COURT OF APPEALS

Case number: **PAKR 434/13**

Date: **20 March 2014**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Annemarie Meister as Presiding and Reporting Judge and EULEX Judge Bertil Ahnborg and Judge Driton Muharremi as members of the Panel, with the participation of Anna Malmström, EULEX Legal Officer, acting as Recording Officer, in the criminal proceeding against:

> **N.B**, nicknames and , born on XX 19XX in , Municipality, son of I and N, citizen of Kosovo, ID no XXXXXXXXXX, married with three children;

charged with, in the Indictment PPS 460/09 filed on 26 April 2013 and *found guilty of*, by the Basic Court of Pristina on 13 July 2013, case no PKR 276/13, the following criminal offence:

Aggravated Murder, under Article 30 paragraphs 1 and 2 of the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK), in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 179 paragraph 1, subparagraph 1.4 of the Criminal Code of Kosovo (CCK);

acting upon **the Appeal of Defence Counsel Osman Havolli filed on behalf of N.B on 22 October 2013 against the Impugned Judgment;**

having considered the Response of the Appellate Prosecutor of Kosovo no PPA/I 393/13 dated and filed on 14 November 2013;

after having held a session, closed to the public, on 20 March 2014 in the presence of the accused **N.B** and Defence Counsel Osman Havolli assisted by Sarandë Beqiri and Ylber Havolli, State Prosecutor Claudio Pala and injured party **A.K**;

having deliberated and voted on 20 March 2014,

pursuant to Articles 391, 394, 398 and 401 of the Criminal Procedure Code, Law no. 04/L-123 (CPC);

renders the following

JUDGMENT

I. The Appeal by Defence Counsel Osman Havolli on behalf of N.B is hereby rejected as unfounded.

II. The judgment of the Basic Court of Pristina in case no PKR 273/13, dated 19 July 2013, is hereby affirmed.

REASONING

I. Procedural history of the case

1. The indictment in this case, PPS 460/09, was filed on 26 April 2013 in which **N.B** was charged with the above mentioned criminal offence. An initial hearing, in which **N.B** pleaded guilty, was held on 3 July 2013. On 15 July 2013 the main trial hearing, before a panel of the Basic Court of Pristina composed of two EULEX judges and one Kosovar judge, determining matters relevant for sentencing was held. On 19 July 2013 the judgment in which **N.B** was found guilty of the above mentioned criminal offence was announced.

2. On 22 October 2013 an appeal was timely filed by Defence Counsel Osman Havolli on behalf of **N.B** in relation to the sentencing. No response to the appeal was filed by the Special Prosecutor. The opinion of the Appellate Prosecutor was filed on 14 November 2013.

II. Submissions of the parties

1. The Appeal of N.B

3. Defence Counsel Osman Havolli on behalf of **N.B** challenge the Impugned Judgment due to decision on punishment as per Article 387 CPC and proposes the Court of Appeals to impose a more lenient punishment, crediting the time spent by **N.B** under close protection to the imposed punishment.

4. The Defence submits that had the Trial Panel better assessed, analysed and simplified the mitigating circumstances it would have rendered a more favourable decision. Due to a serious risk that **N.B** could be liquidated or assaulted certain measures to provide security was undertaken. The Court and the Prosecution found a solution to come out of this complicated

situation and they made a deal between the EULEX Institutions and **N.B** for close protection. The close protection was organized and coordinated well. **N.B's** house was protected and secured in a so called iron way, whereas the access to the house was made only by the family members with some exceptions. **N.B** and his house were attacked several times in different ways and the security circle started to narrow. He was under surveillance for 24 hours per day. These security measures undertaken to secure his life surpassed the limits of the measures and security criteria's for close protection.

5. Even though it is not envisaged in the law that close protection shall be credited as imposed sentence; nevertheless, if we analyse and carefully assess the case we have the answer that time spent in close protection for almost four years should be credited as deprivation of freedom since he was in full isolation.

2. The Response by the Appellate Prosecutor

6. The Appellate Prosecutor moves the Court of Appeals to reject the appeal as ungrounded and affirm the challenged judgment. He submits that as per Article 365 CPC the inclusion in the punishment of the time during which a person was deprived of his liberty is only foreseen for the convicted person and for that deprivation of liberty suffered in relation to the criminal offence(s) he was found guilty of or in relation to an earlier sentence and it does not include security measures. Moreover, **N.B** was under close protection as cooperative witness in relation to the different criminal proceedings known as B1 and B2.

III. The Findings of the Court of Appeals

1. Competence of the Court of Appeals

7. 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).

8. 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. Findings on merits

9. **N.B** has been found guilty of Aggravated Murder in co-perpetration pursuant to Article 30 paragraphs 1 and 2 of CLSAPK, in conjunction with Article 22 CCSFRY, currently criminalized under Articles 31 and 179 paragraph 1, subparagraph 1.4 CCK. The question of **N.B's** guilt is not

subject to any appeal and does therefore not fall within the review of the Court of Appeals. Subject to appeal is only the decision on punishment.

10. Based on the principle of applying the most favorable law, Article 3 CCK (Article 4, paragraph 2 CCSFRY), the court must first establish which law is the most favorable to the defendant in the current case. This issue was in depth analysed and reasoned in the Impugned Judgment. The Court of Appeals concurs with the Basic Court's findings that the most favorable and therefore applicable law is the Criminal Law of the Socialist Autonomous Province of Kosovo (CLSAPK) with a minimum punishment of ten (10) years of imprisonment and a maximum punishment of fifteen (15) years of imprisonment for Aggravated Murder. Pursuant to Article 42 paragraph 2 CCSFRY the court may set the punishment below the limit prescribed by law and pursuant to Article 43 paragraph 1 point 1.1 CCSFRY if a period of three or more years' imprisonment is prescribed as the lowest limit for the punishment it may be reduced for a period up to one year of imprisonment.

11. When deciding on the punishment the Basic Court has again in depth analysed the relevant factors, the mitigating and the aggravating circumstances. As mitigating circumstances the Basic Court has considered the behavior of the defendant and his family situation. **N.B** is married with three children aged 8, 10 and 12. He voluntarily came forward to tell about the criminal offence in this case as well as a number of other criminal offences he had been involved and knowledge of. He confessed to have committed the killing in this case and he entered a guilty plea. Ever since he first came forward he has waited for his punishment and repeatedly confirmed his initial version of facts. Since 2010 he has been under close protection because of his decision to come forward and testify against his co-perpetrators.

12. As aggravating factors the Basic Court considered only the circumstances of the crime that led to the qualification of the criminal offence as an Aggravated Murder. These circumstances have rightfully not been considered again when imposing the punishment.

13. The Court of Appeals finds that the Basic Court correctly has identified the mitigating and aggravating circumstances and they have also been considered by the Court of Appeals. The Court of Appeals further finds that the imposed punishment is reasonable and proportionate. The Court of Appeals has particularly considered as a mitigating circumstance **N.B's** admission of guilt and his decision to come forward. The Court of Appeals has also particularly considered that **N.B** and his family have, ever since he first came forward, been under a constant threat and will probably continue to be so for a long time if not for their entire lives. Since 2010 they have lived with close protection which has strictly limited their freedom. The Court of Appeals is however mindful that **N.B** is guilty of a very serious criminal offence.

14. The time **N.B** has spent in house detention has correctly been credited to his punishment pursuant to Article 365 paragraph 1, subparagraph 1.5 CPC. **N.B** has in his appeal argued that also the time spent with close protection should be credited to the punishment. The crediting of

time spent under deprivation of liberty is regulated in Article 50 CCSFRY (Article 83 CCK). The article reads:

> *"The period of time spent in custody awaiting trial, as well as each deprivation of liberty relating to a criminal act, shall be counted as part of the sentence of imprisonment, juvenile custody or a fine."*

N.B has argued that the form of protection he has had during the past years, although not envisioned as such in the law, has been a deprivation of liberty.

15. The Court of Appeals can find no legal ground for crediting the time **N.B** has spent with close protection towards his punishment. The law envisions that time spent under deprivation of liberty relating to a criminal offence be credited towards the punishment. It applies to any detention ordered on the grounds of the criminal act, regardless of which authority ordered it.[1] The key, the Court of Appeals finds, is that the deprivation of liberty is ordered and that it is ordered on the grounds of a committed criminal offence.

16. The Court of Appeals in no way doubts that it has indeed been a deprivation of liberty for **N.B** in the sense that he has not been able to move freely. It is however not a deprivation of liberty in the sense of the law as it has not been ordered by a Court or any other authority. The close protection has been provided to **N.B** due to the constant threat to his life because of his decision to come forward with his story and his testimonies against a number of people. The protection has however at all times been provided with the agreement of **N.B**. Since the measure of house detention against him was lifted in October 2010 until it was again ordered in July 2013 he has been able to at any time refuse the protection. The protection has not been given to him on the grounds of the criminal offence he has been found guilty of in this case. It has been given on the grounds that **N.B** is a cooperative witness in two other criminal cases.

17. In conclusion the Court of Appeals finds that the time **N.B** has spent under close protection cannot lawfully be credited towards his punishment. It has however been considered as a mitigating factor both by the Basic Court and the Court of Appeals resulting in a mitigation of the punishment.

Presiding Judge

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Annamarie Meister

EULEX Judge

[1] See Commentary to the Criminal Code of SFRY 1982, Article 50.

Panel member	Panel member	Recording Officer
_____	_____	_____
Bertil Ahnborg	Driton Muharremi	Anna Malmström
EULEX Judge	Judge	EULEX Legal Officer

Prepared in English, an authorized language. Reasoned Judgment completed and signed on 26 March 2014.