by the Lepenc Bridge (located on the road that from the Pristina-Skopje Highway leads to the village of Soponica). In particular the defendants ambushed the car Golf 2 with license plates 469KS117 on which B.B. and S.B. were traveling towards the village of Dubrave. When the car reached the Lepenc Bridge, B.H. and S.Q. (who were waiting on the right side of the road) opened fire against the car with two AK 47 automatic rifles. At least 40 shells of AK 47 cal. 7.62 were fired against the car used by the victims. B.B. was was hit by bullets at the head and at the right side of the abdomen, including the skin tissue, the cell tissue, the colon ascendens, which then perforated and whose content dispersed to the abdomen cavity and partially damaged the omentum majus. Despite the serious injuries sustained, B.B. survived. S.B. was directly exposed the raffles of bullets which caused the death and injuries of the other victims but remained miraculously unharmed."

[3] "Because in the circumstances described above sub count 1 and 2, they without authorization transported, were in possession of and used two automatic rifles model AK-47 Kalashnikov cal. 7.62, by which they committed the criminal offences described above sub a. and b."

[4] Another co-defendant was found guilty of having committed the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of CCK and sentenced to the payment of a fine.

[5] On 14 February 2012, the Supreme Court of Kosovo issued a Ruling Ap-Kz no. 264/2011 amending the typographical errors contained in the Judgment Ap-Kz no. 264/2011.

on behalf of S.Q. on 7 December 2011. The Special Prosecutor also filed an appeal on 7 December 2011. Defence Counsel Mahmut Halimi representing B.H. and Defence Counsel Azem Vllasi, together with N.C. filed a Reply to the Appeals on 28 December 2011. The OSPK filed an Opinion and Motion to the Appeals on 13 March 2012.

II. Findings of the Supreme Court of Kosovo

A. Competence of the Supreme Court of Kosovo

7. The Supreme Court of Kosovo is competent to decide on the Appeals pursuant to Articles 26 Paragraph 1 and 398 and following of the KCCP. The Supreme Court Panel has been constituted in accordance with the Law no. 03/L-53 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo and the Guidelines for Case Allocation for EULEX Judges in Criminal Cases at the Supreme Court of Kosovo. Public sessions were held on 18 and 21 September 2012. The Judgment was announced in open session on 24 September.

B. Admissibility of the Appeals and Replies and Motion to the Appeals

8. The latest Judgment Ap-Kz no. 264/2011 was announced on 12 October 2011. Defendant B.H. received it on 25 November 2011. Defence Counsel Tahir Rrecaj did not put a date on the delivery slip and filed an appeal on 1 December 2011. Defendant S.Q. received the Judgment on 25 November, and his lawyer, Avni Ibrahimi, on 30 November. The Appeal was filed on 7 December 2011. The Special Prosecutor signed the delivery slip on 24 November and filed an appeal on 7 December 2011. N.C. and Lawyer Azem Vllasi received the Appeals respectively on 24 and 28 December 2011 and filed a Reply on 28 December 2011. As for Lawyer Mahmut Halimi and Defendant B.H., they received the Appeal of the Special Prosecutor on 15 and 16 February 2012. Defence Counsel Mahmut Halimi filed a Reply on 20 February 2012.

9. The Supreme Court Panel finds that all the Appeals as well as the Replies to the Appeals are timely filed by an authorized person, thus admissible pursuant to Articles 398 Paragraph 1 and 408 of the KCCP.

C. Merits of the Appeals

10. The Special Prosecutor bases its appeal on substantial violations of the provisions of criminal procedure under Article 403 of the KCCP, a violation of the criminal law under Article 404 of the KCCP, and an erroneous and/or incomplete determination of the factual situation under Article 405 of the KCCP. He requests to the Supreme Court of Kosovo to annul both challenged Judgments and to return the case for re-trial.

11. The Defence for B.H. and S.Q. alleges that the First Instance Court and the Second Instance Court committed substantial violations of the provisions of criminal procedure, a violation of the criminal law, an erroneous and/or incomplete determination of the factual situation, and further contends the decision on criminal sanctions under Article 406 of the

KCCP. Lawyer Tahir Rrecaj proposes to the Supreme Court of Kosovo to annul the challenged judgments and to return the case for retrial. Defence Counsel Avni Ibrahimi requests to modify the Second Instance Judgment as to acquit S.Q., or to annul it and send back the case for retrial.

12. In his Reply to the Appeal filed by the Special Prosecutor, the Defence Counsel Mahmut Halimi of B.H. proposes to approve it, to annul both contested Judgments and to send back the case for re-trial. He puts forward that the determination of the factual situation was erroneous and that the Second Instance Court was compelled to consider the new evidence presented by the Prosecution. In their Reply, Lawyer Azem Vllasi and N.C. claim that the SPRK's Appeal is ungrounded as the Prosecutor alleges to submit new evidence. This evidence consists in the statements of B.H. and S.Q. and of their family relatives, which they allege to be inadmissible and unconvincing. They also submit that the Indictment PP no. 36/2011 dated 7 October 2011 against N.C., A.D. and A.D.2 for the same criminal acts was dismissed by Ruling KA no. 644/2011, and the criminal proceeding terminated.

13. The State Prosecutor, concurring with the Special Prosecutor's submissions, proposes to annul both impugned Judgments and to return the case for retrial. The State Prosecutor bases his motion on the following grounds: the enacting clause of the first instance judgment is incomprehensible and does not contain decisive facts regarding the nature of the convictions; it is also internally contradictory and it contains essential violations of the provisions of criminal procedure; the Second Instance Court failed to evaluate the arguments presented in the SPRK's appeal against the first instance judgment; and the Second Instance Court violated Article 409 Paragraph 4 of the KCCP by ignoring the new evidence submitted by the Special Prosecutor. The State Prosecutor also submits that it has been proven that N.C. committed the criminal offence for which he was charged.

C.1. The Appeal of the Special Prosecutor related to N.C.

14. The Supreme Court of Kosovo finds the Appeal filed by the Special Prosecutor related to the acquittal of N.C. impermissible pursuant to Article 422 read with Article 403 Paragraph 1 of the KCCP.

15. In his Appeal, the SPRK Prosecutor puts forward that the right of appeal against a second instance judgment is foreseen under Chapter XXXVII of the Code as an ordinary legal instrument. It is argued that a judgment by which some defendants are convicted to a long-term imprisonment and others are acquitted should be considered as a 'joint verdict'. Consequently, Article 430 Paragraph 1 of the KCCP allows the right to appeal also against the part on acquittal. Moreover, this provision does not specify that an appeal may only be filed in regard to the sentencing part. In their Reply, Lawyer Azem Vllasi and N.C. present that the Appeal filed by the Special Prosecutor is impermissible because an appeal against a second instance judgment can only be filed as far as it relates to a conviction. In his Opinion, the State prosecutor concurs with the Special Prosecutor's submission. He submits that as the first instance judgment is one and indivisible and two of the Defendants were sentenced to a long-term imprisonment, the Special Prosecutor is entitled to file an appeal against the entire judgment.

16. The Supreme Court Panel finds the Prosecution's allegation without merit. Article 430 Paragraph 1 sub-Paragraph 1 of the KCCP states *"an appeal against a judgment of a court of second instance may be filed with the Supreme Court of Kosovo in the following instances: 1) If a court of second instance has imposed a punishment of long-term imprisonment or has affirmed the judgment of a court of first instance by which such punishment was imposed [...]"*. The wording of this article leaves no room for misinterpretation. The right to appeal is prescribed against a judgment imposing of a sentence of long-term imprisonment. The intent of the law maker was to give the right to a convicted person to challenge a decision imposing a long-term punishment, in deviation of the general rule that a decision can be appealed only once. Another interpretation of this article would lead to a different treatment of those who are acquitted in a case involving a plurality of defendants, and those who are the only defendant in the case.

17. The law does not foresee a right for the prosecutor to challenge the decision of the second instance court when a defendant has been acquitted in two instances. In the case at hand, N.C. was acquitted by the first instance Judgment, subsequently affirmed in second instance. This part of the appeal is therefore declared inadmissible.

C.2. Substantial violations of the provisions of criminal procedure under Article 403 of the KCCP

That a substantial violation of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraphs 8 and 12 of the KCCP occurred

18. The Special Prosecutor alleges that the challenged Judgment contains violations of the provisions of criminal procedure under Article 403 Paragraph 1 sub-Paragraph 12 of the KCCP. He mentions that the enacting clause of the First Instance Judgment has not been drawn in compliance with Article 391 Paragraph 1 of the KCCP because it is incomprehensible as to the exact date of the event and the constitutive elements of the criminal offences. The Special Prosecutor alleges that both courts failed to provide any reasoning on the intent and the motive of the perpetrators even though they were clearly stated in the Indictment. In the Prosecutor's view, the Second Instance Court committed a violation of Article 403 Paragraph 1 sub-Paragraph 12 because the Prosecutor in accordance with Article 401 Paragraph 1 of the KCCP presented additional evidence[6] together with his Appeal, which was not considered by the Supreme Court Panel. The State Prosecutor supports the Special Prosecutor's allegations in this regard.

19. Defence Counsel Tahir Rrecaj challenges the First Instance Judgement because the enacting clause differs from count (a) to count (b), rendering it unclear and contradictory. As a consequence the Second Instance Court has incorrectly interpreted the provisions of Articles 396 Paragraph 4 and 391 Paragraph 1 of the KCCP. In the Defence's view, the First Instance Court failed to consider the intent and motive of the perpetrators as essential elements of the offence of Aggravated Murder. Article 147 Paragraph 1 sub-Paragraph 11 of the CCK clearly

[6] Statements of 11 witnesses and indictment PP no. 36/2011

requires the existence of intent and motive. The First Instance Court omitted to accurately assess the conflicting evidence and to provide clear findings on its evaluation. The Second Instance Court has not given any reasoning on the arguments mentioned in the appeals against the First Instance Judgment. Furthermore, the Defence contests the second instance's conclusions which endorse the findings of the First Instance Court in respect to the conviction of the Accused and the weight of the statements of witness R.T. given in another case (the bombing case). The Defence also alleges a violation of human rights standards[7] as both courts that adjudicated the bombing case (P no. 488/2008) and the triple murder case (P no. 459/2009) had preconceived idea on the cases and failed to abide with the principle of presumption of innocence.

20. Aside from these allegations, the Defence Counsel of S.Q. avers a violation under Article 403 Paragraph 1 sub-Paragraph 8 of the KCCP as the First Instance Judgment is based on inadmissible evidence, namely the statements of Witness R.T. In his Reply, Defence Counsel Mahmut Halimi of B.H. submits that the Supreme Court of Kosovo, acting as second instance court, failed to consider new evidence proposed by the defence and the prosecution.

21. The Supreme Court of Kosovo finds that the allegation that the Second Instance Court committed a violation of the provisions of criminal procedure with regard to the alleged new evidence is ungrounded.

22. The so called "new evidence" refers to a new version of the material facts given by both Defendants and supported by witnesses. These explanations were attached to the first appeal filed by the Prosecution on 30 May 2011. It consists in witness statements gathered in the case against N.C., A.D. and A.D.2 regarding the same incident that occurred on the night between the 27 and 28 September 2007.

23. It is noted that in the Judgment Ap-Kz no. 264/2011, when considering the evidence submitted, the Second Instance Court stated that:

> *"43. It at this point needs to be mentioned that neither the Defence nor the Prosecution has presented any new evidence... However, although upon motion of the Defence Counsel Av. Mehmut Halimi explicitly asked by the Presiding Judge in the appeal session, whether or not the Prosecutor would like to present new evidence to the Court, also the OSPK Prosecutor Juzuf Mezzini finally clearly denied. It is also worth mentioning in the context given that it was communicated to the Presiding Judge of the Supreme Court panel unofficially but after the appeal session that the defendant S.Q., who until now has defended himself completely in silence, together with defendant B.H. meanwhile (after them having been found guilty for the murders) have stated in front of the Prosecutor that it had been the acquitted defendant N.C. together with some of the witnesses, who had fired at the vehicle of the victims...*
> *44. Despite that even the Supreme Court of Kosovo is not gifted with clairvoyance abilities and therefore can not just assume what one of the parties of a trial may want to present, if this finally is not being done in fact, it deems almost superfluous to mention that in the case of alleged new evidence the re-opening of the procedure against B.H. and S.Q. pursuant to Articles 438 through*

[7] Article 3 Paragraph 1 of the CCK, Article 31 of the Constitution of the Republic of Kosovo, Article 6.2 of the ECHR and Article 14.2 of the International Covenant on Civil and Political Rights dated 16 December 1966 (ICCPR); reference to European Court of Human Rights (ECtHR), case Barbera, Messegue and Jabardo v. Spain, Application no. 10590/83, 6 December 1988

> *447 of the KCCP would have been the appropriate way to re-enter into court proceedings against other defendants, particularly those who already have been acquitted in the respective case. [...]"*[8]

24. The above formulation is somewhat unfortunate and may be misleading, in particular that the information was "*...communicated to the Presiding Judge of the Supreme Court panel unofficially but after the appeal session...*" If evidence was communicated unofficially to the Presiding Judge after the session, this may amount a violation of the provisions of criminal procedure. However, the formulation only relates to information that was already known to the parties during the Supreme Court session of 11 October 2011. This information was also commented upon by the State Prosecutor Jusuf Mezini during the appeal session and by the Defence Counsels of B.H..[9]

25. The next question relates to the allegation that the Second Instance Court significantly violated the provisions of criminal procedure by not considering this new information. It is clear from the above excerpts of the Supreme Court Judgment Ap-Kz no. 264/2011, and in spite of the inaccuracy mentioned above, that the Second Instance Court was aware of the new information and considered it,[10] although not in a thorough and explicit manner. The Second Instance Court has not substantially violated the provisions of criminal procedure as this Court in fact considered the 'new evidence'.

26. As to other allegations under Article 403 Paragraph 1 sub-Paragraphs 8 and 12 of the KCCP, the Supreme Court of Kosovo fully concurs with the Second Instance Court's reasoning and need not to reiterate the findings compiled in the Judgment Ap-Kz no. 264/2011 dated 12 October 2011.[11] With regard to the alleged omission of the First Instance Court to mention the intent and motive of the perpetrators, the Third Instance Court restates that the criminal law does not stipulate that the motive is a necessary requirement in the legal qualification of the criminal offence of Aggravated Murder.[12] The Supreme Court Panel emphasizes that motive is not the same as the required intent (*mens rea*) of the criminal act as stated in Article 15 of the CCK. The intent, either direct or eventual, relates to the knowledge and/or willingness of the perpetrator to commit the crime (*actus rea*). Different from this is the motive an individual may have to commit the crime. The Supreme Court Panel considers, in the same way as the Second Instance Court did, that the First Instance Court rightfully

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[8] Supreme Court of Kosovo, Ap-Kz No. 264/2011, Second Instance Judgment, 12 October 2011, pages 18-19, paras 43-44

[9] Supreme Court of Kosovo, Ap-Kz no. 264/2011, minutes of appeal session, 11 October 2011, page 6

[10] Supreme Court of Kosovo, Ap-Kz No. 264/2011, Second Instance Judgment, 12 October 2011, pages 18-19, para 43: "...that the defendant S.Q., who until now has defended himself completely in silence, together with defendant B.H. meanwhile (after them having been found guilty for the murders) have stated in front of the Prosecutor that it had been the acquitted defendant N.C. together with some of the witnesses, who had fired at the vehicle of the victims. [...]"

[11] Ibid, page 8, para 12: "*The Supreme Court of Kosovo finds that alleged weaknesses of the enacting clause of the challenged Judgment do not reach a level of severity that would justify annulling the Judgment because of substantial violation of the criminal procedure, as presumed by Article 403 paragraph 1 item 12 of the KCCP.*[...]"

[12] Ibid, page 9, para 14

concludes to the absence of proof on the alleged motives of the Defendants.[13] Finally, contrary to the Defence's submissions, this Panel holds that the enacting clause contains the minimum requirements under Article 396 of the KCCP read with Article 391 Paragraph 1 of the KCCP.

27. On this background the Supreme Court holds that no substantial violation of the provisions of criminal procedure was committed either by the First Instance Court or by the Second Instance Court.

That an erroneous and/or incomplete determination of the factual situation under Article 405 of the KCCP occurred

28. The Defence and the Prosecution allege that the First Instance Court had erroneously determined the factual situation. The State Prosecutor concurs with these submissions. The parties refer to the opening of an investigation for the same facts against other suspects, following the hearings of the Defendants B.H. and S.Q. and of several witnesses. The Prosecutor and the Defence Counsel of B.H. claim that the Second Instance Court failed to analyse the arguments presented at the appeal stage and to open a hearing to take new evidence. The Special Prosecutor provides a summary of this additional information and claims the witness statements to be reliable.[14] The Defence Counsel of B.H. contends the findings of the Second Instance Court that neither the Defence nor the Prosecutor has presented new evidence,[15] although the State Prosecutor, during the appeal session, submitted this evidence. He submits that the Second Instance Court mistakenly directed that the reopening of the proceeding against Defendants B.H. and S.Q. could be based on Articles 438 through 447 of the KCCP.

29. The parties also contend the assessment made by the First Instance Court of the evidence, notably the statements of Witness R.T. given to the Police and to the Prosecutor. In addition, Defence Counsel Tahir Rrecaj claims that both courts unilaterally assessed the witness statements given by this witness, and only attached weight to the pieces of evidence that favour the Prosecution. He presents a summary of R.T.'s statements and the discrepancies contained in those, and avers that the Second Instance Court has not given any reasoning on the Defence's arguments in this respect. Similarly, the First Instance Court has not properly evaluated the statements of X.T. as well as the timeline of the event and the weather conditions at the time of the criminal offence. Finally, he alleges that the First

[13] District Court of Prishtinë/Priština, P no. 459/2009, First Instance Judgment, 7 February 2011, page 30: "*The panel notes, anyway, that the absence of full proof on the motives of the crime is not of any obstacle to the affirmation of criminal responsibility against the defendants, because the remaining part of the evidentiary framework is solid and conclusive.*"

[14] On 25 May 2011, the SPRK issued the Ruling PPS no. 36/2011 on initiation of investigation against the Defendants N.C., A.D. and A.D.2 for the same facts and the same criminal charges for which B.H. and S.Q. were convicted to. An indictment was filed on 7 October 2011 following the gathering of evidence which consists in the statements of the co-Defendants B.H. and S.Q., and several witnesses, e.g. B.H., F.H., A.H., M.Q., A.H.

[15] See *inter alia* Supreme Court of Kosovo, Ap-Kz no. 264/2011, Second Instance Judgment, 12 October 2011, pages 18-19, paras 43-44

Instance Court reached erroneous findings of the factual description as no reconstruction of the crime scene was performed, and the identification of S.Q. was made in contravention with Article 255 of the KCCP and is not reliable. Besides, Defence Counsel Avni Ibrahimi alleges that there is no direct evidence that Defendant S.Q. was involved in the criminal offence and that the Second instance Court has failed to reply to the arguments presented by the Defence. In his Reply, Defence Counsel Azem Vllasi and N.C. oppose the admissibility and relevance of the alleged new evidence.

30. The Supreme Court of Kosovo finds without merit the allegations of the Defence relating to the wrongful assessment of the evidence by the District Court. This Panel is of the opinion that the First Instance Court thoroughly evaluated the evidence and its weight to reach rightful conclusions, and agrees with the Second Instance Court in this regard. As these submissions are a mere duplication of the ones presented during the first appeal proceeding, the undersigned Panel specifically refers to the second instance findings on this point.[16]

31. The undersigned Panel, nonetheless, would like to reply to the Defence's contention in regard to the rejection of the motion to carry out a reconstruction of the crime scene. The First Instance Court based its refusal on the grounds that "*[i]t must be repeated here that the requested reconstruction of crime scene cannot be fruitfully performed during the main trial, being it impossible to reproduce the same meteorological and light conditions of the critical night. On the other hand, the inspection of the crime scene is confirmed to be superfluous, in consideration of the huge amount of evidentiary documents present in the case file (photographs, aerial photographs, sketch maps), which was also submitted to the witnesses during their examinations and are therefore by far sufficient in order to shed light on the factual and topographical issues connected to the case.*"[17] The Supreme Court observes that on 3 August 2010, the Trial Panel ordered the Meteorological Institute of Kosovo to issue a report on the phase of the moon, the atmospheric conditions and the hours of moonrise and moonset between 27 and 28 September 2007 in the region of Kacanik. The First Instance Court also admitted documentary evidence relevant to this point, e.g. three aerial maps with metric scale attached and a sketch map,[18] and evaluated these pieces of evidence. The Supreme Court Panel holds that in the light of the above, a reconstruction of the crime scene with dissimilar meteorological conditions more than three years after the event would have been superfluous.

32. As to the allegation related to the identification of S.Q. by Witness R.T., the Supreme Court Panel notes, that during his hearing before the Prosecutor on 4 March 2009, the witness provided a description of a person called 'Shpend'[19]. He stated that after a month or so, in a coffee place in Ferizaj/Uroševac, he told B.B. that he saw S.Q., present in the coffee place

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[16] See *inter alia* Supreme Court of Kosovo, Ap-Kz no. 264/2011, Second Instance Judgment, 12 October 2011, page 12, paras 17-18

[17] See District court of Prishtinë/Priština, P no. 459/2009, First Instance Judgment, 7 February 2011, pages 6-7

[18] Ibid, pages 5-6

[19] See Record of the witness hearing in an investigation PNH no 623/07 dated 4 March 2009, page 2: he mentioned "one person was holding a long gun by the side of the asphalted road,..", "later I learnt that the person carrying the weapon was called S.Q., he had blond hair, his hair has shaved behind, and he was wearing something black and open from behind".

with a child, on that critical night. He was then shown pictures and clearly identified S.Q. as the person being on the bridge holding a long weapon on the night of the event.[20] In the Supreme Court's opinion, the identification was done in accordance with Article 255 of the CCK. The undersigned Panel does not see any issue if an identification made by a witness is mainly based on a subsequent recollection of the suspect's main features. Unlike the Defence sustains, the identification was done on the basis of Witness R.T.'s account, not of B.B.'s one, and in compliance with the rules of criminal procedure.

33. With respect to the new information, namely these statements of the co-Defendants and of several witnesses, part of these submissions, were already presented by the Special Prosecutor in his appeal dated 26 May 2011 as mentioned above. The content of the Appeal is the same that the one submitted at the second instance stage. The Special Prosecutor, through his appeal against the decision on conviction of B.H. and S.Q., seems to challenge the court findings in respect to N.C. in order to quash his acquittal.

34. As confirmed by the court records, the Presiding Judge gave the opportunity to the State Prosecutor to file a Motion for the opening of a hearing to take new evidence during the first appeal session in October 2011. The Prosecutor, whilst mentioning the on-going investigation in the same case, rejected the proposal to present new evidence.[21] The elements of evidence presented by the Prosecution and supported by the Defence in their appeals were already submitted during the first appeal session. The situation at hand does not therefore justify the annulment of the judgment of the Second Instance Court and the remittal of the case to the first instance.

35. The Supreme Court, moreover, observes that it is not unusual during criminal proceedings that new evidence is called upon to challenge the factual findings made by the First Instance Court, including new accounts of the event given by the Defendants. This is what happened in the case at hand as the Defendant B.H. after the first instance Judgment has changed his version - supported by alibi witnesses - of the decisive facts while the Defendant S.Q. has decided to explain himself instead of remaining silent as he did during the main trial.

36. This Court will consider more thoroughly the elements of evidence submitted by the Prosecutor in his appeal dated May 2011. The new statements seem to indicate that N.C. is the dominant figure behind the attack on the Lepenc Bridge on the night between the 27 and 28 September 2007 and participated as one of the two persons opening fire at the victims. Furthermore, the new statements appear to a substantial degree to be the results of

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[20] Ibid, page 3

[21] Supreme Court of Kosovo, Ap-Kz no. 264/2011, minutes of the appeal session, dated 11 October 2011, page 5: "*Presiding Judge: As I have said we will not be assessing any new evidence in this session. Mr. Prosecutor, are you planning to present new evidence? Prosecutor: No I do not have new evidence to present.*"; see also page 6: "*Prosecutor: I just wanted to mention some of the reasons. After the judgment was rendered the Special Prosecutor examined a number of witnesses in connection with this case and he issued a ruling on the initiation of investigations against N.C., A.D. and A.D.2. These investigations are still ongoing. Since this is in connection to the same murder and attempted murder the Special Prosecutor in his appeal proposed the joining of the two cases and that a main trial is held. Thus, I propose that the appeal of the prosecution be granted in its entirety and that the case be returned for re-trial. We support our written submissions. Thank you.*"

conversations between various witnesses and the co-Defendants that happened after the events. Most of the new witnesses introduced are either family members of B.H. and S.Q. or friends of theirs. The witness statements newly introduced give a different account of the events than the one the District Court Panel found established.

37. The new version of the events given by the Defendant B.H. was clearly available at the time of the main trial, however the Defendant then decided to give another account. The version now stated by the Defendant S.Q. was also available to him during the main trial, but he decided to remain silent. None of the Defendants decided to give this new account of the facts during the main trial although available to both of them at the time. Instead, the Defendant B.H. called on other witnesses to support his first version, and shall therefore bear the consequences of this choice.

38. When considering the new information, the Supreme Court will *inter alia* assess that if the new evidence were presented at the main trial, it might have had an impact on the First Instance Judgment and that its exclusion would amount to a miscarriage of justice. It is the opinion of the Supreme Court Panel that the new information would not have had an impact on the First Instance Judgment for the stated above and aforementioned reasons.

39. As to the credibility of the witnesses that testified at the main trial, the Supreme Court Panel refers to the jurisprudence of the Supreme Court of Kosovo in the case R. et al.: "*Appellate proceedings in the PCPCK rest on the principles that it 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.*"[22] Similarly, in the case V. U. et al., the Supreme Court held that "[t]*he Supreme Court of Kosovo must refer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so...*"[23]

40. Referring to a new account of the facts either by the Defendants themselves or by new witnesses is not in itself a 'sound basis for overruling the trial panel'. The Supreme Court Panel must also assess the reasoning of the First Instance Court regarding the determination of the factual state. The role of B.H. and S.Q. is clearly stated in the First Instance Judgment.[24] This reasoning is comprehensive, detailed, logical, and coherent. Furthermore, the Trial Panel thoroughly examined the alibis, including the alibi witnesses, then presented by the Defence. Also the District Court provided a detailed assessment of the different statements given by the key witness R.T. on the identification of S.Q. as one of the two persons on the bridge,[25] including *inter alia* the possibility of a wrong identification.

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[22] Supreme Court of Kosovo, Ap-Kz no. 477/05, case R. et al., Second Instance Judgment, 25 January 2008, page 20
[23] Supreme Court of Kosovo, Ap-Kz no. 478/2005, case S. et al., Appeal Judgment, 28 May 2007, page 24
[24] District Court of Prishtinë/Priština, P no. 459/2009, First Instance Judgment, 7 February 2011, pages 10-33
[25] Ibid, pages 10-24

41. The findings of the First Instance Court do not exclude the involvement of other co-perpetrators or accomplices. The Supreme Court of Kosovo, when assessing the alleged new evidence and considering the above mentioned reasoning of the First Instance Court, concludes that there is no sound basis for overriding the factual findings of the Trial Panel.

42. Against this background, and especially considering the new information introduced by the State Prosecutor in the Appeal filed on 30 May 2011, the Supreme Court Panel finds that no element presented by either the Defence counsels or the Prosecution seriously undermines the correctness or the reliability of the material facts as determined by the District Court. Thus, there is no erroneous or incomplete determination of the factual situation at the first instance level. The ground of appeal is hence rejected as unmeritorious.

That a violation of the criminal law was committed under Article 404 Paragraph 1 sub-paragraph 1 of the KCCP and that the decision on criminal sanctions is erroneous under Article 406 of the KCCP

43. Defence Counsel Tahir Rrecaj alleges a violation of the criminal law under Article 404 Paragraph 1 sub-Paragraph 1 of the KCCP read with Article 147 Paragraph 1 sub-Paragraphs 3 and 11, Article 20 and 23 and Article 328 Paragraph 2 of the CCK. In his view, the First Instance Court erroneously applied the legal designation under Article 147 Paragraph 1 sub-Paragraph 3 of the CCK as there are no pieces of evidence attesting that the Defendants acted in a cruel or deceitful manner. He presents explanations on the act of murder committed in a deceitful manner which implies that the perpetrator actually deceives and ambushes the victim. Defense Counsel Avni Ibrahimi avers that considering the violations of the provisions of criminal procedure and the erroneous determination of the factual state, both courts committed a violation of the criminal law to the detriment of the Defendant S.Q. under Article 404 Paragraph 1 sub-paragraph 1 of the KCCP.

44. The Supreme Court of Kosovo concurs with the first instance and the second instance's findings in this respect, and refers to the Supreme Court Judgment Ap-Kz No. 264/2011 for that purpose. These grounds are also rejected as without merit.

45. It has been decided as per in the enacting clause.

Presiding Judge	**Member of the panel**
Tore Thomassen, EULEX Judge	Nesrin Lushta, Supreme Court Judge
Member of the panel	**Member of the panel**
Elka Filcheva-Ermenkova, EULEX Judge	Avdi Dinaj, Supreme Court Judge

Member of the panel	**Recording clerk**
Cornelie Peeck, EULEX Judge	Chiara Rojek, Legal officer

SUPREME COURT OF KOSOVO
Api-Kži no. 2/2012
24 September 2012
Prishtinë/Priština