

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in the panel composed of EULEX Judge Timo Vuojolahti as Presiding and Reporting Judge, and Supreme Court Judges Erdogan Haxhibeqiri and Nebojša Borčić as members of the panel, in the presence of Lendita Berisha EULEX Legal Advisor, acting in capacity of a recording clerk,

in the criminal case against the defendant:

O.Z. father's name XXX mother's maiden name XXX born on XXX in village of XXX municipality of XXX Kosovo, Kosovo Albanian, last residence in freedom. XXX, businessman by occupation. high school education, XXX currently held in Detention Centre Prizren.

Convicted in the third instance, by a final judgment of the Supreme Court of Kosovo, dated 4 September 2013 (PAII no.3/2013), and found guilty of committing the criminal offences of:

- Count 1: **Murder**, committed on 10 October 2005 in co-perpetration in a state of diminished mental capacity, pursuant to Article 146 in conjunction with Article 23 and 12 paragraph 2 of the Provisional Criminal Code of Kosovo (PCCK),
- Count 2: **Attempted murder**, committed on 10 October 2005 in co-perpetration in a state of diminished mental capacity, pursuant to article 146 in conjunction with Article 20, Article 23 and Article 12 paragraph 2 of the PCCK,
- Count 3: **Unauthorized Ownership, Control, Possession or Use of Weapons**, committed on 10 October 2005, pursuant to Article 374 paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK, in force since 1 January 2013)
- Count 4: **Unauthorized Ownership, Control, Possession or Use of Weapons**, committed on 19 April 2007, pursuant to Article 374 paragraph 1 of the CCRK;

Based on the Judgment of Basic Court of Prizren, rendered on 9 December 2013 (PK.no.96/13), as corrected by the Ruling rendered on 16 December 2013 (PK.no.96/13), where the Basic Court, pursuant to the provisions of the Law on Amnesty, granted amnesty to the defendant for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons in Count 4 and sentenced the defendant with a new **aggregate punishment of eleven (11) years and six (6) months of imprisonment**, with the time spent in detention on remand (since 19 April 2007) being credited against the punishment imposed;

Acting upon the Request for Protection of Legality filed on 20 December 2013 by Defence Counsel E.R. considering the Opinion of the Office of the State Prosecutor of the Republic of Kosovo (OSPK) dated 8 January 2014;

Following the deliberation and voting, in accordance with Article 435 of the Criminal Procedure Code (CPC), the Supreme Court issues the following:

JUDGMENT

The Request for Protection of Legality filed by Defence Counsel E.R. on behalf of defendant O.Z. against the judgment PAII no.3/13 of the Supreme Court of Kosovo dated 3 September 2013 is hereby rejected as ungrounded.

REASONING

I. Procedural history:

On 16 July 2007 the District Public Prosecutor in Prizren filed the indictment PPS. No. 230/2005, at the District Court of Prizren against the defendant O.Z. and a second alleged perpetrator. The defendants were charged with committing the criminal offences of (Count 1) Aggravated Murder, committed in co-perpetration, pursuant to Article 147 paragraphs 4, 5, 8 and Article 23 of the PCCK; (Count 2) Attempted Aggravated Murder, committed in co-perpetration, pursuant to Article 147 paragraph 11, Articles 20 and 23 of the PCCK; (Count 3) Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 1 and 2 of the PCCK and defendant O.Z. alone (in Count 4) for another Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 2 of the PCCK.

The District Court of Prizren by its judgment P.Nr.155/2007 dated 17 April 2008, found the defendant O.Z. guilty of the criminal offences of **Aggravated Murder** in violation of Article 147 paragraphs 5 of the Provisional Criminal Code of Kosovo (PCCK), committed in co-perpetration, under Article 23 of the PCCK, of **Attempted Aggravated Murder** in violation of Article 147 paragraph 11 and Article 20 of the PCCK, committed in co-perpetration under Article 23 of the PCCK, of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 1 of the PCCK and of another count of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 2 of the PCCK, and sentenced him to an aggregated punishment of twenty-five (25) years of imprisonment.

Upon appeals filed by the Defence, on 21 July 2009 the appeals panel of the Supreme Court of Kosovo (as second instance court) pronounced its judgment AP-KŽ 481/2008. What comes to the defendant O.Z. the Supreme Court modified the first instance court judgment as to the legal qualification under counts 1 and 2, which were qualified as one **Aggravated Murder** in violation of Article 147 paragraph 11 of the PCCK, and as to the legal qualification under count 3, stating that the defendant O.Z. committed the criminal offence of **Unauthorised Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005 in XXX age, Prizren municipality. The other remaining parts of the judgment were confirmed.

The Judgment was appealed by the Defence Counsel.

On 28 December 2010 the Supreme Court of Kosovo (as third instance court) by Ruling API-KŽI 09/2009 annulled the Judgment of the Supreme Court of Kosovo AP-KŽ 481/2008 (dated 21 July 2009). The case was returned for re-trial to the Supreme Court as court of second instance.

On 6 November 2012 the Supreme Court of Kosovo, acting again as the second instance court, by its Judgment AP-KZ no.110/2011, modified the first instance judgment. The defendant was found guilty of the criminal offence of (Count 1) **Murder**, in co-perpetration and in a state of diminished capacity, contrary to Article 146 of the PCCK read with Article 12 paragraph 2 and Article 23 of the PCCK, and of (Count 2) **Attempted Murder**, in co-perpetration and in a state of diminished mental capacity, contrary to Article 146 read with Article 20, Article 23 and Article 12 paragraph 2 of the PCCK), and of (Count 4) **Unauthorized Ownership, Control, Possession or Use of Weapons**, in violation of Article 328 paragraph 2 of the PCCK. The court considered that the criminal offence in Count 3 was subsumed under counts 1 and 2. The court sentenced the defendant for the count 1 and 2, pursuant to Article 147 paragraph 1 item 11 of the PCCK, with a single punishment of fourteen (14) years of imprisonment and for the count 4 with two (2) years of imprisonment, resulting in an aggregate punishment of fifteen (15) years of imprisonment.

Upon the appeals filed by the Defence Counsel 'E.R.' and the State Prosecutor of Kosovo on 4 September 2013 the Supreme Court of Kosovo as a third instance court issued a judgment PAII no.3/13 by which it modified the judgment of the Supreme Court of Kosovo as a second instance court AP-KZ No.110/2011 (dated 6 November 2012), and found the defendant guilty of the criminal offence of (Count 1) **Murder**, committed in co-perpetration in a state of diminished mental capacity, contrary to Article 146 in conjunction with Article 23 and Article 12 paragraph 2 of the Provisional Criminal Code of Kosovo (PCCK), of (Count 2) **Attempted murder**, committed in co-perpetration in a state of diminished mental capacity, pursuant to article 146 in conjunction with Article 20, Article 23 and Article 12 paragraph 2 of the PCCK, and of (Count 3) **Unauthorized Ownership, Control, Possession or Use of Weapons** and (Count 4) **Unauthorized Ownership, Control, Possession or Use of Weapons**, both counts pursuant to Article 374 paragraph 1 of the Criminal Code of the Republic of Kosovo (CCRK, in force since 1 January 2013). The Supreme Court sentenced the defendant O.Z. to an aggregate punishment of twelve (12) years of imprisonment with the time spent in detention on remand since 19 April 2007 being credited against the punishment imposed.

What comes to Count 3 the Supreme Court in its reasoning stated that the indictment included also other elements than the use of the weapon, namely the ownership, control and possession of the weapon. The offences of Murder and the Weapons offences contain different elements and are directed against different protected social values. The weapons offence holds significant danger for the society on its own. Therefore, the Supreme Court concluded that the weapons offence should be punished separately. It also applied Article 374 paragraph 1 of the CCRK (in force since 1 January 2013) as the most favourable law to the defendant.

As regard to the punishment the Supreme Court stated that the defendant was found guilty for committing the criminal offences of Murder and Attempted murder (in state of diminished mental capacity), which are two separate criminal acts. Moreover, only one

murder was committed. For these reasons the defendant cannot be sentenced for the counts 1 and 2 pursuant to Article 147 item 11 of the PCK to a single punishment. Therefore, the Supreme Court sentenced the defendant separately for each count of charges: for Count 1 eight (8) years of imprisonment, for Count 2 four (4) years of imprisonment, for Count 3 one (1) year and six (6) months of imprisonment and for Count 4 six (6) months of imprisonment. The aggregate punishment was twelve (12) years of imprisonment.

On 9 December 2013 the Basic court of Prizren in accordance with Articles 2 and 3 paragraph 1.2 item 1.2.5 and Article 7 paragraph 1 item 1.1 of the Law on Amnesty (04/L-209) granted amnesty to the defendant ' O. E. for the criminal offence of **Unauthorised Ownership, Control, Possession or Use of Weapons** in Count 4, pursuant to Article 328 paragraph 2 of the CCK. The punishment for the criminal offence in Count 4 was dismissed. Therefore, the District Court modified the Judgment of the Supreme Court dated 4 September 2013 (PA.II.no.3/2013) and imposed a new aggregate punishment of eleven (11) years and six (6) months of imprisonment (the Judgment of the Basic Court of Prizren PK.no.96/13 of 9 December 2013 was corrected with the Ruling of 16 December 2013).

On 20 December 2013 Defence Counsel E. R. on behalf of the defendant O. E. filed a Request for Protection of Legality against the Judgment of the Supreme Court of 4 September 2013. The Defence Counsel alleges violation of Article 402 paragraph 1, subparagraph 1 related with Article 403 paragraph 1 subparagraph 12 of the Criminal Procedure Code of Kosovo (KCCP) and violation of Article 402 paragraph 1 subparagraph 2 related with Article 404 subparagraph 2 of the KCCP. He proposes the Supreme Court to amend or annul the challenged judgment and the previous judgments of the lower instances.

On 9 January 2014 the Office of the State Prosecutor of Kosovo (OSPK) filed a reply to the defendant's Request for Protection of Legality. In its reply the State Prosecutor submitted that the Defence has not presented such facts which were not considered and adjudicated by the Supreme Court of Kosovo. According to the OSPK the Supreme Court has already evaluated and rightfully decided on issues which were raised in the request of the Defence. Therefore, it considers that the request is without merits and proposes that the Supreme Court rejects it as unfounded and affirms the contested judgment.

II. Findings of the Court

The Supreme Court finds that:

- a. The Request for Protection of Legality is admissible (timely filed before the competent court by the authorized persons in accordance with Article 432 paragraph 4 and Article 433 paragraph 1 and 2 of the CPC).
- b. The request for protection of legality is unfounded.

The Supreme Court of Kosovo preliminarily refers to Article 432 of the CPC, which stipulates that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation. Therefore, contesting the factual situation at this stage of the proceeding is inadmissible and the Court will limit itself to the assessment of eventual violation in the interpretation or application of the law.

Pursuant to Article 436 of the CPC, the Supreme Court of Kosovo shall confine itself to examination of violations of the material and procedural law as alleged by the Defence Counsels.

Merits of the case:

a. In the Request for Protection of Legality the Defence argues that the enacting clause of the challenged judgment under counts I – III is incomprehensive as it does not contain the legal figures of the criminal offences. According to him the court failed to provide description of the actions which are characteristics of these criminal offences.

In review of this point the Panel could not established any substantial deficiency as regard to the enacting clause of the appealed judgment. The Panels finds that the enacting clause of the appealed judgment is sufficiently clear and comprehensive. The Panel observes that the factual description as established once by the first instance court remained unchanged during the entire criminal procedure. Subject of modifications (in higher instances) were only qualifications of the criminal offences committed by the defendant, which were all done within the frame of same factual description of the criminal activities. Therefore, it rejects as ungrounded the Defence allegation as regard to this issue.

b. The Defence claims that the qualification of the criminal offence under count I and II of the enacting clause does not correspond with the reasoning. The Defence Counsel emphasizes the existence of contradiction as to the findings of the court that the defendant committed the criminal offence with premeditation and the fact that the defendant committed the criminal offence under the condition of diminished mental capacities. According to him the court did not provide sufficient reasons in relation to the decisive facts.

The Panel does not see any contradiction between the enacting clause and the reasoning. Contrary to the Defence the Panel notes that the issues of commission the criminal offence under *the condition of diminished mental capacities* on one side and *premeditation* on the other side are of different nature. So, if the first circumstance exists, it doesn't mean necessarily, that the second one must be excluded. This Panel fully concurs with the opinion of the Supreme Court that the fact that the defendant committed the criminal offence in co-perpetration puts forward the fact that at least there was some degree of planning in commission of criminal offences he was convicted for. This also points that the defendant has the capacity to control his own actions even though he has a disturbed personality due to which his capacity to abstain from the criminal acts has been diminished. Therefore, it rejects as unfounded the allegations of the Defence.

When it comes to issue of decisive facts, the Panel finds that the Supreme Court in its reasoning has explained the circumstances based on which it was concluded that the defendant committed the criminal offence he is convicted for. Further, this Panel notes that the Defense Counsel only cited the provisions of the criminal procedure without indicating which facts were not sufficiently reasoned. It is not adequate to allege that the court did not sufficiently reason the decisive facts if the facts are not pointed out and clarified. The duty of the Defence Counsel should be to indicate clearly the facts and provide convincing explanation in regard to the allegations.

c. The Defence claims violation of the criminal law as the court did not apply Article 148 of the CCK. As regards to the criminal offence of Attempted Murder the Defence maintains that the defendant had no intention to commit this offence and the court failed to provide any reason how it determined the legal qualification and the existence of intent. The offence can only be qualified as the criminal offence of Grievous Bodily Harm, pursuant to Article 154 paragraph 1, sub paragraph 1 of the CCK.

The Panel observes that such allegations were already made by the Defence in the third instance (against the judgment of the second instance court) and thoroughly addressed by the Supreme Court in its Judgment (page 11 -13). The Panel concurs with the conclusion of the appealed judgment and points out, that the element of intent has been reasoned. There are no violations of law as alleged by the Defense Counsel.

Based on the above, it is decided as in the enacting clause.

Presiding Judge:

Recording Officer:



Timo Vuojolahti
EULEX Judge




Lendita Berisha
EULEX Legal Adviser

Members of the panel:



Erdogan Haxhibeqiri
Supreme Court Judge



Nebojša Borić
Supreme Court Judge

SUPREME COURT OF KOSOVO
PML – KZZ no 237/2013
22 May 2014
Prishtinë/Priština