

COURT OF APPEALS

Case number: PAKR 146/15

(P. no. 958/2012 Basic Court of Prishtina, dated 6 November 2014)

Judgment of the Court of Appeals of Kosovo, in a panel composed of EULEX Judge Roman Raab, presiding and reporting, EULEX Judge Elka Filcheva-Ermenkova and Court of Appeals Judge Driton Muharremi, as members of the panel, with the assistance of the EULEX legal advisor Vjollca Kroci-Gerxhaliu, acting as recording officer, in open sessions on 1 October 2015 in relation to the defendants:

1. **S.M.**, nickname xxx father's name xxx, xxx born on xxx in xxx Xxx, Municipality of Xxx, residing in xxx, Municipality of Xxx, xxx nationality, Xxx, xxx, xxx of xxx xxx, occupation: xxx;
2. **S.M.1.**, nickname xxx father's name xxx, xxx, born on xxx in Xxx and residing in Xxx, Municipality of Xxx, xxx nationality, Xxx, xxx, xxx of xxx xxx, occupation: xxx;
3. **S.S.**, nickname xxx father's name xxx, xxx, date of birth xxx, place of birth unknown, residing in Xxx, Municipality of Xxx, xxx nationality, Xxx, xxx, occupation: xxx;

charged by the Indictment PPS no. 240/09 dated 20 November 2010, and **Acquitted** with the Judgment **P. no. 958/2012 Basic Court of Prishtina, dated 6 November 2014** in relation to the following criminal offences:

(Count one): War crime against civilian population contrary to Article 22 and 142 of the Criminal code of the Socialist Federal Republic of Yugoslavia (hereinafter: CCSFRY), currently criminalized under Article 23 and 120 (2) of CCK, in violation of common Article 3 common to the four Geneva Convention dated 12 August 1949 ('common Article 3') and Articles 1 and 17 of the Protocol II of 8 June 1977, Additional to the 1949 Geneva Convention ("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 charges the defendants in their capacity as Serbian military 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 and N.P., treated inhumanely S. B. and H.D., two civilians not taking part in the hostilities, by keeping them detained in inhuman conditions (filthiness, lack of food, water and medical care); in around Xxx between 19 and 22 April 1999;

(Count two): War crime against the civilian population contrary to Article 22 and 142 of the CCSFRY, currently criminalized under Article 23 and 120 (2) of the CCK, in violation of common Articles 3, 1 and 17 of 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 military of paramilitary officers, including D.T., S.T. 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 Xxx between 17 and 21 April 1999;

and

pursuant to Article 390 (3) of the KCCP, **S.S.** is Acquitted of:

(Count three): War crime against the civilian population contrary to article 22 and 142 of the CCSFRY, currently criminalized under article 23 and 120 (2) of the CCK, in violation of common Articles 3, 1 and 17 of 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 them, and particular by striking H.D. on the head with wooden trunk in Xxx on or about 21 April 1999.

acting upon

The appeal of the Special Prosecutor PPS no. 240/09 filed on 15 January 2015¹ against the Judgment P. no. 958/2012 of the Basic Court of Pristina dated 6 November 2014 that Acquitted the defendants of all charges;

having considered the:

Response to the Prosecutor's appeal, filed by the defense counsel Miodrag Brkljać on behalf of the defendant **S.M.** dated 28 January 2015 and the response of the defense counsel Živojin Jokanović on behalf of the defendant **S.S.** dated 29 January 2015;

Motion of the Appellate Prosecutor PPA/I.no. 147/15 dated 18 March 2015 and filed on 19 March 2015;

having held the panel session on 1st of October 2015 according to Article 411 of the Kosovo Code of Criminal Procedure (hereinafter: KCCP)²;

having deliberated and voted on 2 October 2015;

pursuant to Article 420 of KCCP *renders the following:*

JUDGMENT

- **The Appeal filed by the Special Prosecutor of the Republic of Kosovo against the Judgment of the Basic Court of Pristina P. no. 958/2012 dated 6 November 2014, is hereby Rejected as Ungrounded;**

¹ The English version of the appeal is stamped by the Basic Court of Pristina on 15 January 2015 while the Albanian version of the appeal is stamped on 13 January 2015. Both versions of the appeals are dated 11 January 2015.

² Criminal Procedure Code in force until 31 December 2012.

- **The Judgment of the Basic Court of Prishtina P. no. 958/2012 dated 6 November 2014, is hereby Affirmed.**

REASONING

1. Procedural History

On 20 November 2010, the Special Prosecutor of the Republic of Kosovo filed the Indictment PPS no. 240 /09 against **S.M., S.M.1and S.S.** for the criminal offences as described above. On the 31st of March 2011, the Indictment was entirely confirmed.

The first main trial commenced on 7th June 2011 before the panel of the (then) District Court of Pristina composed of two EULEX Judges and one local Judge. The main trial sessions commenced on 16 June 2011 to continue on 13th, 14th, 19th and 20th July 2011. On 22nd July 2011 the panel of the District Court of Pristina announced the Judgment and found all the accused not guilty as charged, because it was not proven that the accused had committed the criminal offences they are charged with.

On 8th of November 2011 the SPRK Prosecutor filed an appeal against the Pristina District Court Judgment.

Pursuant to Article 39 (1) of the Law on Courts, Law 03/L-199, on 1st of January 2013, the case was transferred from the previously competent Supreme Court as the second instance to the Court of Appeals of Kosovo.

On 25th July 2013, the Court of Appeals of Kosovo rendered the Ruling PAKR 978/12, by which the first instance Judgment was annulled and the case was returned to the Basic Court of Pristina for reconsideration and re-trial.

The re-trial commenced on 4 November 2013 at the premises of the Basic Court of Pristina. The defendants pleaded not guilty. The trial sessions were conducted on 23rd of November 2013, the 9th, 10th, and 18th of December 2012, the 21st of January 2014, 25th of March 2014, 29th of April 2014, 9th of June, 14th of July 2014, 15th of July 2014, 5th of August 2014, 16th September 2014, 13th, 17th, 29th of October 2014, 6th of November 2014. On the last session, after the deliberation and the voting were held, in the presence of all parties, the panel announced the Basic Court Judgment P. no. 958/2012 by which the defendants were acquitted.

Against the Judgment P. no. 958/2012 of the Basic Court of Pristina (hereinafter: appealed Judgment), dated 6 November 2014, the Special Prosecutor filed an appeal.

2. The appealed Judgment

With the appealed judgment dated 06 November 2014, pursuant to Article 390 paragraph 3 of the KCCP the defendants were acquitted, because it was not proved that they committed the acts they

were accused of. Namely, with the Indictment PPS 240/09 dated 20 November 2010 the defendants **S.M., S.M.1. and S.S.** were charged for the criminal offences 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 CCK in violation of common Article 3, common to the Geneva Conventions of 12 August 1949 (common Article 3) and Articles 1 and 17 of the Protocol II of 8 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:

1. The defendants S.M. and S.M.1. in their capacity as members of Serbian military or paramilitary structures, in co-perpetration with S. F., I. P., D.T., S.T., S.T1. and N.P., in and around Xxx, between 19 and 22 April 22 1999, treated inhumanely civilians S. B. and H.D. by keeping them detained in inhumane conditions such is filthiness, lack of food, water and medical care;
2. The defendants S.M. and S.M.1. in their capacity as members of Serbian military or paramilitary structures, in co-perpetration with each other and with the Serbian military and paramilitary officers, including D.T., S.T , S.T.1 and N.P., in and around Xxx, between 17 and 22 April 22 1999, violated the bodily integrity and health of civilians S. B. and H.D., by repeatedly beating them;
3. The defendant S.S. in her capacity as Serbian police officer or member of paramilitary structure, violated the bodily integrity and health of civilians S. B. and H.D. by beating them, and in particular by striking H.D. on the head with wooden trunk in Xxx, on or about 21 April 22 1999;

The first instance court found that the defendants did not commit the crimes they were accused of, because the relevant facts remained unproven. There is only the statement of the injured party S. B. to incriminate the defendants. Due to the lack of evidence to affirm beyond the reasonable doubt that the defendants took part in the crimes of which they were accused, the first instance court acquitted the defendants of all charges.

3. Submission of the parties

3.1 The appeal of the Special Prosecutor

The appeal of the SPRK Prosecutor is timely filed but ungrounded. The SPRK Prosecutor appealed the Judgment on 15 January 2015, because of:

- Essential violation of provisions of the criminal procedure pursuant to article 403 paragraph 1 item 12 and paragraph 2 item 1 of the CPCK; and
- Erroneous determination of facts pursuant to article 405 paragraph 2 of the CPCK

In relation to the first ground for the appeal the SPRK Prosecutor submits that the Judgment is in direct violation with an important piece of evidence, namely the report of the expertise concerning the psychological aspects of the testimony of the injured S.B. The Appellant points out, the expertise was obtained following the initiative of the panel, not been proposed by the parties. Despite the professionalism of the experts the Court has entirely neglected their opinion. Namely the explanations concerning the motivation of injured B. to make his statement, the general characteristics of his personality and his orientation in criminal proceedings are mentioned. In consequence, the injured is assessed as unable to properly and precisely recollect the event and recognize things and persons.

Moreover the contradictions in relation to the statements of other witnesses are also mentioned. Namely these are presentations of the witness N.K. of the food supply by the defendant **S.M.**, the witness R.K. knowledge of bad or violent behavior of the same defendant during the war and statements of the witnesses B.R, F.R and F.M. concerning the use of military uniform by the defendant **S.S.**.

In relation to Article 430 paragraph 2 item 1 of the CPCK the SPRK Prosecutor expresses her opinion, that the first instance court repeated the errors of the first judgment. She reminds, that the first judgment was quashed because it was based mostly on the statement of the injured S. B. dated 21.09.2000 which was taken in violation of the legal provisions for witness statements. Despite of the precise reasoning of the Court of Appeals' judgment dated 25 July 2013, the first instance court treated the abovementioned statement of injured as totally credible evidence with a big evidentiary weight. By comparison of this statement with later statements of injured S. B. and stressing the differences between them the Court justifies its evaluation of the injured being not credible as a witness.

Further she alleges many other facts that are not mentioned in the first statement of Injured S. B. of 21.09.2000 but they are regarded as proven. In essence the judgment is exclusively justified with inconsistencies in the statements of the injured which have not been obtained in accordance with provisions of procedural law in force at time when taken.

The Appellant thus considers Judgment based on such evidence essentially violating the above mentioned provisions of CPCK. The mistakes made by police in the course of preliminary proceedings resulted in erroneous consideration the injured as not trustworthy witness and in consequence led to an unjust final decision.

Relating the grounds of appeal – erroneous determination of the factual situation, the instructions of the International Criminal Tribunal for the former Yugoslavia (the Tribunal) on rendering sentencing judgment on the basis of a single witness, as cited in the first instance judgment, are stressed. Concerning the basic motive of the witness S. B. is ascertained by the experts as “justice not revenge”. The question of identification of the defendants by the witness is not relevant in this case, as the injured has lived his entire life in the same village with them, so in no way he can be wrong in their identification. That is why the witness S. B. meets all conditions of the Tribunal and any other assessment made by Court is erroneous.

Further on the erroneous evaluation of the statements of other witnesses is alleged. Concerning this point it is mentioned, that statements of witnesses F.N., F.I and R.N., confirming their supply of food or cigarettes by defendant **S.M.** are interpreted a wrong way. All of them have stated the people who had beaten them were masked, so they were unable to identify them. Their statements in no way prove the defendant have not been amongst the attackers.

The circumstances of blindfolding of the injured S. B. and accuracy of his descriptions in this matter, elaborated by the first instance court, are not in a high importance due to the time elapsed from these events and relative marginality of blindfolding in comparison with a pressure caused by general situation of the injured in that time. The same goes also for the uniforms and the ranks of the defendants. On the contrary the undisputable lack of interest of the defendants concerning reasons of their neighbor's B. arrest proves a little value of the injured for the accused. Also the dispute between the accused S.M. and injured S. B. from 2008 is mentioned.

As for the defendant **S.S.** the appeal opposes the conclusion of the court that there is no evidence whether the defendant has been engaged in any military action or not. In this context the statements of witnesses B.R, F.R and F.M. are cited. The mere fact of throwing the wooden log on the head of injured H.D. is stressed as the principal one, while the circumstances of wearing the uniform or its parts by the defendant are only of secondary importance.

The SPRK Prosecutor considers the alleged inconsistency in the statements of the injured S. B. referring to two secondary circumstances only. Moreover his statements were never in contradiction in relation to the main facts. Thus the Appellant considers the evidence collected sufficient to confirm the guilt of the defendants and proposes to approve the appeal in its entirety and amend the acquitting judgment by pronouncing all three defendants guilty of the criminal offences as charged and sentence them pursuant to the law, or quash the judgment and return the case to the court of first instance for review and re-decision.

3.2. The Opinion of the Appellate Prosecutor

The Appellate Prosecutor entirely concurs with the allegations of the Special Prosecutor. He finds the substantial violation of provisions of the criminal proceedings, what reflects to the fact, that the enacting clause of the Judgment is inconsistent with its reasoning and evidence contained in the case files. Further he finds the determination of factual state erroneous and incomplete, as the Court has not credited the relevant evidence, namely the testimony of injured parties S. B. and H. D. He states that from their testimony it is evident that the defendants have been engaged and uniformed within paramilitary units of former Yugoslav regime during the relevant period have in an inhuman way abused and beaten the injured parties though they were civilians and not implicated in the armed conflict. By not crediting these facts the Court acquitted the defendants by considering it is not proved they have committed the crimes they are charged with. As a consequence the criminal law has been violated by not applying the punishing criminal provisions.

3.3. Responses to the Appeal

Two Defense Counsel have filed their responses to the Appeal, namely Defense Counsel Miodrag Brkljać on behalf of the Defendant S.M. and Defense Counsel Živojin G. Jokanović on behalf of the Defendant S.S.

The Defense Counsel Miodrag Brkljać in his Response to the Appeal proposes to reject the appeal as unfounded and confirm the first instance Judgment. He fully refers to his closing arguments pronounced in front of the first instance Court and his response to the Appeal in previous proceedings as the allegations of the Special Prosecutor in this stage of the proceedings do not bring any new arguments.

The Defense Counsel Živojin G. Jokanović proposes to reject the Appeal as ungrounded and to confirm the first instance Judgment. He points out concerning the military performance of the defendant S. J. that only two witnesses described her wearing a military uniform, on the contrary ten others totally denied it. The Defense Counsel however stressed his arguments on the evaluation of the witness S. B. by the experts. He finds the Court's attempt to clarify the inconsistencies in the statements of the witness by the expert assessment unsuccessful. He challenges the expert findings concerning the witness' mental state in 1999 because of the laps of time. Further he challenges the conclusions of the experts based on the general findings concerning the witness' characteristics.

4. Competence of the Court of Appeals and applicable law

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).

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).

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

The criminal procedure 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, namely Article 544 of the CPC, stipulates that "if on the occasion of an appeal the judgment is annulled, the main trial shall be conducted *mutatis mutandis* under the previous code". Also referring to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23.01.2013, 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.

5. Preliminary procedural issues

The Panel of the Court of Appeals held a session in the case on 1 October 2015 and deliberated on 2 October 2015.

6. Findings of the court of Appeals

The Special Prosecutor grounds her appeal on the violation of Article 403 (1) 12) and para. (2) 1) of the CPCPK as well as the erroneous determination of facts pursuant to Article 405 (2) of the CPCPK.

The appellate panel will now address each one of the alleged violation raised by the Prosecutor.

Alleged violations of the criminal procedure provisions

- **Violation of article 403 paragraph 1 item 12 of CPCPK**

1. The referred Article stipulates:

*“There is a substantial violation of the provisions of criminal procedure if:
(12) The enacting clause of the judgment was incomprehensible or internally inconsistent or inconsistent with the grounds for the judgment;
The judgment lacked any grounds; there was no statement of grounds relating to material facts;*

*The statement of grounds was wholly unclear or inconsistent in a large part;
Or in regard to material facts there was a considerable discrepancy between the statement of grounds relating to the content of documents or records of testimony given in the proceedings on the one hand and these documents or records themselves on the other hand.”*

2. The appellant does not point out which particular violation cited above she refers to. However, from the content of her allegations it is clear the only applicable is the last one, namely a considerable discrepancy between the statement of grounds relating to the evidence assessed by the Court and the evidence itself. All these evidences are admissible. The panel of the Court of Appeals has evaluated the evidence in case file and in the light of this the Panel does not find any procedural action to breach the procedural provisions in relation to the evidence that would constitute the essential violation of criminal procedure provisions. The panel of the Court of Appeals notes that the Judgment is based on real documentary evidence
3. The appellant argued that Judgment is in direct violation with an important piece of evidence, namely the report of the expertise concerning the psychological aspects of the testimony of the injured S.B.
4. The Panel has to stress out that the expertise and subsequent statement of the expert witnesses in front of the Court is to be considered one piece of evidence and assessed in the whole context of the evidence provided within proceedings. Further, the Panel observes that the Court gives a broad overview of the expert witnesses’ statement on pages 20, 21 of the English version of the impugned Judgment. The presentation of the witness’ statement fully concurs with this piece of evidence, thus making the allegations of the appellant irrelevant. This allegation however does not fall under the substantial violation as foreseen in Article 403 of CPCPK, but rather Article 405 of CPCPK thus will be elaborated later.

5. Further the appellant argues that the Judgment is in contradiction with the contents of other evidence, namely the statements of other witnesses, which were presented differently from their genuine content. Namely the statements of witnesses N.K. and R.K. are listed.
6. The Panel is again of the opinion, that the above mentioned allegation is ungrounded. The impugned Judgment in its part concerning the proceeded evidence describes the witness statements in concert with the records of the Main Trial, so there is no discrepancy matching Article 403 paragraph 1 item 12 of CPCK. The appellant allegations are read as a challenge of how the evidence was assessed. Therefore, this issue will be elaborated below.
7. The last objection in this part of the Appeal concerns the assessment of witnesses' statements in case of S.S., namely the statements of B. R., F. R. and F. M. The Appellant, however, refers to the conclusions of the Court, its factual findings based on these statements and considers them incorrect. Also this allegation will be thus elaborated in the part dedicated to Article 405 of the CPCK.

- **Violation of article 403 paragraph 2 item 1 of the CPCK**

8. The appellant argued that the first instance court repeated the errors of the first judgment. She reminds, that the first judgment was quashed because it was based mostly on the statement of the injured S. B. dated 21.09.2000 which was taken in violation of the legal provisions for witness statements.
9. The article 403 paragraph 2 item 1 of the CPCK states:

(2) There is also a substantial violation of the provisions of criminal procedure if in the course of the criminal proceedings, including the pre-trial proceedings, the court, the public prosecutor or the police:

1) Omitted to apply a provision of the present Code or applied it incorrectly;

10. It is to be mentioned, the Appellant did not specify which provision of the CPCK she considers omitted to apply or applied incorrectly. She refers to the previous Ruling of the Court of Appeals dated 27 July 2013. Besides this, she raises the allegations concerning the determination of the facts by the Court on the basis of evidence, which has been obtained in violation of provisions of the Criminal Procedure Code in force at the time of collection of evidence.
11. The Court of Appeals wishes to point out an important aspect related to the validity of evidence. According to Article 153 CPCK, evidence cannot be used by the court to base a decision only when its inadmissibility is expressly prescribed in the law. Thus, not all violation of procedural provisions makes the evidence imperatively inadmissible. When the law does not prescribe that consequence, an essential violation of proceedings in the collection of evidence may only occur if such breach of procedural provisions influenced the rendering of a lawful and proper judgment, pursuant to Article 403 paragraph 2.2 of the CPCK.

12. This has been pronounced in the point 18 of the Court of Appeals Ruling dated 25 July 2013. It has also been found that injured witness S. B. was only briefly asked about the discrepancy in his statements, considered by the 1st instance Court as substantial. It was the reason for the annulment of the Judgment and the return of the case for retrial.
13. In course of retrial the 1st instance Court has concentrated on this issue by re-hearing of the injured witness, appointment of expert witnesses and hearing of other witnesses in order to assess the witness's statement in a correct way and obtain all available evidence concerning the identification of the perpetrators of the crimes alleged to the defendants. After this, amendment of evidence, all the obtained evidence was evaluated and the conclusions were reached. Although the final findings of the court did not vary if compared with the previous judgment, the allegations of the appellant, that the Court repeated the mistakes in total ignorance of the remarks made by the Court of Appeals are not appropriate.
14. All the allegations of the Appellant concerning factual findings are to be referred in context of Article 405 CPC and thus will be elaborated below.

6.b) **Erroneous determination of the facts**

- **Violation of article 405 paragraph 2 of the CPC**

15. Before addressing all the allegations concerning determination of the factual situation mentioned by the appellant in all points of the Appeal, the Panel wishes to point out an outstanding importance of the witness statements given by injured party S.B. He is the only party present during all the events being a subject of this case and at the same time was able to identify all the defendants, who were his neighbors for a whole life before the war.
16. In fact there are two items that are to be proven. On one hand there are the events themselves, that happened to S. B. and H.D. in and around Xxx between 19 and 22 April 1999. This item is well proven, as there is not only single witness statement, but the statements of injured party S. B. are corroborated with the statements of injured party H.D., who describes the events in principal in the same way. Moreover, the statements of both injured parties are in concert with the medical statements concerning their injuries suffered after their release from detention and matching the mechanisms of injury described by both witnesses. The statements concerning mere fact of their detention and general conditions of this detention are supported by statements of other witnesses. The Panel therefor fully concurs with the impugned Judgment in its list of proven facts and evidence given on page 28 of the English version.
17. The Appellant's allegation that many of those facts were not mentioned in the early statements of S.B, is not relevant. As stated above, those facts are strongly proven by corroborative and supportive evidence derived from the different independent sources.

18. The second item to be proven is the issue of the identity of the perpetrators of above mentioned criminal acts. Concerning this issue, the evidence is limited to nothing more but statements of the injured party S.B..
19. The Panel needs to point out the principle of presumption of innocence, which means, the guilt of the suspect has to be proven beyond reasonable doubt, otherwise the suspect is deemed to be innocent. Bearing in mind the statements of the injured party S. B. are the only evidence capable to prove the role of the defendants in his and H.D.'s ill-treatment, the Panel points out the high importance of careful assessment of the entire performance during these criminal proceedings.
20. There is no doubt the particular statements of S. B. differ in time during the proceedings in this case. The impugned Judgment gives an overview of all his statements on the page 27 of the English version. It is clear, that for the first time the defendants were mentioned as persons who beat him in his statement dated 17.10.2008. Despite the Appellant allegations presented on page 7 of the English version of the Appeal, heading towards disqualification of the early statements of S. B. on the grounds of violation of procedural provisions, the Panel, bearing in mind its conclusions concerning admissibility of evidence, as presented above, cannot overlook the witness' early statements, as the Prosecutor suggests. Having opined the procedural violations recognized at obtaining evidence do not cause inadmissibility of such evidence, the Courts have to take these statements into consideration.
21. It is to be repeated that in the statement of S. B. given on 21. 09. 2000, the names of the defendants do not appear, or more precisely do not appear as individuals who have ill-treated him. In fact, there are other names mentioned as the names of perpetrators of this behavior rather than the defendants. The defendants do not appear in this context at all. The Panel is aware of the incapacity of the procedure of obtaining this witness' statement, so assesses this piece of evidence in relation to other items of evidence.
22. Next matter to address is S.B.'s description of the events in his own handwritten statement from 10.07.2007. The Panel points out the time elapsed from the time of the events until the time when the mentioned statement is given, as well as evident lack of any pressure, as this statement was written by injured party himself in his privacy and handed over the authorities only after it was completed. Although this statement points out concrete names of individuals beating S. B. and H.D., the names of **S.** and **S.M.1.** are mentioned as people willing to help the detainees, but because of their position in the military structure, they were not able to do so. In the statement of S.B., only **S.S.** is described as a person to beat them, but since the factual findings in her case are different comparing to the case of other two defendants, it will be elaborated separately.
23. The statement from 17.10.2008 S. B. points both defendants out as persons who have beaten him. However, the Panel has to mention the facts that steam out from other items of evidence. First, it is a statement of I.P. who-was disclosed in two early statements of S. B. as a person who beat them. P. described a conversation between him and B., in which he swore his innocence. Such a conversation was confirmed by a witness T. B., who, however, was not familiar with its content. S. B. refused participation in such a conversation, but in his

later statements, the name of I. P., originally one of the main perpetrators, does not appear anymore.

24. The second issue is the argument between S. B. and **S.M.** at the corridor of the Municipality where both of them were employed. This scene was described by S. B. and confirmed by the witnesses B.A. (in his statement of 2009 and in the main trial) and the statement of the witness M. G. (in his statement of 2009, in the main trial his statement was evasive and implausible). Following all the statements, the argument between S. B. and **S.M.** occurred in 2008, more precisely following the statement of M.G.in spring of 2008.
25. Being aware of these circumstances, the Panel considers that the name of S.M.as a person that mistreated him was mentioned in the later statements of S. B. (unlike in the previous statements) under influence of the scene they both had in the Municipality, which triggered the hostile recollection of those painful events S. B. went through.
26. Neither of these two findings as mentioned in points 23 and 24 can be seen as a circumstance in favor of the credibility of S.B.'s statements.
27. Numerous arguments raised by the appellant are in relation to the expertise and subsequent statements of the expert witnesses at the main trial. It is alleged that the Court has entirely neglected the opinion of the experts, despite their professionalism and correctness. The Appellant refers to the motives leading S. B. as "justice, not revenge" and the profile of this witness as "a good person..." Moreover, the Appellant refers to the experts' findings concerning witness' non-understanding of the criminal proceedings, lack of his psychological preparation and his overall credibility.
28. The Panel points out that the witness was interviewed by the experts after many long-lasting hearings that forced him to recollect very traumatic events of his life. During the entire proceedings, he has suffered from the lack of any psychological assistance and even clear understanding of the procedure itself. Moreover the repetition of the interrogations, the duration of his hearings and his expert examination, clearly demonstrated the court doubts about the credibility of his description of the events. . All this was mentioned by the experts. In this situation the experts came to the conclusion he continues to tell the same.
29. The expert opinion gives the explanation to the contradictions in witness' statements concerning the precise details of his blindfolding, chronology of his beating and other details, which the Panel considers understandable in the light of duration of the painful events, the stress within their progress and also the range and the frequency of witness' hearings. It is clear, the witness cannot describe the extremely painful events, threatening his life, lasting several days, exactly the same way in each detail, especially after at least 9 years have elapsed since then. The experts however did not explain the crucial point of the assessment of his statements, namely the change of the identification of the perpetrators since 2008.
30. The Panel is convinced that this is the most important issue in assessment of the evidence related to the witness S.B. The witness himself gives the explanation of mistakes of the record or the translation, or the lack of the direct questions concerning namely both

defendants **M.** The Court of Appeals admitted this explanation in the ruling from 25 July 2013 concerning the first witness statement from 2000. The Panel however cannot accept this explanation for the statement from 2007, when neither the interpreter nor the authority asking questions was involved. Despite this, the witness himself mentioned the names of the two defendants, but presented them as trying to help, not as the perpetrators.

31. The Panel again wishes to point out the principle of the presumption of innocence as a fundamental protection for a person accused of crime which requires the guilt of the defendants be proven within the standards of *beyond reasonable doubt*. As stipulated in Article 3 paragraph 2 of the CPCK, doubts regarding the existence of the facts relevant to the case shall be interpreted in favor of the defendant (*in dubio pro reo*). The doubts cannot be solved in a way suggested by the Appellant to not take the early statements of the injured party into consideration, although they are admissible as evidence. In relation to this, the Panel emphasizes that all admissible statements must be assessed and scrutinized carefully. After such a careful assessment, the Panel states that the change of the witness statements in 2008 and the circumstances mentioned above, make the doubts even more grounded which prevents the Panel to consider the identification of the defendants as the perpetrators proven beyond reasonable doubt solely on the basis of his statements.
32. Next Appellant's allegations concern the assessment of other evidence, namely the statements of other witnesses. The statements of the witnesses N.K. and R.K. are mentioned only in the review of the proceeded evidence, but not in the evaluation of evidence and Court findings. It is clear that their statements did not influence the final findings of the Court. Beside this, the witnesses did not say whatsoever concerning the detention of injured parties. They did not bring any piece of evidence proving the involvement of any of the defendants in beating of S. B. and H.D. The Panel considers them irrelevant and is of the opinion they were mentioned in the Judgment only in order to display their content.
33. Concerning the statements of other witnesses who were imprisoned in Xxx and the subsequent Appellant's conclusions in relation to this (page 8 and 9 of the appeal in English) the Panel is of the opinion that they are nothing more than fabrications without any evidential grounds. The Prosecution points out the witnesses F. N., F. I. and R.N. who stated that the defendants were supplying them with food. Besides this they stated, they were beaten by military persons wearing masks, so they could not recognize them. The Appellant presents her conclusion, that the defendants could have beaten the detainees masked and in the meantime provide them with food without mask in order to prepare their life in Kosovo in case they lose the war. There is no evidence supporting it. The constructions of possible intents of the defendants without any grounds in the evidence are not acceptable and cannot be presented as the prove of the guilt.
34. The same can be stated concerning the absent interest of the defendants about details of the detention of the injured parties. The defendants admitted they did not ask for those details, but explained that they were only ordinary soldiers without any opportunity to help their neighbor. This fact is in consent with the testimonies of the witnesses F.N. and F.I. who stated the Serbs were not able to help them and those trying to help were arrested. It is to be

pointed out that the lack of interest, especially in those circumstances, does not prove the participation of the defendants in the alleged events.

35. It can be added, that the witness B. R., who admitted the visit of the defendant **S.M.** at her house stated that, despite the friendly relationship with him and despite her knowledge of S.'s detention, she did not ask him for his release.
36. It has been established by the Panel that the present evidence is not sufficient to form the body of the criminal act the defendants were initially charged for.
37. The Panel will turn to evaluate the involvement of the defendant **S.S.** in this criminal act. After careful review of the case file and the entire evidence, the Panel observes that the case of the defendant **S.S.** is different comparing to the other two defendants. Her involvement in ill-treatment of the injured parties was for the first time mentioned in the written statement of S. B. from in 2007.
38. As it was clearly explained in the impugned Judgment, the perpetrator of the war crime may be only a member of military, political or administrative organization of the side of the conflict as well as each person in its service. The question of the defendant's involvement in the armed conflict in Kosovo and her personal capacity to be a perpetrator of the war crime is thus the pivotal one in her case.
39. It was mentioned that **S.S.** worked in the kiosk before the war and she continued to work in this position during the war conflict. The defendant herself stated she worked in the kiosk and fully denied her involvement in any activities within the military conflict. Witness S. B. in his statement from 2007, when the first time mentioned the defendant's name, did not explain her position in the military structure, only stated that recently (in 2007) she is wearing KPS uniform. In his later statement he however described her in a military uniform. The assessment of his statements concerning the Defendant was made in the reasoning of the first District Court Judgment dated 22 July 2011 at the pages 12 and 13. It was not a subject of any challenge by the Court of Appeals Ruling from 25 July 2013. The review of the inconsistencies in the statements of S. B. is repeated in the impugned Judgment at page 26 (English version). The Panel is convinced that because of those differences within whole criminal proceedings the statements of S. B. cannot be the ground to prove the defendant's role in the standard beyond reasonable doubt.
40. The Appellant refers to the witness statements of B.R., F.R. and F.M., who allegedly prove the military status of the defendant **S.S.**. The Panel has assessed the statements of these witnesses and came to the following conclusions:
 - 40.1 The witness B.R. stated continuously she has seen **S.S.** often present in the military center in Xxx, but did not describe any purpose of her visits. The other witnesses have stated, the people from Xxx were coming to the center to see the detained. The mere fact the defendant was present there, as described by B.R., thus does not prove her participation in the military structure. Besides this the witness continuously stated, the defendant did not wear any kind of uniform, she wore only the xxx uniform after the conflict, while during the conflict she worked in the xxx.

40.2 The witness F. R. stated, the defendant was always in the uniform during the conflict, although he was not able to give details of her uniform. It is clear from the files, the witness was born in August xxx, so during the war he was xxx years old (he stated he was xxx). His statement is fully in contrary to the one of his mother. Due to his age in the war time the Panel cannot consider his statement unshakable prove of defendant's military position. Being aware his statement is in contrary with another piece of evidence, his description of the uniform is unclear and it was proven the defendant wore a police uniform after the conflict, the Panel is of the opinion that those issues could have influenced the perception of the Defendant's personality by the witness.

40.3 The witness F. M. stated the defendant **S.S.** was wearing a uniform when beating the injured parties, but his description of whole act differs from the description of the injured parties. The witness stated they were brought to the school yard by a tractor, beaten and moved to the container. Also he identified xxx (**S.M.1.**) as one of the perpetrators of the beating outside the school which does not concert with any version of S.B. For these reasons the witness statement of F.M. assessed in relation with other witness statements, including the one of B. R., which is consistent during whole proceedings, does not back the conclusion of military involvement of the Defendant beyond reasonable doubt.

41. As described above the evidence proceeded in this case did not prove **S.S.** was a member of military, political or administrative organization of the side of the conflict, nor a person in its service. The Panel wishes to point out that for the criminal responsibility for the crimes described in the indictment the mere perpetration of the acts is not sufficient, as the involvement of the perpetrator in the military structure is an integral part of the merits.

42. Closing remarks

For reasons elaborated above, the Court of Appeals rejected the Prosecutor's Appeal as ungrounded and affirmed the impugned judgment.

The costs of the criminal proceedings shall be paid from budgetary resources.

As stated above, pursuant to Article 420 (2) of the KCCP, the Court of Appeals decided as in the enacting clause.

The Judgment drafted in English language.

Presiding Judge:

Roman Raab, EULEX Judge

Panel Members:

Driton Muharremi
Kosovo Judge

Elka Filcheva-Ermenkova
EULEX Judge

Recording Officer:

Vjollca Kroçi - Gërxhaliu, EULEX Legal Advisor

KOSOVO COURT OF APPEALS

PAKR no. 146/15

2 October 2015

(finalized on 17 November 2015)

