

COURT OF APPEALS

Case number: PAKR 978/12

Date: 25 July 2013

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Tore Thomassen as Presiding and Reporting Judge, and EULEX Judge Annemarie Meister and Judge Vahid Halili as members of the Panel, with the participation of Anna Malmström, EULEX Legal Officer, acting as Recording Officer,

in the criminal proceeding against

S.M.1., nickname , born on XX.XX.19XX in village (/), son of KM and SM, citizen of Kosovo, with primary school education, married with two children, profession , of average financial situation, no previous convictions;

S.M.2., nickname , born on XX.XX.19XX in village (/), son of KM and SM, citizen of Kosovo, with secondary school education, married with three children, profession , of poor financial situation, no previous convictions;

in first instance acquitted of the criminal offence of *War crime against the civilian population* contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23 and 120 (2) of the Criminal Code of Kosovo (CCK) in violation of common Article 3 common to the four Geneva Conventions of 12th August 1949 (“common Article 3”) and Articles 1 and 17 of the Protocol II of 08 June 1977, Additional to the 1949 Geneva Conventions (“Additional Protocol II”), all rules of international law effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present charge the defendants in their capacity as Serbian Police officers or paramilitary member, in co-perpetration with each other and with other Serbian military or paramilitary members, including **S.F.**, **I.P.**, **D.T.**, **S.T.1.**, **S.T.2.** and **N.P.**, treated inhumanely **S.B.** and **H.D.**, two civilians not taking part in the hostilities, by keeping them detained in inhumane conditions (filthiness; lack of food, water and medical care); in around Novobërdë/Novo Brdo between 19 and 22 April 1999;

War crimes against the civilian population contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23 and 120 (2) of the Criminal Code of Kosovo (CCK) in violation of common Article 3 and Articles 1 and 17 of Additional Protocol II, all rules of international law effective at the time of the internal conflict in Kosovo and at all times relevant to the present charge the defendants in their capacity of Serbian military or paramilitary officers, including **D.T.**, **S.T.1.**, **S.T.2.** and **N.P.**, violated the bodily integrity and health of **S.B.** and **H.D.**, two civilians not taking part in the hostilities, by repeatedly beating them, in and around Novobërdë/Novo Brdo between 21 April 1999;

S.S., nickname , born of XX.XX.19XX, place of birth Village (/), daughter of T and D, citizen of Kosovo, with secondary school education, single, occupation , of poor financial situation, no previous convictions;

in first instance acquitted of the criminal offence of *War crimes against the civilian population* contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 23 and 120 (2) of the CCK, in violation of common Article 3 and Articles 1 and 17 of the Additional Protocol II, all rules of international law effective at the time of the internal armed conflict in Kosovo and at all times relevant to the present stage the defendant in her capacity as Serbian Police officer or paramilitary member, in co-perpetration with other Serbian military of paramilitary officers violated the bodily integrity and health of **S.B.** and **H.D.**, two civilians not taking part in the hostilities, by beating then and particular by striking **H.D.** on the head with wooden trunk in Novobërdë/Novo Brdo on or about 21 April 1999;

by Judgment no P No. 445/2010 dated 22.07.2011 of the District Court of Pristina

acting upon the Appeal of the Special Prosecution office of the Republic of Kosovo filed on 08.11.2011 against the Judgment of the District Court of Pristina no. P 445/10 dated 22.07.2011,

having considered the Response of the Appellate State Prosecutor of Kosovo no PPA 164/12 dated 04.05.2011, filed on 07.05.2012;

after having held a public session on 25.07.2013 in the presence of the accused, Defence Counsels, State Prosecutor Lulzim Sylejmani and the injured parties;

having deliberated and voted on 25.07.2013,

pursuant to Articles 420 and the following of the Kosovo Code of Criminal Procedure (KCCP)

renders the following

RULING ON APPEAL AGAINST JUDGMENT

I. The Appeal of the Special Prosecution Office filed on 08.11.2011 against the Judgment of the District Court of Pristina no. P 445/10 dated 22.07.2011, is hereby granted.

II. The Judgment of the District Court of Pristina no. P 445/10 dated 22.07.2011 is hereby annulled. The case is returned to the Basic Court of Pristina for reconsideration and retrial.

REASONING

I. Procedural history of the case

1. On 2 December 2010, The Special Prosecutor of the Republic of Kosovo filed the indictment PPS no 240/09 against the defendants **S.M.1.**, **S.M.2.** and **S.S.** and charged them with the above mentioned criminal offences against **S.B.** and **H.D.** The indictment was confirmed with Ruling KA. 411/10 on 31 March 2011.

2. The main trial commenced on 7 June 2011 before a panel of the District Court of Pristina composed of 2 EULEX judges and 1 Kosovar judge. Five more sessions were held on 16 June, 13 July, 14 July, 19 July and 20 July 2011.

3. The court heard the testimonies of the following witnesses: the injured parties **H.D.** and **S.B.**; **B.R.**, **F.M.**, **V.T.** and **I.P.** as well as examined the defendants **S.M.1.**, **S.M.2.** and **S.S.** In addition the parties agreed to read out in the minutes of the main trial all the statements made by the following witnesses during the investigative stage: **S.K.**, **B.C.**, **R.R.**, **N.A.**, **S.L.** and **R.B.**

4. On 22 July 2011 the panel of the District Court of Pristina announced the judgment and found the defendants not guilty.

5. On 8 November 2011 an appeal was timely filed by the Special Prosecutor. Responses to the appeal were filed by Defence Counsels Miodrag Brklač, Dejan Vasić and Miro Delević all on 29 November 2011. The opinion of the State Prosecutor was filed on 7 May 2012.

6. On the 1 January 2013 the case was transferred from the previously competent Supreme Court of Second Instance to the Court of Appeals pursuant to Article 39 Paragraph (1) of the Law on Courts, Law no. 03/L-199.

II. Submissions of the Parties

1. The Appeal of the Special Prosecutor

7. The Special Prosecutor filed his Appeal on the grounds of essential violations of the provisions of criminal procedure pursuant to Article 403 Paragraph (1) Item 8 read with Paragraph 2 Item 1 KCCP and Erroneous establishment of facts pursuant to Article 405 Paragraph 2 KCCP. He proposes to the Court of Appeals to annul the Impugned Judgment and return the case to the Court of First Instance for reconsideration and retrial.

8. The Special Prosecutor argues that the Impugned Judgment is based on inadmissible evidence because during the criminal procedure, on the occasion of obtaining witness statements legal provisions were not respected. On the most part the verdict is based on the statement of the injured party **S.B.** dated 21.09.2000 but the form of this statement is in contradiction with all legal provisions in a way that it should not be considered a statement at all. The fact that the first instance panel has failed to notice all the omissions and has considered the document a valid declaration and has even based its verdict of acquittal mainly on it represents an essential violation of the provisions of the criminal law.

9. The Special Prosecutor also submits that the statements given to the police in 2007 and 2008 were not taken in conformity of the legal provisions due to the fact that translators used did not take their oaths. This means that the evidence was obtained in an erroneous manner which has influenced the Panel, which has then brought an unfair verdict.

2. The Responses by the Defence Counsels

10. Defence Counsel Miodrag Brkljač of **S.M.1.** proposes the Court of Appeals to reject the appeal and submits that the judgment is correct and lawful. The mentioned statements were deemed ok when the indictment was filed and has been treated as evidence that prosecutes the defendants until the conclusion of the main trial. The Prosecutor, as a party in the proceedings, had to propose in earlier phases of the procedure (latest in the hearing for Confirmation of Indictment) to the court to declare the evidence as inadmissible and to request it to be removed from the case files, and not file a motion only in the appeal against the judgment.

11. Defence Counsel Dejan Vasić of **S.M.2.** proposes the Court of Appeals to reject the appeal and submits that the mentioned statements are part of the indictment itself. The inadmissibility of

this evidence was not asked for in the confirmation hearing or during the main trial itself. The first instant court did a very careful analysis of all the evidence presented at the main trial and it rendered a valid and the only possible decision.

12. Defence Counsel Miro Delević of **S.S.** proposes the Court of Appeals to reject the appeal and submits that the injured party **S.B.** came to the police on his own to give the statement, without invitation, pressure or repression thus no one has influenced his statement in terms that it was given against his will and even under the supposition that there were some formal lacks by the police regarding the taking of the statements it did not affect the presented facts that describe the event. The Prosecutor's interpretation of the injured party's statements is impossible to understand and it is based on assumptions that cannot be proven.

3. The opinion of the Appellate State Prosecutor

13. The State Prosecutor fully supports the Appeal of the Special Prosecutor and proposes the Court of Appeal to annul the judgment of the District Court of Pristina and return the matter to the Basic Court of Pristina for retrial while approving the appeal of the Special Prosecutor. The State Prosecutor submits that the appealed judgment contains numerous essential violations of provisions of criminal proceedings. The conclusion of the first instance court is completely inconsistent to the administered evidence whereas the grounds provided in the judgment are insufficient and do not justify rendering such a conclusion. In his statement provided during the criminal proceedings **S.B.** has been categorical in identifying the accused as perpetrators of the criminal offences they are accused of. That testimony of the injured party corresponds to the testimony of witnesses involved in the procedure as well as the statements of injured party **H.D.** The Court of First Instance relied on statements of **S.B.** provided during all stages of criminal proceedings. The court has relied its judgment on inadmissible evidence.

III. Findings of the Court of Appeals

1. Competence of the Court of Appeals

14. The Court of Appeals is the competent court to decide on the Appeal pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

15. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053).

2. Applicable procedural law - *mutatis mutandis* Kosovo Code of Criminal Procedure as in force until 31.12.2012

16. The criminal procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31.12.2012. The proper interpretation of the transitory provisions of the (new) Criminal Procedure Code (CPC), in force since 01.01.2013, stipulates that in criminal proceedings initiated prior to the entering into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the KCCP will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23.01.2013.

3. Findings on the merits

17. As submitted by the Special Prosecutor the District Court has based its verdict on the most part on the statement given by the injured party **S.B.** on 21.09.2000. The statement was according to the records given in front of UNMIK at the Police Station in Gjilan. However the records do not contain any information about the other persons present, apart from the translator, and in what capacity they were present.

It is thus unclear who took the statement or who wrote it down. This is a violation of Article 80 of the Law on Criminal Proceedings (no. 26/86, LCP), applicable law at the time of the statement, and of Article 87 KCCP. There is no record of **S.B.** being informed of his right to read the record and as far as the case file shows the statement was never translated into Albanian giving **S.B.** a chance to read it. Further the statement has not been signed by **S.B.** This is all in violation of Article 82 LCP and 89 KCCP. Furthermore, as far as the records show **S.B.** was not warned or informed of his rights and obligations as per Article 231 LCP or Article 164 KCCP. In this sense the Court of Appeals agrees with the Special Prosecutor that it cannot be considered a correct witness statement as such.

18. The violations mentioned do however not make the statement inadmissible as submitted by the Special Prosecutor as evidence obtained in violation of the provisions of the criminal procedure will only be inadmissible when the code or other provisions of the law expressly so prescribe pursuant to Article 153 KCCP. The inadmissibility of witness statement is regulated in Article 161 KCCP and a similar provision was also in LCP, Article 228. However, if the Court of Appeals finds that the omission to apply the provisions of the code may have influenced the rendering of a lawful and proper judgment it still constitutes a substantial violation of the provisions of criminal procedure according to Article 403 paragraph 2 item 1 KCCP.

19. It is acknowledged as a general rule that witness statements closer in time to the events usually are more trustworthy and reliable than later statements, as details may be forgotten with the passage of time. This is however dependent on certain conditions, one being that the witness

is free at all times to openly express what he knows. In unclear and uncertain circumstances that usually appear in connection with wars and turbulent times as it was in Kosovo in 2000, a witness may not have been in such a situation to freely express his knowledge when called upon to give a statement. Such circumstances may cause an exception to the general rule of accuracy in statements closer to the events. Based on this an earlier statement may therefore be more inaccurate than a later statement.

20. When analyzing the statements of **S.B.** the District Court Trial Panel pay particular attention to his mentionings of the defendants, or rather lack thereof. The fact that **S.B.** did not mention the defendants as participants in the beatings back in 2000 and 2007 is deemed a substantial discrepancy. **S.B.** has in all his subsequent statements repeatedly stated that the defendants did take part in the beatings, yet it is the lack of their mentioning in the two very first statements that bears the heaviest weight for the Trial Panel. The statements from 2000 and 2007 are very short and are lacking in detail. Regarding the statement from 2000 we don't know if questions were actually put to the witness due to the flaws expressed earlier. Regarding the statement of 2007 it is clear that questions were not put to the witness as this was a handwritten statement handed in by the victim himself. The omissions of the defendants' names as perpetrators in the first two statements is by the Trial Panel considered a discrepancy in relation to what **S.B.** stated in the main trial yet this was not properly examined at main trial. Only briefly is **S.B.** asked about it at which point he says that he has been telling the story since 2000 and it might have been omitted by the person writing it down. The Trial Panel does not believe this. The Court of Appeals agrees that it is not likely that a court recorder or interpreter would invent facts, however it is not impossible that for example names are omitted if a statement is not taken down verbatim and in this case there is no way of knowing since we don't know the circumstances of when the statement was taken down and since **S.B.** has not been able to check the written report of his statement we cannot dispute him when he says he mentioned the defendants' names.

21. In conclusion, all of the above taken into consideration and after having reviewed the statements of **S.B.** and other witnesses in the case, the Court of Appeals finds that the violations of the above mentioned provisions may have influenced the rendering of a lawful and proper judgment, especially since the District Court Trial Panel has relied on these earlier statement to such a considerable extent.

22. When finding that there has been a substantial violation of the provisions of criminal proceedings the Court of Appeal shall annul the judgment and return the case for retrial pursuant to Article 424 paragraph 1 KCCP. It is therefore decided as in the enacting clause.

Prepared in English, an authorized language.

Presiding Judge

Tore Thomassen

EULEX Judge

Panel member

Annemarie Meister
EULEX Judge

Panel member

Vahid Halili
Judge

Recording Officer

Anna Malmström
EULEX Legal Officer