COURT OF APPEALS

Case number: PAKR 13/2014

(P no. 322/09 BC Pristina)

27 March 2015

Judgment of the Court of Appeals of Kosovo, in a panel composed of EULEX judge Manuel Soares, presiding and reporting, and Court of Appeals' judges Mejreme Memaj and Xhevdet Abazi, as members of the panel, with the assistance of the EULEX legal advisor Vjollca Kroci-Gerxhaliu, acting as recording officer.

DEFENDANT

H.U.K, male, Albanian from xxx, born on xxx in village xxx, Municipality of xxx, residing in xxx, personal ID xxx.

JUDGMENT OF THE COURT OF APPEALS

Pursuant to Article 398 of the CPC[1], regarding the appeal filed against the Judgment of the Basic Court of Pristina, dated 18 October 2013, in the case P no. 322/09, the panel of the Court of Appeals decides as follows:

1) The appeals filed by defense counsel Mustafe Kastrati on behalf of the defendant **H.K**, on 19 December 2013, is hereby rejected.

2) The appeal filed by the prosecutor on 25 November 2013 is hereby approved;

3) The Judgment P no. 322/09 of the Basic Court in Pristina dated 18 October 2013 is modified with regard to the decision on punishment, as follows: The accused **H.K.** is sentenced to a punishment of 25 (twenty-five) years of imprisonment for the criminal offence of Aggravated Murder in violation of the Article 147 (5) and (9) of CCK in force until 31 December 2012. The time spent in detention on remand from 19.02.2009 until the Judgment is final shall be accredited in the sentence.

[1] The following abbreviations referring to the pertinent codes will be used hereinafter: previous Criminal Code: CCK, current Criminal Code: CCRK, previous Criminal Procedure Code: CPCK, current Criminal Procedure Code: CPC.

STATEMENT OF GROUNDS

1. Summary of the relevant proceedings

Following the discovery of the victim **V.S.K**, on 18 February 2009, an investigation started against the defendant **H.K.** for the criminal offence of *Aggravated Murder*.

On 19 February 2009, the defendant was arrested by the Kosovo Police.

On 16 June 2009 the indictment was filed charging the defendant of *Aggravated Murder* in violation of Article 147 (5) and (9) of CCK. The indictment was confirmed on 18 January 2010.

The main trial initiated on 7 May 2010 and several hearings were held until 27 February 2013.

After the case was assigned to EULEX judges, the main trial reinitiated on 9 September 2013 and terminated on 18 October 2013, with the announcement of the judgment. The defendant was found guilty as charged and sentenced to 22 years of imprisonment.

On 19 December 2013, the defense counsel Mustafë Kastrati on behalf of the defendant filed an appeal against the judgment.

The prosecutor also filed an appeal against the judgment on 25 November 2013.

The opinion of the appellate prosecutor was filed with the Court of Appeals on 13 January 2014.

The public session and the deliberation of the appellate panel were held on 1 October 2014.

Due to administrative issues related with the formal appointment of the appellate panel, the written judgment which had been concluded after the deliberation held on 1 October 2014, was only signed and finalized on 27 March 2015.

2. Charges filed against the defendant

Aggravated Murder, in violation of Article 147 (5) and (9) of CCK.

3. Judgment in first instance

The defendant was found guilty of *Aggravated Murder* in violation of Article 147 (5) and (9) of CCK and sentenced to 22 years of imprisonment, because on 17 February 2009, between 15:30 and 17:00, in the forest of Zllatar/Zlatare village, Municipality of Pristina, the defendant acting in a ruthless and violent manner for low motives, repeatedly struck V.S.K**.** on her head and her body with a heavy object, causing her grave bodily injury, other penetrating and lacerating injuries, hematomas in different parts of the body, fractures in the skull as well as severe injuries to the brain, thus depriving the victim of her life.

4. Submissions of the parties

The appeal of the defense

The defense counsel challenges the impugned judgment on the grounds of substantial violations of the procedure, violation of the criminal law and erroneous and incomplete determination of the factual situation. Therefore he proposes the court to approve the appeal entirely and to annul the impugned judgment and return the case for the retrial, or to modify it in order a not guilty verdict is pronounced. He also proposes detention on remand to be terminated.

The appeal of the prosecution

The prosecutor proposes the Court of Appeals to modify the judgment in order to sentence the defendant with a higher punishment. He considers the pronounced punishment inadequate taking into account the social risk of the criminal offence.

The opinion of the appellate prosecutor

The appellate prosecutor proposes the Court of Appeals to grant the prosecutor's appeal and to modify the impugned judgment in order to impose a higher punishment to the defendant.

5. Applicable procedural law

The first instance court's judgment applied the provisions of Criminal Procedure Code of Kosovo that remained in force until 31 December 2012 (CPCK) based in the assumption that the main trial started in 2009. This assumption is not correct. The main trial started in 7 May 2010, but the case was taken over by EULEX and the trial restarted on 9 September 2013, when the CPC was already in force.

According to Article 540.2 of the Criminal Procedure Code (CPC) in force since 1 January 2013, the new code is applicable to proceedings on which the indictment was confirmed before 1 January 2013 and the main trial initiated after that date. In the current proceedings the indictment was confirmed on 18 January 2010 and the main trial started in 9 September 2013. In the appellate panel's opinion, the proper interpretation of the applicable transitory provisions stipulates that the new CPC is applicable. Thus, all procedural actions performed by the court and the parties will have to be evaluated and decided in light of this interpretation.

6. Admissibility of the Appeal

The Court of Appeals finds that the Appeals were timely filed by authorized persons, in accordance with Articles 374.1.1 and 380.1 of the CPC.

7. Merits of the appeals

7.1. Appeal of the defence

In general, in many relevant aspects, the appeal is not entirely clear and sufficiently reasoned. The legal grounds are not presented in a logical order. Matters are even mixed and confusing in some

aspects. It should be noted that to challenge a judgment on matters that cannot be examined *ex officio* it is not sufficient to argue conclusively that the judgment of first instance is wrong in this or that regard. It is mostly necessary to state why it is wrong and to be as accurate and clear as possible on the qualification and explanation of the legal grounds to challenge it. This is an obligation of the parties derived from the duty to provide "a description of the legal basis for the remedy" and "the grounds for challenging the judgment" (Articles 376 1.6 and 382.1.2 of the CPC). The court reviewing the judgment is not expected to dig on the wording of the submissions guessing the appellants' will.

Despite this fact, the Court of Appeals will next address all questions challenged in the defence's appeal. To do so in the most logical and understandable way possible, the questions will be decided according to the sequence established in the law.

7.1.1. Substantial violations of the provisions of criminal procedure

Use of inadmissible evidence, in reference to Article 384.1.8 of the CPC

Before addressing each evidence that the appellant consider inadmissible, the Court of Appeals wishes to point out an important aspect related to the validity of evidence. According to Article 257.2 of the CPC, 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 384.2 of the CPC.

Having this principle in consideration, the appellate panel will now address each one of the alleged causes for invalidity of evidence.

The appellant argued that his statement dated 19 February 2009 was given to the police under physical coercion. This matter was raised by the defence in first instance but the trial panel rejected the request (see paragraphs 21-24 of the judgment).

There is no doubt that a statement given under coercion is prohibited and inadmissible, pursuant to Article 257.4.1 of the CPC. During the main trial the court examined some evidence to check if the defendant's allegation could be established. A witness was called, a medical report examined and the disputed statement analysed. The judgment established that the defendant's statement was given voluntarily and freely and explained in detail how this conclusion was reached. There was not a single credible element to ground the allegation of coercion. Both the defence counsel present when the statement was given and the medical report prepared at the time the defendant was detained, show that such event ever happened. The appellate panel agrees completely with this assessment.

The appellant also alleged that the defence was not informed and was not present during the identification procedure by the witnesses H.T. and N. G. This objection was addressed in the judgment (see paragraphs 25-27).

By the time the identification proceedings were conducted, on 17 and 19 March 2009, such investigative action was governed by Article 255 of the CPCK. Reading the pertinent documents, the appellate panel agrees with the conclusion in the judgment and finds that the investigative police followed closely those requirements. The presence of the defence was not mandatory in all investigative actions, according to the applicable provisions. Prosecution was only obliged to invite the defendant and/or the defence counsel to the following actions: examination of the defendant (Article 231 (3) of the CPCK), extraordinary investigative opportunity (Article 165 (1), *ex vi* Article 238 (3) of the CPCK), search (Article 243 (1) of the CPCK) and site inspection or reconstruction (Article 254 (3) of the CPCK). As to the identification of persons and objects, the law was silent about the obligation of inviting the defence, meaning that it was not mandatory (Article 255 of the CPCK). Even if the rules for the examination of witnesses were to be applied by analogy, such possibility was left to the discretion of the prosecution (Article 237 (4) of the CPCK). Thus, in the appellate panel's opinion, no procedural violation occurred.

Finally, the appellant stated that the collection of evidence in the crime scene was inadmissible. No further explanation was given as to the reasons to ground that inadmissibility. The judgment decided this objection (see paragraphs 28-29).

Actions taken by the police in the scene were covered by provisions of Article 201 of the CPCK. It appears that the defendant alleges that he should have been informed of the right to participate in those investigative actions, but this does not make any sense. At the time police collected evidence in the scene there was no sufficient knowledge about the identity of the perpetrator. Therefore, it is obvious that the police could not inform the defendant in his capacity of suspect. The appellate panel concurs with the first instance court's judgment in this regard.

Judgment exceeded the scope of the charge, in reference to Article 384.1.10 of the CPC

The defence argues that the judgment exceeded the scope of the indictment because it was established that the defendant killed the victim with a different instrument as in the charge.

The indictment must contain the factual description of the criminal offense. It may be amended by the prosecution during the main trial, pursuant to Articles 241.1.4 and 350 of the CPC. In that case, the accused must to be provided with the possibility to prepare and present the defence. The factual description in the indictment is of the utmost importance to limit the object of the charge and to allow a proper and effective exercise of defence rights. However, contrary to what is alleged in the appeal, there was no modification of the indictment. It is irrelevant if during the closing statement the prosecutor opined about the facts differently as in the indictment. Any modification of the indictment would have to be made upon a formal motion to the court, which never occurred.

The autopsy report mentions a "sharp hard object" as the instrument of the crime. No reference is made to a "construction brick" as alleged in the appeal. The indictment accused the defendant of killing the victim with a "heavy object", which was an "iron bar". In the judgment it was established that the killing was perpetrated with a "heavy object". The appellate panel finds that no excess of the scope of the charge occurred. Although it is undisputable that the judgment may only relate to facts contained in the charge (Article 360.1 of the CPC), a modification of the factual

situation has to be substantial and capable of effectively affecting defence rights. Different words to describe the same fact do not amount to such violation, as the concept of "fact" relates to a specific natural event or human action located in time and space and not the words that are used to describe it. What is important is to provide the defendant with the necessary information to know in advance what material facts he or she is accused of and to allow him or her to contradict those facts and to present the respective supporting evidence. Reading the judgment, the Court of Appeals is of the opinion that no relevant modification of the facts in detriment of the defendant is included in the enacting clause.

Other procedural violations, in reference to 384.2 of the CPC

The appellant raised four other matters to challenge the correctness of the proceedings. As it was stated above, only violation of proceedings that influenced the rendering of a lawful and fair judgment may be found as substantial. The appellate panel will now address those matters.

The appeal refers to jurisprudence of the ECHR in relation to the principle of a fair trial in a reasonable period of time, resulting in detriment of the situation of the accused. It is not clear what is the outcome that the appellant seeks to obtain by raising this issue, namely if he is proposing that the judgment is modified or annulled in the basis of this motive.

The appellate panel certainly agrees that the proceedings in the main trial stage suffered unreasonable delay. This was the reason why EULEX took over the case on 26 August 2013, as the trial was pending for more than 3 years. After that moment, the new panel concluded the trial in little more than one month, which is a reasonable and adequate period. A new delay occurred in the appellate stage due to formal issues mentioned above. Notwithstanding the fact that delaying the proceedings beyond a reasonable period of time is a breach of rights, if it has no consequences on the merits of the decision it does not constitute a procedural violation. A judgment of acquittal cannot be based on that reason and an annulment would result in more detriment of the defendant's righs, as it would lead to a situation on which the delay would be even greater.

The appellant stated the defendant was deprived of the right to file an appeal, as the first instance court did not issue a separate ruling on his motion to dismiss inadmissible evidence.

A separate ruling on objections to evidence is to be rendered before the initiation of the main trial, according to the provisions of Articles 249.3 of the CPC. Subsequent to that moment, the trial panel can still reject inadmissible evidence either *ex officio* or upon a submission of a party, but no provision in the law prescribes the need to render a separate ruling. On the contrary, it derives from Articles 260.1,2 and 370.7 of the CPC that the assessment of evidence, including the decision on its admissibility, may be done in the judgment. The defence was not deprived of the right to challenge the decision because the law admits an appeal against the judgment based on the use of inadmissible evidence. Thus, this argument of the appellant is somehow strange and surely contradictory. In the same submission that he is appealing against the admission of evidence he is stating that he could not appeal to raise this allegation.

The appellant also challenged the fact he was interrupted and asked to reduce his closing statement, in violation of defence rights.

The law is clear providing that the closing statements can be subject to time limits set by the presiding judge and even interrupted if the party is referring to matters manifestly irrelevant or delaying the proceedings (Article 356 of the CPC). Evidently, the use of these prerogatives must be guided by a reasonable balance between the necessary speediness of the trial and the rights of the defence. The defendant's counsel was granted the possibility of filing a written closing statement that is in the case file. The appellate panel read the minutes and is of the opinion that the presiding judge acted in a justifiable manner and that no violation of defence rights occurred.

Finally, the appellant stated that the court did not take any decision on his request to release the defendant from detention on remand.

This statement is not correct, as a ruling extended detention on remand until the decision is final was rendered on 18 October 2013.

7.2.2 Erroneous or incomplete determination of the factual situation

The review of the first instance court's decision regarding the determination of the facts is bounded by the allegations of the appellant. This is not a matter that the Court of Appeals can examine *ex officio* (Article 394.1 of the CPC *a contrario sensu*). The party has to give precise motivation for the appeal and explain clearly which evidence would show that a certain fact should have been considered proven or not proven and why. The law does not grant the parties the right to a second judgment of the same evidence as opposite to the review of the way it was established. As it was affirmed previously by the Court of Appeals[2], the terms "erroneous determination of the factual situation" and "incomplete determination of the factual situation" are referred to errors or omissions related to "material facts" that are critical to the verdict reached[3]. Only if the first instance court committed a fundamental mistake while assessing the evidence and determining the facts will the Court of Appeals overturn the judgment[4].

As a general principle the evaluation of evidence should rely on a direct and immediate examination of oral testimonies and statements by a panel of judges. The reading of the record of the evidence examined in the trial, however faithful and accurate it may be, is always a less reliable instrument for its evaluation. Even the examination of documents and other material evidence is in general more accurate in the trial because often that evidence has to be analyzed in relation with other elements and subject to oral explanations by witnesses or parties. Therefore, as affirmed by this court in other occasions[5], "It is a general principle of appellate proceedings that the Court of Appeals must give a margin of deference to the finding of fact reached by the Trial Panel because it is the latter which was best placed to assess the evidence". The Supreme Court of Kosovo has held

[2] PAKR 1121/12, judgment dated 25/09/2013.

[3] The mentioned judgment refers to B. Petric, in: Commentaries of the Articles of the Yugoslav Law on Criminal Procedure, 2nd Edition 1986, Article 366, para. 3.

[4] PaKr 1122/12, Judgment dated 25.04.2013.

[5] PAKR 1121/12, judgment dated 25/09/2013.

that it must “defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so”. The standard which the Supreme Court applied was “to not disturb the trial court’s findings unless the evidence relied upon by the trial court could have not been accepted by any reasonable tribunal of fact, or where its evaluation has been wholly erroneous”.[6]

The appellate panel reviewed all the evidence examined by the first instance court and the assessment made by the panel in the judgment. It is obvious that one can always find a contradiction or an inconsistency, especially if a certain piece of evidence is enlightened out of its general context, ignoring other concurrent information and the rules of interpretation in the basis of common sense and logic. This is always possible in every case, especially when the facts are related to events that were not directly witnessed and the court must rely on circumstantial or indirect evidence.

The judgment, in the appellate panel’s opinion, did not incur in any critical mistake on evaluation of evidence and establishment of facts. The appellant failed to show that the trial panel erred or was not complete in determining the factual situation. All he did was enlighten certain specific parts of evidence he considered in favor of the defendant’s interest, to extract conclusions that are not acceptable.

The disputed facts were not witnessed directly. The defendant gave to opposite statements on those facts. Consequently, the first instance court had to rely on evaluation of indirect or circumstantial evidence, but this is a valid and lawful instrument to lead to a certainty beyond any reasonable doubt. The number of indirect evidence is significant. All circumstantial elements are consistent and internally compatible. Indirect evidence leads all to the same conclusion. No direct evidence exists that decisively contradicts the judgment of guilt. The evaluation of the evidence as a whole, under the criteria of logic and common sense, support the conclusion on the defendant’s guilt. No other plausible and reasonable explanation for the evidence would exist.

The defendants’ and witnesses’ statements, both given in the investigative stage and in the main trial, were examined profoundly by the first instance court. The same happened with the telephonic communications metering and transcription of SMS. Documental and forensic evidence was also assessed carefully. The judgment explains in detail the meaning of that evidence and of the contradictions between them. It does it a convincing manner that moves the appellate panel to accept that the factual findings in the judgment are the only reasonable, logic and possible explanation for the evidence. In conclusion, it is not found that the judgment incurred in erroneous or incomplete determination of the factual situation.

It is clear that the defendant’s denial of the veracity of his first statement given to the police investigators on 19 February 2009 is not credible. As it was explained in the judgment, the defendant gave details of the events that only he could have known and that match with other

[6] Supreme Court of Kosovo, AP-KZi 84/2009, 3 December 2009, paragraph 35; Supreme Court of Kosovo, AP-KZi 2/2012, 24 September 2012, paragraph 30.

decisive corroborating evidence. For example, who else could have known that the jacket and the purse of the victim had been thrown away a few meters from the body? Obviously this detail stated by the defendant means that he was present at the scene in the crucial moments. He later gave a different account of the events before the prosecutor, on 17 March 2009, basically denying everything he had said before. On 9 September 2009, during the confirmation hearing, he had a strange behaviour that latter was established with no relation to any mental impairment. On 18 October, when he gave statement before the trial panel, he even denied he had given statement before the prosecutor and averred his signature in the minutes was falsified. He also denied the SMS were sent from his phone and that he did not communicate with the victim on the crucial day. At the appellate stage he stated before the appellate panel that the real murderers are at free and that the police know who they are but is not investigating properly. The appellate panel finds that the successive modifications of the defendant's statements are only an attempt to create confusion and to cast doubts. It is his right to do so, but he cannot wait for the court to ignore the overwhelming evidence against him.

The appellant states that no witness saw the defendant killing the victim. There is no provision in the law that requires eye witnessing to establish guilt in a murderer. The judgment explains that the defendant was seen with the victim in the crucial day in a manner that allows no doubt that he and the victim were having a discussion before she was murdered. Contrary to the allegations in the appeal, the defendant was identified as the person together with the victim.

The appellate panel, therefore, is of the opinion that the judgment did not incur in erroneous or incomplete determination of facts.

7.1.2 Violation of criminal law

The appeal of the defence challenged the judgment on the basis of violation of criminal law but no issue related to Article 385 of the CPC was raised.

The also appellate panel found no violation that should be addressed *ex officio*.

The established facts fulfil all the elements of the criminal offense for whish the defendant was convicted and sentenced. The appellate panel finds the allegations on the appeal without merit.

7.1.3 Erroneous determination of the punishment (Article 386 of the CPC)

The punishment of 22 years imprisonment imposed on the defendant was challenged by the prosecutor. In the appeal of the prosecution it was argued that the sentence is too lenient and did not consider all aggravating circumstances.

According to Articles 147 5) and 9), 37 (2) and 38 (1) of the CCK in force when the action occurred, the criminal offense was punishable with imprisonment from 10 up to 20 years or from 21 up to 40 years. Whilst under Articles 179.1.8 and 45.1 of the CCRK in force from 2013, the same criminal offense is now punishable with imprisonment from 10 up to 25 years or with lifelong imprisonment. It is undisputable that the punishment under the code in force when the crime was

perpetrated is more lenient. The first instance court was therefore right deciding that the most favourable law applicable to this case is the CCK.

However, paradoxically, despite the fact that the limits of the imprisonment are different in the CCK and CCRK, the first instance panel affirmed in the judgment that in face of the same aggravating and mitigating circumstances, the adequate sanction would be the same under the rules of both codes. This cannot correct. The graduation of a specific sanction is necessarily different if the applicable limits in the law vary significantly.

In order to decide if the prosecution is right by stating that the circumstances relevant to calculate the punishment were not correctly assessed, the appellate panel finds necessary to briefly address the respective applicable principles, in the light of the provisions of the CCK.

The criminal law is the last resort to protect social values and cannot intervene beyond what it is strictly necessary. This means that as a rule a criminal sanction should not exceed the necessity of justice enforcement and protection of social values. According to this principle of the necessity of the criminal sanction, the calculation of the punishment should assume that the lower punishment foreseen in the law will be sufficient and adequate as a starting point for standard situations, which may be subsumed to the legal incriminating provision.

The punishment is bounded by the purposes of individual prevention and rehabilitation and general prevention. Its main aims are preventing the perpetrator of reoffending and deterring other persons from committing criminal offenses, by expressing social disapproval for the violation of the protected social values (Article 34 of the CCK).

While determining the punishment, it has to be considered that the long-term imprisonment is only applicable for the most serious crimes committed intentionally under particularly aggravating circumstances or causing especially grave consequences (Article 37(1) of the CCK).

Having in mind the principle of proportionality established in Article 33.3 of the Constitution of the Republic of Kosovo, while determining the punishment within the legal limits, the sanction cannot exceed the guilt of the perpetrator, or be lower than the necessary to ensure individual and general prevention. Its calculation will consider all specific mitigating and aggravating circumstances, namely those enumerated in Article 64 of the CCK, related to the criminal action, to the conduct of the perpetrator before, during and after the crime, and to his/her personal and social circumstances.

The first instance panel imposed 22 years imprisonment of long-term imprisonment. It was not reasoned why the conditions of Article 37(1) of the CCK were found. The judgment also failed to give a detailed motivation for the measure of punishment, as it was obliged by Article 370.8 of the CPC. Some relevant circumstances to the determination of the punishment were mentioned but without precise indication of their value or meaning. The law does not suffice with a mere descriptive and neutral indication of the mitigating and aggravating circumstances, as this is not an explanation of the grounds that guided the decision to impose a certain period of imprisonment within the limits established in the law.

Some of the aggravating and mitigating circumstances that the court considered are not even acceptable under the legal criteria. It is not correct to state that a love relation with a family member

is questionable and therefore aggravating. Since the love relation in question between the defendant and the victim was not illegal, the court cannot consider it morally questionable because it is not in its role to impose moral standards of behaviour, qualifying what is morally right or wrong. Only moral and/or ethical values which are protected in the law may be imposed by courts.

Also the fact that the defendant spent a very long time in detention on remand cannot be used as a mitigating factor, in order for the court to impose a lesser sentence as a "remedy for his human rights violation". It is not correct to reduce a sentence for that reason because the compensation for that depravation of liberty is given by the credit of that period in the sentence and not by the reduction of the sentence under its normal and adequate limits.

The Court of Appeals will now assess the relevant available elements to determine the adequate sentence.

The first matter to decide is whether the conditions for imposing a long-term imprisonment established in Article 37(1) of the CCK are met. The criminal offense was one of the most serious in the code and in violation of the most important protected value, which is the life of a human being. The crime was committed intentionally. The aggravating circumstances are many and very strong, as it will be addressed below. The consequences caused to the victim and to her family could not have been graver. Therefore, the appellate panel is of the opinion that a long-term imprisonment sentence from 21 up to 40 years is necessary.

The guilt of the defendant is particularly high. The will to kill the victim did not occur suddenly, but instead lasted for a certain period, at least from the moment when the victim was driven to the forest. The defendant had time to reflect on his intentions and to avoid the criminal action. Still he persisted on it, revealing a strong criminal energy. He was in a position of physical and psychological superiority in relation to the victim, who trusted him as someone she had a love relation with. The victim was placed in a situation where she could not defend herself or call for help.

Individual prevention factors are at a normal level. The defendant has family depending on him and this circumstance is important to make him feel the need to seek for his own rehabilitation.

General prevention factors are, however, at a relatively intense level. The deterrence of other persons from committing criminal offenses such as this one has to be influenced by the sanction imposed on the defendant. The imprisonment period has to be higher than the minimum of 21 years because otherwise it would not satisfy the purpose of general prevention.

The appellate panel considers that 22 years imprisonment does not reflect adequately the aggravating and mitigating circumstances present in this case.

As aggravating circumstances, the appellate panel finds the following:

- There was some premeditation of the crime. The defendant started to send threatening messages to the victim 2/3 days before killing her. This does not mean that he already had decided to kill her, but that he let that idea develop in his mind without fighting adequately against it. After meeting and discussing with the victim, the defendant drove her to a forest, quite far from the main roads and houses. The first instance panel established that only when the defendant and the victim arrived

at the village of Zllatar he decided to kill her (paragraph 98). However, the appellate panel finds unquestionable that when he drove her to such a remote place without any other plausible reason, although he may have not decided yet, he was already developing that idea in his mind. Furthermore, he had the object with which he killed the victim later already in his possession in the vehicle. While driving her there he could have reflected on what he was about to do and let her go. He did not.

- The defendant was in total control of his actions and could reflect on what he was doing. It is true that he was upset and his actions could be influenced by his feelings. However, the evidence show that he was not disturbed in a manner that he was deprived of will or capacity of understanding the meaning of his actions. He tried to conceal the identity of the victim after killing her, which demonstrated he was well aware of what he was doing.

- The defendant had physical and psychological superiority upon the victim. He had been somehow charged by her husband with the task of taking care of her, as an older family member, by providing transport for her language lessons and being paid for this task. They had a love relation. He was xxx and she was xxx. All these factors are sufficient to establish that the victim trusted the defendant and that while being driven to the place of the killing she did not anticipate what could happen.

- The victim was a young person. Although the value of human live is incommensurable, being the victim still xxx years of age is of the utmost relevance. She was deprived of her existence in a moment when she had not yet had the chance to experience and enjoy life, as all persons are entitled to. The loss for her family was even greater for that same reason she was so young.

- The crime was committed with unnecessary brutality. Reading the autopsy report, in face of the number and intensity of the blows, the appellate panel is lead to the conclusion that the defendant hit the victim in the head repeatedly, which was unnecessary for the purpose of killing her.

As mitigating circumstances, the appellate panel finds the following:

- The defendant has no previous known convictions. This factor is relevant to determine the possibilities of social rehabilitation in a higher level.

- The defendant cooperated with the investigative authorities in an early stage of the proceedings and did it in a relevant manner. He admitted what he had done and explained it in detail. This is important because it shows that he was capable of experiencing some regrets and self-censorship. This is also relevant to assess the possibilities of his social rehabilitation.

- The defendant is a person with family, including wife, children and old parents, who depend on him.

The appellate panel discussed deeply the sentence. As it was stated above, if found that 22 years of imprisonment is insufficient to reflect the purpose of general prevention and to adequate the weight of the aggravating circumstances. However, the panel also considered that it would not be fair if the sanction would be set high above the minimum limit, since the possibilities of rehabilitation would be excessively harmed. One could not consider the rehabilitation purpose fulfilled if the defendant would have to spend almost entirely his remain years of life in prison.

Therefore, the appellate panel found adequate and just to impose on the defendant the sanction of 25 years of imprisonment.

For the given reasons the Court of Appeals decided as in the enacting clause.

Presiding Judge

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Manuel Soares, EULEX Judge

Panel Member

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Mejreme Memaj, CoA Judge

Panel Member

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Xhevdet Abazi, CoA Judge

Recording Officer

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Vjollca Kroci-Gerxhaliu, EULEX Legal Advisor