

COURT OF APPEALS

Case number: PAKR 1047/12

Date: 13 August 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 Abdullah Ahmeti as members of the Panel, with the participation of Anna Malmström, EULEX Legal Officer, acting as Recording Officer,

in the criminal proceeding against

D I, born on XX.XX.19XX in , son of S1 and S2, maiden name B1, citizen of Kosovo, with high school education, single, profession , in detention on remand since 17.12.2010;

in first instance acquitted of the criminal offence *Attempted Aggravated Murder* pursuant to Articles 147 item 4 and 9 in conjunction with articles 20 and 23 of the Criminal Code of Kosovo (CCK, in force until 01.01.2013) and found guilty of the criminal offence of *Causing General danger* pursuant to Article 291 paragraphs 1 and 3 CCK by Judgment no. P 329/11 dated 29.03.2012 of the District Court of Pejë/Pec (hereinafter Impugned Judgment) and sentenced to a term of imprisonment of 5 (five) years and ordered to reimburse costs of the criminal proceedings in the amount of 500,00 EUR and the scheduled amount of 100,00 EUR and;

B K, born on XX.XX.19XX in the village of , municipality of . son of N and H, maiden name B2, citizen of Kosovo, married, of average financial situation, unemployed, in detention on remand 17.12.2010– 29.03.2012;

in first instance acquitted of the criminal offences *Attempted Murder* pursuant to Article 146 in conjunction with Articles 20 and 23 CCK and *Attempted Aggravated Murder* pursuant to Articles 147 item 4 and 9 in conjunction with Articles 20 and 23 CCK by the Impugned Judgment;

acting upon the Appeal of Defence Counsel Gëzim Baloku filed on behalf of D I on 01.06.2012 and the Appeal of the Prosecutor of the District Prosecution Office of Pejë/Pec on 12.06.2012 both against the Impugned Judgment;

having considered the Response of the Appellate State Prosecutor of Kosovo no AP-KZ 313/12 dated 21.01.2013 and filed on the same day;

after having held a public session on 13.08.2013 in the presence of the accused, Defence Counsels Gëzim Baloku and Ragip Radoniqi and State Prosecutor Lulzim Sylejmani;

having deliberated and voted on 13.08.2013,

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

renders the following

JUDGMENT

I. The Appeal of Defence Counsel Gëzim Baloku filed on behalf of D I on 01.16.2012 against the Judgment of the District Court of Pejë/Pec no. P 329/11 dated 29.03.2012, is hereby partially granted.

II. The Judgment of the District Court of Pejë/Pec no. P 329/11 dated 29.03.2012 is hereby AMENDED with regard to the sentence imposed on the accused as follows:

Defendant D I (born XX.XX.19XX), found guilty of *Causing General Danger in a place where a large number of people were gathered* pursuant to Article 291 paragraphs 1 and 3 CCK, is sentenced to a term of imprisonment of 4 (four) years. The time spent in detention on remand from 17.12.2010 shall be credited against the punishment.

Other grounds of the Defence Appeal are hereby rejected as ungrounded.

III. The Appeal of the Prosecutor of the District Prosecution Office of Pejë/Pec filed on 12.06.2012 is hereby rejected as ungrounded.

IV. The remaining part of the Judgment of the District Court of Pejë/Pec no. P 329/11 dated 29.03.2012 is hereby affirmed.

REASONING

I. Procedural history of the case

1. On 9 June 2011, The EULEX District Public Prosecutor filed the indictment PP no 217/10 against the defendants **I I**, **D I** and **B K** and charged them with the criminal offences *Attempted Murder* contrary to Article 146 in conjunction with Article 20 and 23 of CCK as against **D I** and **B K** only and *Attempted Aggravated Murder* contrary to Article 147 item 4 and 9 in conjunction with Article 20 and 23 of CCK as against all three defendants. The indictment was confirmed with Ruling KA. No 211/11 on 26 July 2011.
2. The main trial commenced on 5 December 2011 before a panel of the District Court of Pejë/Pec composed of 2 EULEX judges and 1 Kosovar judge. Eight more sessions were held on 6, 7 and 8 December 2011, 17 and 18 January 2012 and 13, 20, and 28 March 2012.
3. The court heard the testimonies of the following witnesses: the injured parties **V Z** and **A Z**; **R S**, **M G**, **A N**, **A G**, **H G**, **F C**, **V T**, **M I**, **S I**, **A S**, **B F**, **S H**, **Z L**, **N G** and **K B** as well as examined the defendants **I I**, **D I** and **B K**.
4. On 29 March 2012 the panel of the District Court of Pejë/Pec announced the judgment and found the defendant **D I** not guilty of Attempted Murder as in the first count but guilty of Causing General Danger in a place where a larger number of people were gathered pursuant to Article 291 paragraphs 1 and 3 of CCK, thus re-qualifying the original charge of Attempted Murder. **B K** was found not guilty of count 1, Attempted Murder. The Court further found all three defendants not guilty of count 2, Attempted Aggravated Murder.
5. On 1 June 2012 an appeal was timely filed by Defence Counsel Gëzim Baloku on behalf of **D I** and on 12 June 2012 an appeal was timely filed by the District Prosecution Office of Pejë/Pec. No responses to the appeals were filed. The opinion of the State Prosecutor was filed on 21 January 2013.
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 Defence Counsel Gëzim Baloku

7. Defence Counsel Gëzim Baloku on behalf of **D I** challenges the verdict on the grounds of wrong establishment of the factual situation, violation of criminal law and decision on punishment and proposes the Court of Appeal to modify the impugned judgment in holding that **D I** be acquitted of the re-qualified offence or a much more lenient sentence to be imposed against him.

8. The Defence Counsel argues that the Trial Panel has erroneously established the factual situation when **D I** was found guilty as there was no evidence produced to prove that he committed the said offence. From the evidence produced, it has been established that the defendant and injured party had some previous conflicts, that there was a clash between them at the parking of Supermarket and during the fight, two or three gunshots were heard. As a result of the gun fire, **D I** was wounded in his neck and got in his car and went to the hospital. This is the factual situation which has been corroborated by witnesses. Three shell-casings were found, one 7.65 mm from the pistol belonging to **V Z**, the other 9 mm from the pistol that is alleged to have belonged to **D I** but has not been found.

9. Even if he did shoot his gun after he was wounded it is clear that he acted in necessary defence.

10. Further the Defence Counsel argues that the key element of the crime Causing General Danger under Article 291 paragraphs 1 and 3 CCK is that a large number of people were gathered at the spot where the general danger was caused. On this occasion the Trial Panel violated the criminal law when it established that there had been a large number of people because actually in this case there was nobody.

11. Pertaining the decision on punishment the Trial Panel was very tough when imposing the maximum punishment. The panel did not consider any mitigating circumstances namely the circumstances in which the criminal offence was committed. Even if **D I** did shoot it was done instinctively as he was wounded in his neck. Furthermore there was no motive for the criminal offence and **D I** did not endanger anyone. Also it should be considered his proper conduct in the court and the fact that he had not been convicted before of such a criminal offence.

12. In the session on the 13 August 2013 on a question raised by the Presiding Judge **D I** stated that the injury he sustained on 23 September 2009 has led to a partial loss of hearing in one ear and problems with his spine for which he receives treatment.

2. The Appeal of the District Prosecutor

13. The District Prosecutor challenges the verdict in relation to the acquittal of the defendants **D I** and **B K** from charges of attempted aggravated murder committed in co-perpetration under count 2 of the indictment. The grounds of the appeal is erroneous and incomplete determination of the factual situation as per article 402 par 1 item 3 of the KCCP and the District Prosecutor proposes the Court of Appeals to annul the impugned judgment in relation to the acquittal of the defendants **D I** and **B K** as to count 2 of the indictment and return the case to the court of first instance for retrial and decision.

14. The District Prosecutor argues that the contested verdict is flawed in that the Trial Panel failed to take into account the cultural issues prevailing in Kosovo as well as specific circumstances relevant for the analysis of the established facts. The Trial Panel further failed to take into account the reputation **B K** had in the Pejë/Pec region at the time of the event. The population in the Pejë/Pec region is well aware of **B K**'s previous convictions and has developed an understanding that **B K** and his associates are an extremely violent and ruthless group that even the police failed to take appropriate actions against. In light of this background the general perception in the area is that any testimony charging **B K** will trigger serious retaliation endangering life and security of the testifying person and/or his family thus preventing the injured parties to give true testimony against **B K** and/or his associates.

15. The District Prosecutor further submits the Trial Panel's assessment of the statement given by **V Z** to be flawed as is was found not to be in accordance with his son's statement with regards to whether the inside light in the attackers' car was turned on or not. The panel oversaw that **V Z** was protecting his son by pressing him down at the crucial moment which meant that he was not in a position to see anything. In relation to this the prosecutor notes that turning on the inner light in the attackers' vehicle in fact made sense as the subject offence was committed in revenge to the injury **V Z** had inflicted on **D I**. The envisaged satisfaction by taking revenge is increased if the victim in the moment the revenge is taken is recognizing the attacker.

3. The Response by the Appellate State Prosecutor

16. The State Prosecutor proposes the Court of Appeals to modify the judgment of the District Court against the defendants **D I** and **B K** with regard to count 2 of the indictment and to convict them of the charge of Attempted Aggravated Murder and to reject the appeal of the Defence Counsel as ungrounded.

17. In relation to the Appeal of the Defence Counsel the State Prosecutor submits that it must be considered proven that **D I** fired - without aiming at a specific target - two shots from a handgun in a public place in proximity to a supermarket during the normal business hours. This substantiates the charge of causing general danger. The State Prosecutor is of the opinion that the

Trial Panel correctly assessed the ingredients of the criminal offence as re-qualified. The State Prosecutor leaves to the Court of Appeals to evaluate the appropriateness of the imposed sentence. However, the State Prosecutor finds it unfair and unverified to consider the unemployment status of the defendant as an aggravating factor making “the defendant prone to disobey legal orders in the future”.

18. In relation to the Appeal of the District Prosecutor the State Prosecutor concurs with the arguments put forward by the District Prosecutor and submits that a re-assessment of the evidence presented at trial is needed before deciding beyond reasonable doubt in favour of the defendants **D I** and **B K**.

III. The Findings of the Court of Appeals

1. Competence of the Court of Appeals

19. 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).

20. 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

21. The criminal procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31 December 2012.¹ The proper interpretation of the transitory provisions of the (new) Criminal Procedure Code (CPC), in force since 1 January 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 January 2013.

¹ Kosovo Code of Criminal Procedure, in force since 06.04.2004 until 31.12.2012.

3. Findings on merits

3.1. The Defence Appeal

3.1.1. Erroneous Establishment of the Factual Situation

22. The Appeal of the Defence Counsel challenges the Impugned Judgment on count 1 of the indictment. The Court of Appeals concurs with the factual situation as established by the District Court Trial Panel. The Court finds that it has been proven that on 23 September 2009 **D I** along with at least one more man met **V Z** at the parking lot in front of the Supermarket in the village of . When approaching the parking lot and **V Z**, **D I** and the other man had guns in their hands. Three shots were fired. **V Z** fired the first one, wounding **D I** in the neck, and **D I** subsequently fired the other two.

23. The District Court Trial Panel found that it had not been proven that **D I** had the intent to kill **V Z** and consequently re-qualified the crime. The District Prosecutor did not appeal this part of the judgment hence the Court of Appeals is bound by the findings of the District Court in this regard. However the question of necessary defence is still relevant.

24. Pursuant to Article 8 CCK an act is committed in necessary defence when a person commits the act to avert an unlawful, real and imminent attack from himself or another person and the nature of the act is proportionate to the degree of danger posed by the attack. **D I** has argued that he acted in necessary defence when firing his gun. The Court of Appeals finds that **D I**'s firing of his gun cannot be considered a necessary defence. Even though **V Z** fired the first shot **D I** and the other man approached him with guns in their hands and any danger to **D I** was consequently provoked by himself. The Court of Appeals finds that there was no unlawful, real and imminent attack against **D I** for which he needed to defend himself. On this background the Court of Appeals fully concurs with the findings and interpretation of Article 8 done by the District Court².

3.1.2. Violation of the Criminal Law

25. The crime Causing General Danger is regulated and defined in Article 291 CCK. According to paragraph 3 of the same article an aggravating circumstance of the crime is if it is committed in a place where a large number of people are gathered. There is no definition of a large number of people in the code. In the opinion of the Court of Appeals the definition of what a large number means needs to be determined on a case by case basis.

² Judgment by District Court of Pejë/Pec, p 14, second para, last sentence, English version.

26. In this case it has been sufficiently proven that the incident happened in the parking lot in front of a supermarket during its normal business hours. It was in the evening when most people have finished their work. To add to this on this particular evening it was Bajram³. The witness **M G** has testified in a credible way that there were a lot of people around⁴. In this case the Court of Appeals considers it proven beyond reasonable doubt that a large number of people were gathered when the incident happened. Furthermore **D I** fired his gun blindly with the imminent risk of a bullet hitting directly or by ricochet any of the bystanders. This risk did not stop **D I** from firing his gun giving him the eventual intent to cause general danger. Therefore all the elements of the crime have been established.

3.1.3. Decision on Punishment

27. When deciding on punishment the trial panel has, according to Article 64 CCK, to consider both the aggravating and the mitigating circumstances. The District Court Trial Panel have listed both aggravating and mitigating circumstances but the judgment lacks a reasoning for why, when considering all circumstances the maximum punishment was imposed.

28. The Court of Appeals agrees with the Trial Panel that aggravating circumstances to consider are the frequent use of firearms in Kosovo. The Court of Appeals agrees that the punishment of this kind of crime should serve as a general deterrent for all potential perpetrators. The Court of Appeals also agrees that the way that **D I** approached **V Z** with a gun in his hand shows his low level of respect for the law. Even if the District Court Trial Panel found that the intent of **D I** to kill **V Z** had not been proven it has to be considered that **D I** clearly was ready to use his gun, even if it was just to threaten **V Z**.

29. The Court of Appeals fully agrees with the opinion of the State Prosecutor that it is unfair to consider the unverified unemployment status of **D I** as an aggravating factor.

30. As mitigating factors the Court of Appeals considers the actions of **V Z** at the time of the event. As stated above the Court of Appeals did not find that **D I** acted in necessary defence however the fact that **V Z** did fire his gun first makes it likely that **D I** acted somewhat on instinct when he fired his gun. The fact that **D I** was wounded and still suffers from the effects is also considered as a mitigating factor.

31. The Court of Appeals does not find that the defendant's proper conduct during the main trial is to be considered as a mitigating factor as argued by the Defence Counsel. A proper conduct in court should be considered the norm and should not generate in a reduced sentence.

32. Based on the re-assessment of aggravating and mitigating circumstances, the Court of Appeals finds that the imposed punishment of 5 (five) years of imprisonment is excessive.

³ Judgment DC Pejë/Pec, p 12, second para, English version.

⁴ Statement given during main trial on 6 December 2011, page 12 English version, confirming statement given in front of Kosovo Police on 6 October 2010.

Pursuant to Article 64 Paragraph (1) CCK the punishment must be proportionate to the gravity of the offence and the conduct and circumstances of the offender. Mindful that Article 291 paragraphs 1 and 3 CCK for the criminal offence of Causing General Danger in a place where a large number of people are gathered prescribes the punishment of imprisonment of six months to five years, the Court of Appeals determines that the appropriate punishment to be imposed on the accused in this case is 4 (four) years of imprisonment. The Court of Appeals finds that this punishment will fulfill the purposes of punishment as prescribed in Article 34 CCK.

33. Accordingly, the Court of Appeals accepts the Appeal of the Defence Counsel insofar as the Appeal challenges the imposed punishment. The Impugned Judgment is therefore amended in the sentencing part so that the imposed punishment on the accused for committing the criminal offence of *Causing General Danger in a place where a large number of people are gathered* pursuant to Article 291 paragraphs 1 and 3 CCK is 4 (four) years of imprisonment. The time the defendant spent in detention on remand is accredited towards his sentence.

34. The Appeal of the Defence Counsel is rejected as ungrounded on all other grounds.

3.2. The Prosecution Appeal

35. The Appeal of the District Prosecutor challenges the Impugned Judgment on count 2 of the indictment. Also on this count the Court of Appeals concurs with the factual findings as established by the District Court Trial Panel. The Court finds that it has been proven that at around midnight on the night of 11 June 2010 on the road from Pejë/Pec to Pristinë/Pristina **V Z** was driving with his son sitting in the front passenger seat. They were attacked by an unknown person or persons who fired several shots in the direction of their car from at least two weapons. **V Z** and his son both sustained injuries.

36. The only piece of evidence in the case pointing at the defendants is the statement of **V Z**. The only other witness to the event was **V Z**'s son and he did not claim to have seen the defendants. The District Prosecutor claims that the District Court failed to take into account the reputation **B K** had in the Pejë/Pec Region at the time of the event and the effect this had on the injured party when giving statements. The Court of Appeals is mindful that if somebody's reputation is preventing witnesses from telling the truth this is a serious matter however you cannot convict somebody purely on reputation. Having reviewed **V Z**'s statements and the circumstances of the case and the events leading up to the event the Court of Appeals finds that the statement of **V Z** is not sufficient in order to find it proven beyond reasonable doubt that **D I** and **B K** committed the crime they were charged with. The decisive factor in determining this is not the fact that **V Z** has changed his testimony in relation to **B K**'s participation in the event. It is an overall review of all the evidence.

37. For this reason the Court of Appeals finds the Appeal of the District Prosecutor ungrounded. It is therefore decided as in the enacting clause.

Presiding Judge

Tore Thomassen

EULEX Judge

Panel member

Annemarie Meister

EULEX Judge

Panel member

Abdullah Ahmeti

Judge

Recording Officer

Anna Malmström

EULEX Legal Officer

Prepared in English, an authorized language. Reasoned Judgment completed and signed on September 2013.