

SUPREME COURT OF KOSOVO

PML 202/2013

Date: 5 February 2014

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in the panel composed by judge Timo Vuojolahti as Presiding, Kosovo Judge Nesrin Lushta and EULEX Judge Bertil Ahnberg as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk, in the criminal case P.nr 488/08 of the District Court of Prishtine/Prishtina against the defendant:

" **B.H.**, father's name ~~xxx~~, mother's name ~~xxx~~, born on ~~xxx~~ in ~~xxx~~, Kosovo Albanian, previous occupation ~~xxx~~ of r, completed secondary school, average economic situation, ~~xxx~~, no previous criminal background, in detention since on 21 January 2008, and after the final judgment serving the sentence,

charged for commission of criminal offences of Aggravated Murder in Co-perpetration, in violation of Article 147 paragraphs 4, 9 and 11 in conjunction to Article 23 of the CCK, Grievous Bodily Harm in Co-perpetration, in violation of Article 154 paragraph 1 of the CCK, and Causing General Danger in Co-perpetration, in violation of Article 291 paragraphs 1, 5 and Article 23 of the CCK, and sentenced by final judgment of committing the criminal offences of Aggravated Murder in co-perpetration and Grievous Bodily Harm in co-perpetration, to twenty-five (25) years of long term imprisonment, currently before the Supreme Court of Kosovo, pending a request for protection of legality,

Deciding upon the Request for Protection of Legality Av **M.H.**, on behalf of the defendant **B.H.** against the Judgment of the District Court of Prishtinë/Priština (P nr 488/08) dated 22 September 2009, Judgment of the Supreme Court of Kosovo (Ap-Kz nr 246/2010) dated 25 May 2012 and Judgment of the Supreme Court of Kosovo (Api-Kzi nr 06/2012) dated 16 January 2013,

After a session held on 5 February 2014, pursuant to Articles 451 and 454 and 455 of the Criminal Procedure Code (*hereafter* "CPC") issues the following:

JUDGMENT

The Request for Protection of Legality Av **M.H.**, on behalf of the defendant **B.H.** against the Judgment of the District Court of Prishtinë/Priština (P nr 488/08) dated 22 September 2009, Judgment of the Supreme Court of Kosovo (Ap-Kz nr 246/2010) dated 25 May 2012 and Judgment of the Supreme Court of Kosovo (Api-Kzi nr 06/2012) dated 16 January 2013, is hereby rejected as ungrounded.

REASONING

I. Procedural background

It has been established that on 24 September 2007, the defendant '**B.H.**' acting in co-preparation with other defendants placed and detonated an improvised explosive device

on the ground floor of a building at Bill Clinton Avenue. The explosion resulted in the death of N.H. and P.S. whilst other individuals Xh.S. V., Z., L.N., G.S., E.H., N.H., F.B., L.K. and SH.S. sustained grievous bodily injuries.

Upon conclusion of the Investigations, on 12 August 2008 the Indictment has been filed by the prosecutor in relation to this criminal matter. The indictment was confirmed on 2 February 2009.

On 22 September 2009, the District Court of Prishtinë/Priština found the defendant J.B.H. guilty for committing the criminal offences of Aggravated Murder in violation of Article 147 par 4, 9 and 11 of the CCK, Grievous Bodily Harm in violation of Article 154 par 1 of the CCK and Causing General Danger in violation of Article 291 par 1 and 5 of the CCK, and imposed an aggregated long term imprisonment of 25 years.

On 25 May 2012, the Supreme Court of Kosovo deciding on the appeal against the judgment rendered in the first instance, modified the appealed judgment by establishing that the count 3, Causing General Danger, was consumed by count 1, Aggravated Murder. The judgment was affirmed in the remaining parts.

On 16 January 2013, the Supreme Court of Kosovo rejected the appeal filed by the defence counsel on behalf of the defendant B.H. against the Judgments of the District Court of Prishtinë/Priština (P nr 488/08), dated 22 September 2009, and Supreme Court of Kosovo (Ap-Kz nr 246/2010), dated 25 May 2012.

On 28 September 2012, the Defence Counsel M.H. filed a Request for Protection of Legality against the above mentioned judgments.

The Office of State Prosecutor (OSPK) in its opinion KLMP II nr 145/2013, dated 26 November 2013, proposed the Supreme Court of Kosovo the approval of the Request for Protection of Legality filed by defence counsel and to annul the appealed judgments and return the case back for retrial.

II. Procedure before the Supreme Court of Kosovo

1. In assessing the Request for Protection of Legality, the Supreme Court established the following:

- a. The Supreme Court considered the Request in a session of the panel. There was no need to ask for a reply from the opposing party.
- b. The Request has been filed with the competent Court and by an authorized person, pursuant to Articles 433 paragraph 1 and 434 paragraph 1 of the CPC.
- c. The panel could not find out when the judgment of the Supreme Court, dated 16 January 2013, has been served on the defendant. Therefore, it is considered that the request for protection of legality is filed within the deadline pursuant to Article 433 paragraph 2 of the CPC.
- d. The panel considered the Request as admissible.

2. The Judgments in this criminal case have been challenged, first, on the ground of Substantial Violation of the Provisions of Criminal Procedure, and second, on the ground of Violation of the Criminal Law. In the Request for Protection of Legality, the Defence Counsel alleges a number of violations, which can be presented as follows:

- Improper composition of the trial panel, (Articles 345, 359 and Article 403 par 1, item 1 of the Criminal Procedure Code of Kosovo, *hereafter* "KCCP", the law in force at the time of the previous proceedings)
- The judgments are based on inadmissible evidence, such as the expert analysis (Article 176 par 1, Article 237 par 2 and Article 403 par 1 item 8 of the KCCP).
- The judgments have exceeded the scope of the indictment filed initially by the prosecutor (Articles 386 and 403 par 1 item 10 of the KCCP)
- The judgments lack grounds and the reasoning of facts is in contradiction between the evidence presented in the proceedings. The statements of witnesses "Y. P." and "D. " and "V. Z." differ greatly from the statements of witnesses "G.", "B. P." and "Z.", while the statement of the witness "V. Z." was even not included in the reasoning of the judgment. (Articles 387 par 2, 396 par 7 and 403 para 1 item 12 of the KCCP).
- The legal classification of the act, motives and intent: There is a violation of the criminal law because of erroneous legal classification of the criminal act. The defendant did not have intention to deprive from the life "N.M." and "P.S.", as acknowledged in the judgments, but only to cause damages to the Restaurant and frighten the owners. In the reasoning of the judgments there is discrepancy between the established motives and intent.

3. The Panel finds out that the first four allegations were already raised during the previous proceedings, and they all were rejected as ungrounded.

4. The Panel finds that the appealed judgments rendered in previous proceedings do not warrant any *ex officio* intervention. Therefore, pursuant to Article 436 of CPC, the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his Request for Protection of Legality, accordingly.

III. Findings of the Supreme Court of Kosovo

A. Alleged violations of provisions of the Criminal Procedure

1. Defence counsel "M.H." argues essential violations of the provisions of the criminal procedure, first, because the composition of the Trial Panel of the District Court changed but the main trial was not started from the beginning. This means, according to the defence counsel, the provisions in Articles 345 and 354-359 of the KCCP were violated.

This panel notes that improper composition of the panel constitutes a substantial violation of the provisions of criminal procedure. The violations of the provisions of the criminal procedure on composition of the panel are of "absolute" nature. As such, the court is obliged to examine *ex officio* legality of the panel rendering the judgment irrespective if the issue is raised or not by the parties.

On this context, Article 345 paragraph 1 of the KCCP reads: "When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the trial panel may in this case decide not to examine the witnesses

and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection.”

It is worth noting that the Supreme Court has repeatedly reviewed and examined this point in an exhaustive manner during the previous proceedings and has in continuity taken the view, with which this panel respectfully agrees, that the trial panel of the District Court was constituted in accordance with the law. Moreover, as established by the Supreme Court on 16 January 2013 (see chapter Court findings, count 5, pages 6-7), the way how the main trial was continued did not violate the rights of the parties in any relevant way.

Addressing the replacement of trial member, this panel refers to the minutes of the trial which reflect that the parties to the proceedings had been expressly invited to comment whether they had any objections regarding the new composition of the trial panel. The presiding judge had also invited all the parties to declare whether to consider the records as having been read or the parties would want to read the records all over again. No objection was made whatsoever on this point by the parties to the proceedings. All parties, including the defence counsel *M.H.*, have agreed to consider the records as read in order to benefit the expedition of the procedure in this case. Having received no objection and after expressed consent of parties to the proceedings, the court considered as read the statements which were given before the previous trial panel.

The panel finds that the first instance court had fully complied with requirements of the cited provision.

This panel finds it worth to mention that the issues regarding the change on composition of the panel and of reading out of statements was not a contested up until conclusion of the trial proceedings. Only after the conclusion of the trial did defence counsel begin arguing about improper composition of the trial panel questioning the composition of the panel.

The Supreme Court of Kosovo finds no new circumstances that would render the impartiality of the new member of the District Court panel doubtful in this case or any irregularities with regard to composition of the trial panel or the conduct of the main trial when it comes to the question of the change of the composition of the trial panel. Accordingly, the Supreme Court of Kosovo considers this allegation as unfounded.

2. Second, defence counsel *M.H.* argues that the challenged judgment is based on inadmissible evidence such as the expert analysis of traces of residue of explosive in the vehicle Toyota Land Cruiser with registration 093 KS 073 (*analysis made in Germany*), in violation of Article 176 par 1 of the KCCP. According to the defence counsel, the prosecutor did not have competence to order independently an expert witness to conduct an analysis; therefore, there is a violation of Article 237 par 2 of the KCCP. Further, the argument goes that the conclusions of the expert are not even reliable because samples were taken from the car 4 months and 15 days after the incident and the vehicle was used in meanwhile.

The first sentence of Article 176 paragraph 1 of the KCCP reads: *“An expert analysis shall be ordered in writing by the court on the motion of the public prosecutor, the defense or ex officio.”*

Article 153 paragraph 1 of the KCCP reads: "*Evidence obtained in violation of the provisions of the criminal procedure shall be inadmissible when the present code or other provisions of the law expressly so prescribe.*"

As the Supreme Court has pointed in the judgment dated 16 January 2013 the KCCP does not state that expertise acquired without the written order by the court is inadmissible as such.

In Kosovo, as in any other country, the Public prosecutor uncontestedly is a legitimate authority to respond whenever there is information that a crime has occurred. This means also that the prosecutor has the obligation to gather all the information which might be of use to effectively conduct the criminal proceedings. The provisions of the KCCP do not set any legal constraints to any of the parties to present evidence at any stage of the procedure provided that the evidence is relevant and introduced in compliance with rules governing administration of evidence. In the case at hand, the Defence Counsel argues that simply because the prosecutor did not obtain an order from the court for expertise, this fact renders the evidence automatically inadmissible. However, there is no indication, and it is not even argued by the Defence Counsel, that the authorities have in any way misused authority or have infringed the rights of the defendant during the course of the investigation.

What comes to the Article 237 paragraph 2 of the KCCP referred to in the request, the panel points out that this provision deals with intrusion in the privacy of an individual, i.e. a post mortem physical examination, psychiatric examination, molecular and genetic examination and DNA analysis. This is not the case here.

Consequently, the panel finds this argument of the Defence Counsel without merit.

3. Defence counsel argues that the challenged judgments have exceeded the scope of indictment filed initially by the prosecutor when allegedly the motive was to deprive from life **N.B.** because he was aware of perpetrators of explosion at the **S.** restaurant. Further defence counsel argues that the first instance court focused thoroughly on the motives, while the judgment P nr 459 dated 7 February 2011 ("Dubrava" case) did not accept these motives.

The Supreme Court of Kosovo notes that the first part of the argument is not understandable at all. However, what comes to the question of motive and the scope of the charge, this panel first refers to the previous judgments of the Supreme Court in this case (Judgment 25 May 2012, pages 12-14, and Judgment 16 January 2013, count 8 on pages 7-8). Second, it can be added, that the first instance court has made analysis in the reasoning only in relation to the case at hand. Same facts and circumstances can be relevant in two different criminal proceedings, and this means that they must be evaluated in both cases – and it is possible that they can be evaluated differently. This has nothing to do with the question of the scope of the charge. Two separate criminal cases are two different cases, and the question of the scope of the charge must be assessed separately, within each of the cases.

In the case at hand, this panel agrees with the finding of the Supreme Court in the judgment of 25 May 2012 that the District Court ruled on the existence of the criminal act, e.g. the explosion, and the responsibility of the defendants, based on the facts described in the indictment. Therefore, the judgment does not exceed the scope of the indictment. Moreover, this panel does not find any contradictions and/or discrepancies

between the enacting clause and the reasoning in the challenged judgments, the reasoning rather provides further explanations just as it is required by the provisions of the criminal procedure. The court is not bound by indictment with regard to the reasoning of the judgment nor could it be considered as exceed of indictment. The reasoning part how the court reached its conclusions is in the discretion of the courts. Therefore, no deficiency as regards to the enacting clauses of the appealed judgments or exceed of the indictment as alleged by defence counsel could be established. The Supreme Court of Kosovo finds that in this case the enacting clauses of the challenged judgments are sufficiently clear while in the reasoning part, the courts provided in depth reasons that drove the court to such a conclusion.

Consequently, the panel finds this argument of the Defence Counsel without merit.

4. Defence counsel claims that the three challenged judgments are contradictory between what was presented and the reasoning, content of submissions, minutes of statements given in the proceedings and those submissions and minute itself. Specifically, defence counsel argues that statements of witnesses "V" and "D" and "Z" differ greatly from the statements of witnesses "G", "B" and "Z", while the statement of the witness "Z" was even not included in the reasoning of the judgment. This is, according to defence counsel, in violation of Article 387 par 2 and Article 396 par 7 of the KCCP.

The Supreme Court finds that although defence counsel did not expressly argued, in fact, the question partly refers to the establishment of the factual situation. However, the Supreme Court of Kosovo is confined in its assessment by Article 437 of CPCK which provides that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Nevertheless, the allegation regarding appraisals of witnesses' statements shall be addressed to the extent it relates to the application of the procedural rules for evidentiary procedure.

At the outset, the Supreme Court of Kosovo notes that the allegations of defense counsel on this point had been addressed at the appellate procedure during the course of second and third instance. Trial panel and appellate courts have thoroughly considered the allegations put forward by the defense counsel and provided sufficient analysis of witnesses' statements and explanations regarding various discrepancies among different witnesses and/or discrepancies of witnesses that gave statements in different stages of the procedure.

There may be two main issues regarding the witnesses' statements on this point raised by defence counsel; first, whether the evidence was obtained in accordance with rules governing the evidence, and second, whether the evidence relied upon by the court is credible.

With regard to the first question, in order to have evidence admitted, the court needs to consider the requirements for using the evidence. That is, if the authority conducting the proceedings has complied with the rules of the procedure: if the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant; if defense counsel had an opportunity to put forward objection and, if the evidence presented is relevant.

In the case at hand, it is evident that defense counsel and the defendant had been given ample of opportunity to provide their objection and thoroughly cross-examine the

witnesses, which as a matter of fact is not questioned even by defence counsel. Therefore the introduction of the evidence does not constitute any violation of the provisions of the criminal procedure.

Regarding the credibility of the witnesses, the Supreme Court of Kosovo respectfully disagrees with defense counsel that the presence of any discrepancy on witnesses' statements renders their credibility doubtful. The court should not treat minor discrepancies of a particular witness statement as discrediting probative value of other witnesses statements where that witness statement coincide sufficiently in essence in a satisfactory detail. The inconsistencies and contradictions in witness evidence can result from natural psychological processes of human perception, especially in witnesses who had undergone traumatic events and who due to procedural circumstances had to give their account of the same event before the authorities several times. In the case at hand, the fact that some witnesses in their statements contradict other witnesses cannot serve as a legal ground to render other witnesses statements disbelieving. A witness' statement cannot arbitrarily be considered bias solely because another witness states something different as long as the court consciously, carefully and impartially considers each of them separately and in relation with each other and in relation with all the evidence in the case. In respect to credibility, it is the court's duty to assess and evaluate what is relevant and what is not relevant evidence in a case. The court in accordance to its own assessment must admit and consider any admissible evidence that it deems relevant and that has probative value with regard to the specific criminal proceedings as well to ensure that the case is thoroughly and fairly examined in accordance with the rules of evidence as provided for by the Procedure Code.

Specifically, with regard to statements of witnesses " *Y.* and " *D.* and " *V.* *Z.*, the Supreme Court finds that in order to question the credibility of a witness, it is required that some specific circumstances be presented and established that would render reasonably and objectively that particular witness's impartiality, disbelieving. The credibility of a witness could not be simply questioned based on suspicion, except insofar clear and precise facts showing of such bias are presented and established.

The Supreme Court of Kosovo did not find any specific circumstances that would render impartiality of those witnesses doubtful. The witnesses have not from either a subjective or objective analysis of their evaluations been shown to lack impartiality.

Therefore, The Supreme Court of Kosovo is satisfied that the previous court provided sufficient explanations and convicting reasons on the statements relied upon and properly addressed the objection put forward by the defense.

B. Alleged violations of provision of the Criminal Code

5. Defence counsel argues there is a violation of the criminal law because of erroneous legal classification of the criminal act, and thus erroneous application of the provisions of the Criminal Code of Kosovo (CCK). The defendant was acquitted for the criminal offence of causing general danger as being consumed by the criminal offence of murder. The defence counsel *M.H.* claims that, according to the reasoning of the previous judgments, the defendant did not have intention to deprive from the life *N.M.* and *P.S.* but to cause damages to the Restaurant and frighten the owners. In the actions of the defendant, therefore, if taken as the previous courts have stated, there are no elements of direct intent or even eventual intent for the criminal offence of murder. The criminal offence in such a case could be qualified as an aggravated form of

Causing General Danger, contrary to Article 291 par 1 and 5, in conjunction with Article 23 of the Criminal Code of Kosovo, resulting in the death and injuries of towards unintended individuals.

The Supreme Court of Kosovo respectfully disagrees with the defence counsel. The protected value is different in the criminal offence of Murder and in the criminal offence of Causing General Danger. In the criminal offence of Murder the protected value is life and integrity of the individual. Although the criminal offence of Causing General Danger may result in death or injuries of a person or several persons, the premier protected value is not the integrity of the individual. There is no doubt that the criminal offence of murder can be committed by using explosives.

Article 15 of the CCK reads:

- (1) A criminal offence may be committed with direct or eventual intent.
- (2) A person acts with direct intent when he or she is aware of his or her act and desires its commission.
- (3) A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence.

The Supreme Court of Kosovo points out that the perpetrator is considered to have accepted the occurrence of the consequence when he/she did not refrain from the action even if he/she thought the consequence may occur. For purpose of intent, the accuracy of the magnitude of the consequence is not relevant. What is important is that the perpetrator either was aware of or, taking into account the personal characteristics of the perpetrator, he/she could have known that as a result of his/her action a prohibited consequence may occur, and nevertheless proceeds with his/her actions.

In the case at hand, as stated by the District Court (see the judgment, under headline "Conclusions"), it is clear that defendant **B. H.** knew the presence of the customers in the bar Prestige. The defendant, as a police officer, was aware and could have known that as a result of the explosives a death and/or injuries could happen to individuals. There is no doubt that he foresaw the possibility that the explosion could cause death and bodily harm to people near the place of the detonation. Nevertheless, he proceeded with his actions and took part in placing the explosive.

This panel agrees with the previous judgments and considers that the defendant **B. H.** acted with eventual intent. Therefore, appealed judgment of the Supreme Court of Kosovo remains free from error with regard to the qualification of the criminal offence.

IV. Conclusion of the Supreme Court of Kosovo

For the reasons above, pursuant to Article 437 of the CPC, the Supreme Court of Kosovo decided as in the enacting clause.

SUPREME COURT OF KOSOVO
PML 202/2013, 5 February 2014

Presiding Judge:



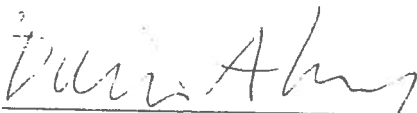
Timo Vuojolahti
EULEX Judge

Recording clerk:



Adnan Isufi
Legal Advisor

Members of the panel:



Bertil Ahnborg,
EULEX Judge



Nesrin Lushta
Supreme Court Judge