BASIC COURT OF MITROVICË/MITROVICA

P.nr. 947/2013

25 November 2014

IN THE NAME OF THE PEOPLE

THE BASIC COURT OF MITROVICË/MITROVICA, in the Trial Panel composed of EULEX Judge Paulo Teixeira as Presiding Judge and EULEX Judges Katja Dominik and Franciska Fiser as Panel Members, with the participation of EULEX National Legal Advisor Dukagjin Kërveshi as Recording Officer, in the criminal case P.nr. 947/2013 against:

S.I., father`s name ..., mother`s name ..., mother`s maiden name ..., born on ... in ... Village, Municipality of Mitrovica,

charged with having committed the criminal offenses of "Aggravated Murder" under Article 147, paragraph 1, point 1.5 of Criminal Code of Kosovo (CCK), "Unauthorized Ownership, Control, Possession or Use of Weapons" under Article 374 paragraph 1 of the CCK in real joinder with the first criminal offence and "Refraining from Providing Help" under Article 191 paragraph 2 in conjunction with Article 31 of CCK in real joinder with the first and second criminal offences.

R.S., father`s name ..., mother`s name ..., mother`s maiden name ..., born on ... in ... Village, municipality of Mitrovicë/a,

Charged with having committed the criminal offense of "Refraining from Providing Help" under Article 191 paragraph 2 in conjunction with Article 31 of CCK;

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Both of them accused through the Indictment of the State Prosecutor dated 18 November 2013, and filed with the Court on 19 November 2013;

After having held the Main Trial hearings, open to the public, on 03, 04, 05 and 06 November 2014, in the presence of the Prosecutor, the Defendants, their Defence Counsel and the Injured party;

Having the Defendant S.I. pleaded guilty to the criminal offence of "Unauthorized Ownership, Control, Possession or Use of Weapons" during the Main Trial hearing of 03 November.

Following the Trial Panel's deliberation and voting held on 07 November 2014,

On 10 November February 2014, pursuant to Article 359 of the CPCK, pronounces in public the following:

JUDGMENT

I. The Defendant S.I. is

A- FOUND GUILTY

1.1. Of committed the criminal offence of Murder from Article 178 of the CCK,

1.2. And in a real concourse the criminal offense of unauthorized possession, control and use of weapons from article 374 par.1 of the CCK.

Because it was proven beyond reasonable doubt that

On ... at around .... hrs. in village ... of Municipality of Mitrovica, the defendant shoot twice with a fire weapon "TT M-57" brand, caliber 7.62 mm, black in color, Yugoslav made (Crvena Zastava), with serial number .... The first bullet passed near the victim and two friends but at a distance and direction unknown. The second projectile, was

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fired between 10 to 30 seconds after and hits the left side of the back of the late B.O., and the projectile damages the third bone of the rib cage and the right lung, from which the late B.I. falls into the hemorrhagic shock (massive internal and external bleeding). 9. At 01.14 h of the 23/01/2014 he succumbs to wounds (police report on 23.01.2013 of the police officer A. A. id cart n. 7541). The defendant S.I. intentionally pointed the gun to the three people that were running and shot twice knowing that eventual he could deprived of his life the deceased B.O., but acted with that eventual intention.

At his house in Village ... Mitrovica until ... . he was in possession of the fire weapon - a pistol of brand “Crvena Zastava” M 57 of caliber 7.62 mm, with serial number ..., Yugoslav mad, without a valid permit issued by the authorized body for issuance of authorizations to keep such a fire weapon.

Those facts have all the elements of the two criminal provisions quoted and no reasonable evidence was present regarding any sound motive for using any kind of force against the victim, and the criminal capability of the defendant was establish by medical expertise that clarified that issue during the trial.

In accordance with Article 259 Paragraph (1) and Article 32 Paragraph of the CCK,

the Defendant S.I. is hereby

SENTENCED

1. pursuant to Article 374 Paragraph 1, of the CCK for the criminal offence of Unauthorized ownership, control, possession or use of weapons under Article 328 Paragraph 1 described under I.2 to 1 (one) year and 6 (six) months of imprisonment years of imprisonment;

2. pursuant to Article 178 of the CCK, for the criminal offence of murder to 10 (teen) years of imprisonment;

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3. pursuant to Article 780 Paragraph 1 and 2 Subparagraphs 2.2 of the CCK for both of the above offences S.I. is hereby sentenced to an aggregate punishment of 11 (eleven) years.

The defendant S.I. is

FOUND NOT GUILTY

Of committed a criminal offence of Aggravated Murder from Article 179 (1) item 1.5 of the CCK and the criminal offence of refraining from providing help from Article 191 par.2 of the CCK[1], and i and therefore, the Defendant is Acquitted

Because, was not proven beyond a reasonable doubt that the defendant knew that the victim was bleeding with a serious risk for is health and that the first shoot caused any real and effective danger to other people. Also that he did not provide help to Mr. B.I.. And that he knew that the victim was in life danger between the incidents until they arrived his family house.

So the elements of those criminal provisions are not accomplished.

II. The Defendant R.S.

IS FOUND NOT GUILTY OF COMITING THE CRIME OF Refraining from providing help from Article 191 par.2 of the CCK and therefore, the Defendant is Acquitted

BECAUSE, IT WAS NOT PROVEN BEYOND ANY REASOBLE DOUBT THAT

He did not provide help to Mr. B.O.. That He knew that the victim was in life danger between the incidents until they arrived his family house. That the defendants were to the pools club to look for friends of the late B.O. despite that they knew that his health

[1] Has stated in the minutes, this verdict is express only for safeguard.

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condition got deteriorated. That all along the way B.I. moaned, but the above mentioned did not sent him to the doctor to provide him first aid.

III. The time spent in detention on remand by the defendant S.I. (since 23/01/2013 until the end of that measure) shall be included in the time of the punishment (art. 365, para. 1.5 of the CPCK).

IV. Pursuant to Article 69 Paragraph (1) and Article 374 Paragraph (3) of the CCK, the pistol TT M-57" brand, caliber 7.62 mm, black in color, Yugoslav made (Crvena Zastava), with serial number ... is hereby confiscated and should be forfeit permanent to the state of Kosovo, under article 38, n 3 or 4, of the Law on Weapons.

V. Property claim

The Injured Party was instructed as to its right to file a property claim pursuant to Articles 458, 459 and 460 of the CPC, but that claim was not presented.

VI. Costs of Proceedings

Pursuant to Article 451 Paragraph (1) and Article 453 Paragraphs (1) , (2) and (4) of the CPC, the Defendant S.I. shall pay 200,00 (two hundred) Euros as part of the costs of criminal proceeding. Thanking into consideration that the trial toke only 3 days, he plead guilty of one of the charge. Under article 453 parag. 4 of the CPC the court rules that the defendant is relieved of the duty to reimburse the remaining costs because he is unemployed and as 4 sons to support.

Any costs (necessary expenses) of defendant R.S. shall be reimbursed pursuant to article 454 of the CPCK.

The Defendant must reimburse the ordered sum no later than 30 days from the day this Judgment is final.

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Reasoning

1. Procedural background

The respective criminal investigation against the Defendants in the case was initiated on 24 January 2013 by a Ruling PP No. 06/2013 of the Basic Prosecutor – Department for Serious Crimes in Mitrovica for the defendant S.I. for the criminal offence of Aggravated Murder under Article 179, paragraph 1, point 1.5 of Criminal Code of Kosovo (CCK), and for the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 374 paragraph 1 of the CCK, and for the defendant R.S. for the criminal offense of Unauthorized Ownership, Control, Possession or Use of Weapons under Article 374 paragraph 1 of the CCK,

On 24 January 2013 the detention hearing was held and by a Ruling of the Pre-Trial Judge the Prosecutor's Application was granted, imposing detention on remand against the Defendant S.I. for one month from the respective date of his arrest. The measure of detention on remand was last extended by the Judge with the Ruling dated 21 October 2014.

The defendants are accused by the Indictment of the State Prosecutor dated 18 November 2013, and filed with the Court on 19 November 2013;

The initial hearing has taken place on 8th of September 2014, the second initial hearing was not held. On 29 September 2014 the court issued a scheduling order regarding the dates of the trial.

After that on 19 September 2014 the prosecution addressed the Motion on Jurisdiction of the Court to the Presiding judge, challenging the EULEX judges' jurisdiction over the criminal proceeding in the current case, and the case had to be referred to a panel consisting of the local judges.

On 21 October 2014, after the deadline for the response of the defense counsel, the Court has rejected the Motion on Jurisdiction of the Court as ungrounded, and confirmed the Jurisdiction of the EULEX Panel of judges.

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On 27 October 2014 the EULEX Prosecutor addressed the Appeal to the Basic Court Mitrovica against the Ruling P.947/13 of the Basic Court of Mitrovica dated 21st October 2014 and, as an alternative petition for disqualification of a Judge.

On 28 of October 2014 the Presiding Judge issued the Ruling considering that the appeal presented by the prosecution shall be submitted to the Court of Appeals if and when an Appeal against the judgment is presented under article 408 n 3 of the CPC. And the petition for disqualification of the Presiding Judge was submitted immediately to the Honorable President of the Basic Court of Mitrovica under articles 39, 40, 41, 42 para. 1, subpar. 1.1. of the CPCK.

On 30 October 21014, the President of the Basic Court of Mitrovica issued the Ruling GJA. 604/14 rejecting the request of the EULEX Basic Prosecution of Mitrovica dated 27 October 2014 as ungrounded.

A. Competence of the Court and Panel Composition:

Under Article 23 par. (1) of the CPC, Basic Courts are competent to hear criminal cases involving charges for which the law allows the imposition of a penal sentence of at least 5 years. Pursuant to Article 27, par. (1) of the CPC, territorial jurisdiction is proper with the court in the district where the crime is alleged to have been committed. The criminal offence of attempted murder allows for the imprisonment of more than five (5) years. Therefore EULEX judges assigned to the Basic Court of Mitrovica are competent to hear this criminal case.

Regarding the issue alleged by the prosecution in three different occasions, the Court has to stress that it appears to be a pacific position on the court of appeals and between all EULEX Judges that the assignment of the cases by the KJC under the Agreement between the Head of the EULEX Kosovo and the Kosovo Judicial Council on Relevant Aspects of the Activity and Cooperation of EULEX Judges with the Kosovo Judges Working in the Local Courts ("The Agreement"), is a legal way to supply jurisdiction. Furthermore under Article 5(a) of the same agreement in the Basic Court of Mitrovica it's necessary to allocate cases to EULEX Judges to keep the court house operational.

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So, in that issue the court maintains the ruling that was already made on 21 October 2014 with the full reasoning already issued.

The court just has to add that the judgments of the Court of Appeals can, and must be, used as a precedent on normal situations. And to quote a previous decision of the court made under article 38 para. 1 of the CPCK during the time that the case was waiting for the adjudicating of the KJC is, at least, an unfair form of understating that ruling.

B. Summary of Evidence Presented

During the course of the main trial the following witnesses were heard:

1. Mr. L. K.
2. Mr. F. K.
3. Mr. F. F.
4. Mr. M. I. (son of the defendant S.I., who used his right to remain silent when questioned)
5. Dr. F. D. (forensic psychiatric expert)
6. M. P..

At the conclusion of the trial, the parties agreed that the following list of documents could be considered read or offered and accepted:

1) Initial Incident Report, dated 23.01.2013, page 34 to 47.
2) Informative Investigation Report (K.P. M.S. #6249), dated 23.01.2013, page 48 to 52.
3) Informative Investigation Report (K.P. M.S. #7398), dated 23.01.2013, page 53 to 55.
4) Criminal Charge (K.P. M.S. #6249 and K.P. R.P. #4681), dated 23.01.2013, page 56 to 61.
5) Police Report (K.P. A.A. #7514), dated 24.01.2013, page 62 to 63.
6) Police Report (K.P. A.K. #5653), dated 23.01.2013, page 64 to 65.
7) Investigation Report (K.P. M.S. #6249), dated 23.01.2013, page 66 to 69.
8) Investigation Report (K.P. R.P. #4681), dated 23.01.2013, page 70 to 71.
9) Official Note of Investigation Unit (M.S. #6249), dated 23.01.2013, page 72 to 73.
10) Decision on Custody, dated 23.01.2013, page 74 to 75.
11) Rights of an Arrested Person, dated 23.01.2013, page 76 to 82.

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12) Official Memorandum (K.P. R.P. #4681), dated 23.01.2013, page 83 to 84.
13) Background check of defendant S.I., dated 23.01.2013, page 85 to 86.
14) Decision for Autopsy – Prosecutor Zejnije Kela, dated 24.01.2013, page 87 to 88.
15) Decision for ballistic expertise – prosecutor Ismet Ujkani, dated 05.03.2013, page 89 to 90.
16) Decision to engage psychological analyses - Prosecutor Zejnije Kela, dated 13.08.2013, page 91 to 94.
17) Request to bring autopsy report - Prosecutor Zejnije Kela, dated 05.09.2013, page 95 to 96.
18) Minutes from hearing session on imposing detention on remand, dated 24.01.2013, dated 97 to 102.
19) Record of the initial hearing, dated 27.05.2014, page 103 to 106.
20) Order for medical expert analysis, dated 13.08.2014, page 107 to 112.
21) Autopsy Report (K.P. D.B. #0022), dated 23.01.2013.
22) Crime scene examination report (K.P. M.S. #6249), dated 23.01.2013, page 194 to 195.
23) Photo Album (Forensic), page 202 to 233.
24) Autopsy report (K.P. A.F. #1782), dated 23.01.2013, page 234 to 235
25) Autopsy report (Dr. F. B.), dated 23.01.2013, page 236 to 245.
26) Photo Album (Autopsy), dated 24.01.2013, page 246 to 258.
27) Cover Sheet, page 259.
28) Report of vehicle examination, dated 23.01.2013, page 260 to 264.
29) Photo Album (vehicle examination), page 265 to 281.
30) List of evidences, dated 23.01.2013, page 282 to 287.
31) List of seized item, dated 23.01.2013, page 288 to 289
32) Copy of traffic permit, page 290.
33) Certificate on sized of items, dated 23.01.2013, page 291 to 294.
34) Photos of seized item, dated 23.01.2013, page 295 to 296.
35) List of returned items, dated 24.01.2013, page 297 to 300.
36) Copy of ID, page 301 to 302.
37) Description of evidence – Forensic Laboratory, dated 15.03.2013, page 303 to 305.
38) Notification of search in IMIS system, dated 20.03.2013, page 306 to 317.

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39) Lawyer Authorization Latter, dated 04. 02. 2014, page 308 to 310.

40) Forensic Psychiatry Report on mental health condition of defendant S.I., dated 22.10.2014

41) Copies received from the local court for the criminal background of both defendants.

42) Medical report that the son of the defendant S.I. suffers from a mental disease and he is not in normal condition.

43) The answer of the expert Dr. F. B. to the question of Defense Counsel G. R..

C. STATEMENT OF GROUNDS

1. FACTS PROVEN BEYOND A REASONABLE DOUBT

1. On … at around … hrs., in village …of Municipality of Mitrovica, late B.O. together with his two friends L.K. and F. K. were wandering along the street located near the house of the defendant S.I..

2. They never left the road nor entered the propriety of Mr. S.I..

3. In front of them, there comes M. I., the son of the defendant, asking them: where are you going?

4. Immediately after the defendant S.I. appear and asked: "where are you going" and attacked L. K. and at a split moment L. K. manages to leave, said to the others run away and all three of them start running in direction of village Vaganice.

5. During that run away, Mr. B.O. was overtaken by the other two friends.

6. The defendant a few seconds after starts to shoot two (2) times in their direction with a fire weapon "TT M-57" brand, caliber 7.62 mm, black in color, Yugoslav made (Crvena Zastava), with serial number ….

7. The first bullet passed near the victim and two friends (L.K. and F.K.) but at a distance and direction unknown.

8. The second projectile was fired between 10 to 30 seconds after the first and hit the left side of the back of the late B.O., and the projectile damage the third bone of the rib cage and the right lung, from which the late B.O. fell into the hemorrhagic shock (massive internal and external bleeding).

9. At 01.14 h of the 23/01/2014 he succumbed to wounds

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10. The defendant S.I. intentionally pointed the gun to the three people that were running away and shot twice knowing that eventually he could deprive the deceased B.I. of his life, but acted with that eventual intention.

11. At his house in Village ... Mitrovica since 2008 until ... he was in possession of the fire weapon - a pistol of brand "CrvenaZastava" M 57 of caliber 7.62 mm, with serial number ..., Yugoslav made, without a valid permit issued by the authorized body for issuance of authorizations to keep such a fire weapon.

12. Mr. S.I. is unemployed has five children at the age of 21, 18, 17, 14, and 9 years old, is married for the second time, doesn't have a car but he owns the house where he lives with the family.

13. One of his sons suffers of Hypophernia.

14. S.I. is a person with mental disorder, named anti-social and personality disorder, coded under code name F 60.02 according to the International Classification Diseases ICD-10.

15. It is a disorder characterized with tendency towards impulsive behavior without premeditation about the consequences / does not learn from sufferings/, changeable and unpredicted mood, tendency to emotional overflow, conflicting behavior and agitating situations towards others.

16. He has a diminished ability but not at a substantial level to understand his actions and to comprehend the seriousness of the offence he is charged with and he was able to attend court proceedings.

17. Mr. S.I. was present during the trial and found guilty of the following criminal offenses: In the case P. 180/06 for the criminal offences by articles 260/1 and article 153/2-He was convicted by a final judgment on 20/04/2007 with a fine of 400 euros. On case P. 43/02 by offences under article 135/1.1 of the Criminal Code Kosovo to an imprisonment punishment of 3 months by a judgment final on 16/09/2002.

18. The defendant S.I., upon undertaking unlawful action by shooting with pistol, shooting the late B.O. in his back from behind causing him injuries in which case he fell into the ground.

19. The defendant S.I., after catching the late B.I., called R.S. by phone asking for help and told him: "I caught one of the thieves and the rest have run away".

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20. The defendant R.I., with his car type WV Golf green in color with registration plate ... went to S.I., and they put him in the back seat of R.S. car, and R.S. did drive the vehicle, whereas S.I. asked R.S. to go to the Pools club in ....

21. In that place, they talked with Mr. M. P. witnesses asking him to call the family of the victim.

22. After that, S.I. talked by phone with Mr. F. F. and with the co-defendant R.S. driving, they took the victim to the house of his family more or less at 00.30hours.

23. In that place, Mr. F. F. initially supposed that the victim was in shock because of fear, but then realized that he was in the last breathing.

24. Then he said that to the defendants and all of them entered the car and while Mr. R.S. was driving very fast to the hospital the witness was trying to give mouth to mouth reanimation to the victim B.O..

25. The victim was brought to the hospital at around 00.45 hours by the defendants and the witness F. F.. (Police report on 23.1.2013, page 0053 of the case binder).

26. In that occasion, the Medical doctor said to the witness Mr. F.F. that the victim had a 50/50 chance of surviving.

27. The blood of victim's wound was not visible in his cloths to any external observer.

28. The defendant R. S. is married and has eleven children.

29. The defendant R.S. was present in the trial and found guilty of the following criminal offense: in the case P.224/05 light body injuries from article 153/2-2 of the PCCK. He was convicted by a final judgment on 15/01/2007 to six month and the sentences shall not be executed if he does not commit another criminal offence in the next two years

II- FACTS NOT PROVEN BEYOND A REASONABLE DOUBT

1. That the defendant S.I. had instantly slapped and attacked L.K., grabbed him by his throat and that the defended chased the deceased and their two friends.

2. That the defendant S.I. had fired more than two shots.

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3. That a few moments after the shooting B.O. had died.

4. That whereby the defendant S.I. with the shooting has also put into jeopardy the life of F.K. and L. K. who were together with the late B.O..

5. That the defendant S.I. had direct intention of killing the victim.

6. That they did not provide help to Mr. B.O..

7. That the two defendants knew that the victim was in life danger between the incidents until they arrived at his family house.

8. That the two defendants drove to the pools club to look for friends of the late B.O. despite that they knew that his health condition got deteriorated.

9. That all along the way B.O. moaned, but the defendants did not send him to the doctor to provide him first aid.

10. That because of that (lack of help) he died a few moments later.

11. That the defendant S.I. had shot only with negligence without knowing that he could kill someone (fact alleged by the defense during the trial).

III- FACTUAL REASONING

Under article 3 of the CPC the presumption of innocence "*imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and] ensures that the accused has the benefit of the doubt*".

This standard "*requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused*".

1. Regarding the charge of murder, the defendant has never denied that he fired against the victim.

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With the medical report regarding the autopsy, the court can establish for sure that the death was caused by that shooting (they were the only shots fired in that time and place).

The statements of the two witness (Mr. L. K. and F. K.) were reliable and credible albeit some natural contradiction. There were some minor divergences and disparities between the witness' testimonies. They were mostly related to the measurement of distance and time. However, in the opinion of the trial panel, they resulted from the time lapse and natural imperfection of human perception and memory. In fact, these divergences and disparities assured the trial panel that the testimonies were fully spontaneous and had not been concocted beforehand by the witnesses.

They stated that they were on the road without any act of trespassing and, after a brief discussing, they ran and then they heard one shoot that passed at an unknown distance and direction. A few seconds after the second shot and immediately B.O. fell down and the sound like "Ough" came from him.

Mr. L. K. stated: *"We stopped; he came and told us what you are looking for in this street. Then his father came running, he grabbed me from my shoulder here and slapped me. The three of us then started running and he shot twice. The first time we heard bullet coming towards our head and for the second time the bullet hit B.O.. Then we escaped and went to the police to report the case".*

And "*He was leading at first and we came at same line later on, then, F.K. ran and reached the same position where B.O. was at that time, and then B.O. legged behind for about one meter, we heard when he shot once; the bullet flew nearby our heads and the second bullet struck B.O. in the back*"

Mr. F.K. stated that he knew the victim was hurt "*because he screamed. He just moaned like 'Oh'".* And that *"We are walking. Then he came behind our back swearing, with threats, swearing, this time he hit L.K.. Then he started running as soon as he was hit, L.K. started running, then immediately after him B.O. ran after him, then I did myself run, then immediately he shot once, and as soon as I overtook B.O., then on the second shot it got him".*

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So the court could establish all the objectives elements of this crime beyond any reasonable doubt.

No reasonable evidence was presented (apart from the previous statement of the defendant) regarding any sound motive for using any kind of force against the victim. In this matter, we have to stress that the court summoned the son of the defendant to clarify that fact but he chose to remain silent.

And the statement of the witnesses is very clear and reliable. *"Presiding Judge: During that night did you cross the land of the defendant S.I.? L. K.: No, absolutely not, we ever went out of the road. Presiding Judge: Did you approach the house of S.I.? L. K.: No. Presiding Judge: You never left the public road? L. K.: No we never did, we just continued onwards".*

The criminal capability of the defendant was established by medical expertise that clarified that issue during the trial.

The medical expert clarifies *"I explained to the prosecutor. His consciousness or his judgment, tempore criminis, for the moment of the action, the ability of the judgment to judge properly was diminished, also the same ability to stop his hand from firing was also diminished. There is also a morbid motivation because if you pull out a gun there is a possibility to shoot someone. In item B, we have described the diagnosis of the same disorders. He is included in that item due to all the circumstances, his actions have constantly been fragile". And finally ""He is dangerous only in circumstances which are not in his favour; situations when his personality is decompensated, when he is irritated, when the cause is insignificant and his reaction overwhelming. They are not rational; they are irrational; irrationality is antisocial".*

Regarding the real intention of the defendant when he fired the gun, the court took in account that if the defendant S.I. wanted to kill the victim, then he could do it easily when B.O. was lying on the floor. Furthermore as the witness F.F. stated when they're running to the hospital the defendant was telling him to save the victim. So the behavior after the shooting reveals and explains the intention of the Mr. S.I..

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But the court must reject the possibility of a negligent murder because anybody (*normal bonus pater familias* or reasonable person) that uses a gun (twice and in few seconds) in the direction of three people has to know that he/she could kill somebody. And in this case the defendant reveals that concrete intention by shooting not one but twice at the direction of 3 people (if the intention should be just to scare (statement page 114) then he would shot to the sky not in the direction of people.

The Court has to stress, finally, that according to the statement of Mr. L. K. almost could establish a direct intention of killing (but only one of the two witnesses refer that precise shout, because of that this fact is not completely sure)

Presiding Judge: Did S.I. or anybody say something at that moment? L. K.: He swears on us.

Presiding Judge: Say the concrete words he used. L. K.: He said: ‘’you stop there, you mother fuckers”.

Presiding Judge: Tell me, in that place was also the son of S.I., did he said something or not? L. K.: Yes he was there and he said: ’Shoot daddy ”.

The argument regarding the trajectory of the bullet was clarified by the second medical information obtained during the trial. In this case the trajectory is adequate because the defendant could have fired with is arm in a lower position than normal, and is a natural movement of any human to curve himself after hear one shot.

Last but not the least, the situation of danger for other people could not be determined beyond any reasonable doubt because none of the witnesses could state what the distance and the direction of the first bullet was. They only know that “*passed above our head”*, and they could not precise that distance. Furthermore the court knows that the place was an open field only with trees so the possibility of a ricochet is low. Therefore the Panel cannot conclude with any reliability that any real danger occurred.

Regarding the aggravation because of cruel treatment.

That aggravation was not in the indictment and is not supported by any statements of the witnesses. Mr. F. F. was very clear. He himself initially thought that the victim was

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in shock. So the court doesn't have any sound element to qualify the trip with the victim in the car as a real intention of causing death by a cruel manner.

3. Regarding the crime of use of weapon the panel decided because of the plea guilt of the defendant that admitted these facts and the ballistic report.

4. The date of the death was based on the police report dated 23.01.2013 of the police officer A. A. ID no. 7541.

The sickness of the defendant's son was based on the medical report dated 28/10/2014, presented as material evidence during the trial by the defense.

The criminal convictions were based on the criminal records presented on trial that were accepted by the two defendants.

The social and economic elements were established with the statements of the defendants.

LEGAL RASONING

1. Applicable Law

Substantively, this case is governed by the actual CC because the events took place on 22/01/2013 and therefore the actual CC (code n. 04/l-082) is applicable.

2. Charge of Murder

The defendant is charged of the crime of attempted murder.

Article 178 of the CC state that: "*Whoever deprives another person of his or her life shall be punished by imprisonment of at least five years* ".

Article 179 of the same code state that the punishment shall be aggravated of not less than ten years (...) if any person: "deprives another person of his or her life and doing so intentionally endangers the life of one or more other persons". (par. 1.5)

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The aggravated murders are considered those murders that are committed in grievous circumstances. In the cases of aggravated murder, it is present a higher step of unlawfulness and culpability of the perpetrator. In the case of para. 1.5. the aggravation regards the manner in which the crime was committed (endangers the life of others).

But from the facts established the court could not conclude that the other bullet fired by the defendant put in real and concrete danger Mr L. K. and Mr. F. K.. First of all because the distance and direction of that shot is unknown. Because of that the court could not state that the trajectory was near the body of any person. Therefore the panel could not conclude that the provision of paragraph 1.5 of the CCK is fulfilled, because the court could not establish if the action of the defendant brought an imminent risk to any person.

In his final statements the prosecution demands the punishment of the defendant also under paragraph 1.4.: "*Deprives another person of his or her life in a cruel or deceitful way*".

The legal meaning of cruel is usually the use of excessive physical force against a person causing suffering even if that person does not suffer serious injury. This action could be made through any type of action even physiological. However in this case the facts do not support any type of cruel behavioral from the defendant. The car trip with the defendant has not a form of causing suffering to the victim but a form (for sure wrong) of finding his family[2].

Because of that the panel concluded that the aggravation of this murder is not fulfilled.

Regarding the crime of murder, the objectives elements of the crime are:

a) a person of sound mind and discretion (i.e. sane);

b) Unlawfully kills (i.e. not self-defense or other justified killing);

c) Any born human being;

d) With intent to kill.

[2] See the parallel legal mean of torture on article 149/2/2.5 of the CC "the intentional infliction of severe pain or suffering, whether physical or mental (...).

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The requisite intention to kill can be inferred by the factual circumstances (art. 22 of the CC).

In this case the facts proven allow the court to conclude that the defendant had an eventual intention to kill the victim. He pointed a gun and shot twice, at least one of them, in the direction of the victim. Therefore it is clear that he aimed to do the action and anybody (any reasonable person) could know that a bullet could cause death. Furthermore the court has to stress that the defendant had military training (medical report interview), and acknowledge that used that weapon during many years. So the court concludes that the defendant acted with an eventual intention (article 21 of the CCK) and not with conscious or unconscious negligence (article 23 of the same code).

Regarding the criminal liability of the defendant it was proven that he has one mental disorder, named anti-social and personality disorder, coded under code name F 60.02 according to the International Classification Diseases ICD-10.

Recognized medical conditions can be found in the accepted classificatory lists, which together encompass the recognized physical, psychiatric and psychological conditions. These are, currently, the World Health Organization's International Classification of Diseases (ICD-10) and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

However, in this case "*that is a disorder characterized with tendency towards impulsive behavior without premeditation about the consequences / does not learn from sufferings/, changeable and unpredicted mood, tendency to emotional overflow, conflicting behavior and agitating situations towards others*".

Because of that it is sure that the defendant is sane and criminally liable.

First of all because that is the medical conclusion "*Has a diminished ability but not at a substantial level to understand his actions and to comprehend the seriousness of the offence he is charged with and he was able to attend court proceedings."* Second because the abnormality of mental functioning must have substantially impaired the defendant's ability to

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a) understand the nature of his conduct;
b) form a rational judgment;
c) exercise self-control.

In this case, all these elements are fulfilled and therefore the Court has to conclude that the defendant committed that crime with diminished mental capacity but not with mental incompetence (article 18/2 of the CC).

Self defense

This line of defense appears to be abounded by the defendant.

Nevertheless the court stresses that the elements of the necessary defense (article 12 of the CCK) are not fulfilled. That provision states "*an act is committed in necessary defense when a person commits the act to avert an unlawful, real and imminent attack against himself, herself or another person and the nature of the act is proportionate to the degree of danger posed by the attack*".

So Kosovo penal law recognizes that there are certain circumstances in which the use of force, even deadly force, against another person may be necessary and justified. But that is not the case. His behavior does not fulfill the principles of necessary defense.

First of all, it was not proven that the victim did any act of aggression. Furthermore, according to the facts, it was the defendant who did the first and the only aggression. So the principle of innocence is not fulfilled. The principle of Innocence refers to the notion that a person who initiates a conflict should not later be permitted to justify his use of force as self-defense. It is this principle that is captured by article 12/2 of the CCK "*to avert an unlawful attack*".

Second, the principle of Imminence refers to the notion that one can defend himself/ herself with force only against a threatened danger that is about to happen (*RIGHT NOW*). Nobody can use force to prevent a danger that may arise at some later time—the law expects any reasonable person to seek an alternative resolution in the meantime, such as calling the police

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In this case, any real or imminent attack was proven, on the contrary the facts reveal that the three friends have never left the road.

But even if it was proven that the victim tried to harm the defendant property, it is clear that the proportionality principle had been violated.

The principle of Proportionality refers to the notion that the degree of force you may use in self-defense must be proportional to the degree of force one is threatened with. Briefly, a non-deadly threat may only be countered with a non-deadly defense. A threat capable of causing death or grave bodily harm (e.g., a broken bone, blinding, a rape) may be met with deadly force. In this case the victim was unarmed, was shot in a public road when while running away. So, it is evident that the use of any kind of firearm was obviously disproportional.

Therefore, the court concludes that the necessary defense is not applicable in this case.

No facts were alleged or proven regarding the existence of a mistake of fact (article 25 of the CC).

3. Charge of unauthorized ownership of weapon.

Article 374 of the CCK states that "*whoever owns controls or possesses a weapon in violation of the applicable law relating to such weapon shall be punished by a fine (...) or by imprisonment of up to five years*".

Under the legal definition of weapon (Law on Weapons - Law No. 03/L-143 and article 120/38 of the CCK) the pistol that was used by the defendant is a weapon.

So, all the elements of this crime are fulfilled because the defendant admitted that he knew the nature of that weapon and the legal duty to obtain a permit (article 4/1/1.2. categories b of the Law on Weapons).

Finally the court stresses that this crime is not under the provision of Law n. 04.L-209 witch article 3 states "*all perpetrators of offenses listed in article 3 of this law that were committed before 20 June 2013 shall be granted a complete exemption from criminal prosecution*".

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This crime was committed on January 2013, and the use of that weapon caused one death. So the amnesty law is not applicable.

4. Crime of refraining for providing help

Article 191 of the CCK states that "*whoever refrains from providing help to a person whose life is directly endangered even though he or she could have acted without serious risk of endangering himself or herself or another person shall be punished by imprisonment of up to one year*".

This provision, as almost every civil law of European jurisdiction, establishes the "*bad Samaritan law*" or duty-to-rescue.

In the case of Kosovo Law, it is required that the victim has suffered or be about to suffer some grave harm. But that risk must be perceived by the defendants or at least that serious risk would have been perceived by a reasonable person in the defendant's circumstances.

In this case, the court has to conclude that the defendants did not perceive that serious risk to the life of the victim. First they didn't see any blood. Second because everybody that saw the victim in that period (witnesses F. F. and M. P.) didn't conclude that he was in a life threatening situation. Last, because as soon as they knew it, they drove very quickly to the hospital (see statements of Mr. F. F.).

So the court concludes that this criminal element is not fulfilled and hereby acquits the two defendants.

But the court has to note that the provision of paragraph 2 could not be applied to the defendant R. S. because he was not a perpetrator or co-perpetrator of the action (fire the gun). And second that there is a relation of concurrence between the provision of the article 191/4 of the CPC and the crime of murder[3].

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[3] See about the general application of these rules the legal opinion of Supreme Court of Kosovo on 07/05/2014 regarding the crime under article 318 and 305 of the CC.

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Real concurrence of offences arises when the accused commits more than one crime, either by violating the same criminalization a number of times, or by violating a number of different crimes by separate acts.

Apparent real concurrence may arise when a series of separate, but closely related, acts fulfil all the elements of a certain criminalization, but are considered as a single, albeit continuing, crime. Ideal concurrence refers to the situation whereby a single act or factual situation violates more than one crime.

And, an apparent ideal concurrence of offences arises when a relationship of concurrence is resolved by the application of further analytical methods. The starting point of this analysis is a comparison of the different elements of crimes in order to determine reciprocal specialty. The principle of consumption (*lex consumens derogat legi consumptae*) is applied as an additional method to determine the propriety of cumulative convictions for ideal concurrence. Consumption refers to relationships between offences of the same kind, but of considerably different gravity, that are designed to protect the same or closely related social interests, but which differ in relation to particular elements. In such circumstances, the more grave crime consumes the lesser crime. Similarly, the more serious forms of participation consume the less serious forms, so that the direct commission of a crime would consume instigation or assistance and even forms of superior responsibility.

In the Indictment, however, the Prosecutor has used the principle of apparent real concurrence for no obvious purpose. For one act the defendant was charged with two crimes even if the article 191 of the CCK as a special provision (paragraph n 4) that punishes the death caused by refrain to providing help.

So the same result (death) is used in two different provisions.

In this point of view the court concludes that the defendant S.I. could not be found guilty of two crimes because article 191 of the CCK is in an apparent concurrence with the crime of murder through the principle of consumption.

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5. Determination of the Punishment

While determining the punishments the court is obliged to evaluate all mitigating and aggravating factors, pursuant to Article 73, 74 and 75 of the CC. The main scope of the punishment is based on the necessity of the criminal enforcement and the proportionality of the level of danger for the human rights and freedoms and social values (article 1, paragraph. 2 of the CC).

The trial panel also noted that various criminal offences involving the use of firearms appear to be committed frequently in Kosovo nowadays. This seriously affects public order and the personal safety of people in Kosovo; therefore the punishment for this kind of crime should serve as a general deterrent for all potential perpetrators.

The trial panel considered the following factors to be aggravating:

The age of the victim and the motive of the crime. The fact that he fired the weapon twice represents a more reliable eventual intention and dangerous action. The acts that were made after the shooting that were not effective and the fact that the defendant had previous punishment even though that punishment is not directly related to the same kind of crimes.

Regarding the crime of use of weapon:

The caliber of that weapon that represents a medium danger. The fact that the same weapon was used to commit a serious criminal offence. And the fact that the defendant used that weapon for years without a permit.[4]

The trial panel considered the following factors to be mitigating:

He voluntarily came forward to tell about the criminal offence (he never denied the shooting). He has a family (five children, one of them with health problems). Then, the medical diminished mental capacity that strongly lowers the unlawfulness of his

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[4] See decision of the court of appeal on 25/04/2104 "The offence of unauthorized ownership, control or possession of weapons is a continuous offence, the gravity of which depends amongst other circumstances obviously also from the duration of the illegal activity. It has been established that Z.V. was in possession of a weapon for an extended period and therefore his guilt is adequately assessed bigger than it would have been in case of only a short period of weapon possession". http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/Court-of-Appeals/35-14/(2014%2004%2025)%20-%20JUD%20-%20Z%20V%20%20-%20CA%20-%20ENG.PDF

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personal responsibility. Third, the fact that he acted with an eventual intention not a direct one. The fact that the defendant revealed a sincere regret during the trial. In terms of the murder crime the efforts that he made, after knowing that the life of the victim was in danger to save the victim (almost under the provision of article 30 of the CC).

Regarding the use of weapon, the guilty plea presented and the common use of weapons in Kosovo due to national and particular reasons.

Regarding the crime of murder the limits are 5 to 25 years (article 45/1 of the CC).

The unlawfulness of the defendant conduct is in a medium level regarding all the types of murderers. But the personal condition and the diminish capabilities decrease significantly the culpability of the defendant.

Regarding the use of weapon the diminished capability is not important because the defendant had 5 years to think and to deliver the weapon to police. So the punishment should reflect this higher level of culpability and unlawfulness.

Pursuant to Article 80 Paragraph 1 and 2 Subparagraphs 2..2 of the CC, for both of the above offences of S.I., the trial panel took in consideration the link between the two crimes.

It was the duty of the trial panel to credit the period of time that Mr. S.I. spent in detention on remand into the term of imprisonment, which was imposed on him.

6. Confiscation of the instruments of crime

The weapon was confiscated because it was used to commit a crime (article 69 of the CC).

Furthermore in this case that weapon was confiscated according to the legal procedure, and the defendant did not demonstrate that he has a permit (articles 4 n 1.2., 7, 10, 17, 33 of Law n. 03/L-143 Law on Weapons).

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The article 38 of the Law on Weapons statues that *“1. Weapon/firearm and ammunition confiscated during a criminal procedure or in a minor offences procedure will be handed over to the competent body within fifteen (15) days from the day of taking of the final court decision”.*

Therefore, under the provision of article 9 of the law n. 04.l.209, this is the final decision regarding the crime

7. Costs

The trial panel based its decision on the costs of criminal proceedings on legal provisions quoted in the enacting clause. The extent and proportion between scheduled amounts that the defendant are obliged to reimburse has been determined with consideration to the gravity of the charges, the economic situation of the defendant and the guilty plea presented regarding the less serious charge. It was also taken into consideration that R.S. was acquitted of the charge against him.

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Legal Remedy: By the provisions of Article 398 (1) of CPC, authorized persons may file an appeal against the judgment within 15 days of the day the copy of the judgment has been served.

Signed and dated this 25 November 2014

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Dukagjin Kërveshi	Paulo Teixeira
Recording Clerk	EULEX Presiding Judge

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