THE SUPREME COURT OF KOSOVO
PML-KZZ 111/15
25 February 2016

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Dariusz Sielicki, presiding and reporting, EULEX judge Elka Filcheva-Ermenkova and Supreme Court judge Sylejman Nuredini as panel members, assisted by Adnan Isufi, EULEX legal advisor, acting in the capacity of recording clerk, in the criminal case against the defendant:

HB [redacted] in detention from 10 May 2006,

Convicted by the first instance Court of committing the criminal offences of Aggravated Murder, in violation of Article 147 par 1 item 11 of the Criminal Code of Kosovo (CCK) and Unauthorized Ownership, Control, Possession or Use of Weapons, in violation of Article 328 par 2 of the CCK, and punished with an aggregated sentence of long-term imprisonment of twenty-two (22) years, which upon the appeal of the prosecutor and injured party, the Supreme Court of Kosovo amended to aggregated term of twenty-five (25) years of imprisonment with the time spent in detention counted as part of the sentence.

XhM HB

seized of the request for protection of legality filed by defence counsel [redacted] on behalf of [redacted] against the Judgment rendered in the first instance P. nr 605/2008 dated 4 August 2010 and the Judgment of the Supreme Court of Kosovo AP 2/2011 dated 25 May 2012,

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having considered the opinion of the public prosecutor dated 15 June 2015,

having deliberated and voted on 25 February 2015,

acting pursuant to Articles 432, 433, 434 435 of the Criminal Procedure Code of Kosovo (hereinafter "CPC"), renders the following:

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Judgment

I. The request for protection of legality filed by defence counsel [redacted] on behalf of [redacted] against the Judgment rendered in the first instance P. nr 605/2008 dated 4 August 2010 and the Judgment of the Supreme Court of Kosovo AP 2/2011 dated 25 May 2012, is hereby partially granted. The challenged Judgment of the Supreme Court of Kosovo AP 2/2011 dated 25 May 2012 is amended with regard to the decision on punishment whereby the sentence imposed against defendant [redacted] is reduced to twenty (20) years of imprisonment. HB

II. All the remaining parts of the challenged Judgment of the Supreme Court of Kosovo stay in force.

REASONING

I. Procedural background

1. Upon the conclusion of the Investigation, an Indictment was filed by Prosecutor of the (then) Prishtinë/Priština District Prosecution Office on 3 August 2006 against HB [redacted] for having allegedly committed the criminal offence of Aggravated Murder in violation of Article 147 par 1, item 11 of PCCK and Criminal Offence of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 par 2 of the PCCK

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2. The Prosecutor alleged that [redacted], after a quarrel over a parcel land located on the main road between Prishtinë/Priština and Mitrovicë/Mitrovica, murdered two individuals, the late [redacted] and [redacted].

3. The trial commenced on 12 January 2007 and on 22 July 2007, the (then) District Court of Prishtinë/Priština announced the Judgment. The first instance court found [redacted] guilty of three criminal offences, namely two counts of Aggravated Murder in violation of Article 147 par 1, item 11 of PCCK, and the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 par 2 of the PCCK, and imposed an aggregated punishment of twenty two (22) years of imprisonment.

4. On 22 June 2007, the Supreme Court of Kosovo granted both the Prosecutor's appeal and the appeal filed by defence counsel on behalf of [redacted] annulled the challenged Judgment and returned the case to the first instance Court for retrial.

5. On 3 July 2009, at the request of the defence, the President of the Assembly of EULEX judges assigned the case to EULEX judges of the (then) District Court of Prishtinë/Prishtina.

6. The retrial commenced on 3 December 2009 before a mixed panel of EULEX and local judges at the (then) District Court of Pristinë/Priština.

7. On 4 August 2010, upon conclusion of the retrial, the presiding judge announced the Judgment. [redacted] was

found guilty of Aggravated Murder in violation of Article 147 par 1, item 11 of PCCK, and the Criminal Offence of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 par 2 of the PCCK. He was sentenced to imprisonment of twenty two (22) years for Aggravated Murder and to imprisonment of one (1) year for the Weapons offence. Pursuant to Article 71 par 1 and 2 item 1 of the PCPCK, an aggregated term of imprisonment of twenty two (22) years was imposed.

8. On 20 April 2011, the Supreme Court of Kosovo granted the appeal of the (then) District Public Prosecutor in Prishtinë/Priština and of the injured party and amended the challenged Judgment only with regard to the decision on the punishment. [redacted] was sentenced to twenty five (25) years of imprisonment for two counts of Aggravated Murder in violation of Article 147 par 1, item 11 of PCCK, and to one (1) year of imprisonment for Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 par 2 of the PCCK. The Supreme Court of Kosovo rejected the appeal filed by the defence counsel as ungrounded. HB

9. On 25 May 2012, the Supreme Court of Kosovo rejected the appeal filed by the defence counsel on behalf of [redacted] against the Judgment of the Supreme Court of Kosovo dated 20 April 2011, as ungrounded. HB

10. Defence counsel [redacted] BS on behalf of [redacted] HB filed a request for protection of legality against the Judgment of the (then) District Court of Prishtinë/Priština dated 4 August 2010 and the Judgment of the Supreme Court of Kosovo dated 25 May 2012.

11. The Office of the Chief State Prosecutor filed an Opinion on the request for protection of legality moving the Supreme Court of Kosovo to reject it as ungrounded.

II. Submissions of the Parties to the Proceedings

12. Defence counsel in his Request for Protection of Legality argues that there has been Essential Violations of the Provisions of the Criminal Procedure Code of Kosovo and Violation of the Criminal Law. Counsel moves the Supreme Court of Kosovo to grant the request as grounded, modify the challenged Judgments and convict [redacted] for Murder in circumstances of excessive necessary defence. Alternatively, if the request is not grounded, defence counsel requests that the Supreme Court modifies the decision on punishment and imposes a more lenient sanction.

13. Defence counsel in particular argues that there has been violation of Article 433 par 1 and 2 in conjunction with Article 432 par 1 subpar 1 and 2 and Article 435 par 1 of the CPC due to the delays in the drafting of the Judgment. Defence counsel further claims violation of Article 403 par 1 of the CPC because the Judgment was announced by the presiding judge in the absence of the panel members. In addition, defence counsel submits that the Court disregarded the statements of the witness [redacted] who clearly explained that the victims had dragged [redacted] which, as a result, caused him to use a weapon in order to defend himself. Defence counsel argues that the elements of necessary

defence, or of eventually exceeding necessary defence, are fulfilled.

14. Defence counsel also points out that the issues relating to the property over which the conflict occurred are already solved between the two families since the family of [redacted] voluntarily compensated the [redacted] for the property in question.

15. Defence counsel argues that due to those violations, the sanction imposed on the defendant is not appropriate for the criminal offences committed because the mitigating circumstances were not appropriately assessed, especially taking into account that defendant admitted the offences.

16. The Prosecutor in his Opinion moved the Supreme Court of Kosovo to reject the request for protection of legality as ungrounded. The Prosecutor submitted that the request failed to properly substantiate any error in the challenged Judgments which would warrant the impugned Judgments being overturned or amended. The Prosecutor further submits that the alleged mistake that was pointed out by the defence counsel does not qualify as a substantial violation of the provisions of criminal procedure capable of significant prejudice to the right of the accused to a fair trial.

III. FINDINGS OF THE SUPREME COURT OF KOSOVO

17. In order for the Court to be able to adjudicate the defence counsel request, it is necessary to first examine whether the admissibility requirements laid down in the CPC have been fulfilled.

18. The Supreme Court of Kosovo established the following:

a. The request for protection of legality is admissible. It is filed with the competent Court pursuant to Article 434 and within the deadline pursuant to Article 433 of CPC.

b. The Supreme Court of Kosovo decided in a session as prescribed by Article 435 the CPC.

c. The Supreme Court of Kosovo finds that the request is partially grounded.

19. After examination of the file records, the panel finds that the appealed Judgments do not warrant an *ex officio* intervention. This Panel, therefore, shall confine itself to examining those violations of law which the defence counsel alleges in the request.

20. In addressing the allegation of the defence counsel regarding the absence of the panel members when the judgment was announced by the presiding judge, the Supreme Court of Kosovo finds the argument without merit.

21. Articles 366 of the CPC provides that *"Judgment shall be announced by single trial judge or presiding trial judge immediately after the court has rendered it"*. The legal provision refers to cases which are tried by a single trial judge and/or cases tried by a panel of judges. In both situations, the announcement of the Judgment is made by the presiding judge. The provision does not explicitly state that panel members must, although they can and it is advisable to, be present when the Judgment is announced.

22. In this case the Judgment was rendered in a *collegium*, namely by a panel consisting of the presiding trial judge

and two panel members. It has not been argued by the defence counsel that the Judgment rendered is not the same as that announced by the presiding trial judge. The submission of the defence counsel is that the absence of the panel members when the Judgment was announced in itself amounts to substantial violation of criminal procedure.

23. The panel finds that Article 366 does not require the presence of the panel members when the Judgment is announced. There are no allegations by defence counsel regarding the content of the written judgment. Therefore, the panel concludes that the mere fact that the panel members were not present when the Judgment was announced does not conflict with the legal provisions of the CPC.

24. Concerning the delays in the drafting of the Judgment, Article 369 of the CPC provides that *"Judgment shall be drawn up in writing within fifteen (15) days of its announcement" if and when the accused is in detention on remand*, respectively, within *"thirty (30) days in all other cases"*. This deadline may, exceptionally, be extended by the President of the respective court upon application of the presiding judge up to sixty (60) days when the complexity and nature of the case so require.

25. The panel concurs with defence counsel that the Judgment in this case was not drawn up in writing and served on the parties to the proceedings within the stipulated legal deadline as prescribed by Article 369 of the CPC. However, it is the view of the panel that this failure in complying with the cited provision does not amount to an essential violation which is such that it would render the Judgment *void* and/or require its annulment as long as the proceedings in general, viewed in their entirety, have been conducted in such a way that the defendant received a fair trial. Further, the panel notes that the CPC, in fact, does not include any sanction for non-compliance with the deadline.

26. The panel finds that the overall proceedings in this case were conducted within a reasonable time, considering the

nature of the accusations against the defendant and the fact that he was sentenced to long-term imprisonment. The fact of the obvious delays in delivering the written Judgment, by itself, does not give rise to an arguable claim of a substantial violation of the defendant's rights as protected by the applicable laws. The Court did not find that the infringement constituted a manifest breach of law.

27. In considering defence counsel's allegation concerning the necessary defence or, alternatively, excessive necessary defence, the Supreme Court considers the argument without merit.

28. The panel finds it important to note that necessary defence exists when a person commits the act to avert an unlawful, real and imminent attack against himself, herself or another person provided that the nature of the act is proportionate to the degree of danger posed by the attack. When an act is disproportionate to the degree of danger which attack poses, it is considered that the act exceeded the limits of the necessary defense.

29. In addressing the claims of necessary defence and excessive necessary defence, the Supreme Court is satisfied that previous courts provided sufficient and correct reasoning, with which this panel fully agrees, that there is no evidence to support the claim that the defendant acted in necessary defence or excessive necessary defence. As established by the court of facts, there is no evidence which determines that there was an imminent attack by the victims which was dangerous for the life of the defendant. The victims had pulled the defendant to the road besides the field and left him there. Following this, the defendant shot the victims from a distance of 6,30-7 m. Therefore, the Panel finds the arguments of the defence counsel without merit.

30. Concerning the decision on punishment, the Supreme Court considers that the lower courts failed in assessing the mitigating circumstances in an exhaustive fashion according to the law. The panel finds it important to

note that the crimes attributed to the defendant were not committed in particularly aggravating circumstances. The only element that qualifies the murder charge in qualified form is the number of persons deprived from life. The criminal code prescribes when two persons are deprived of life, irrespective of the circumstances in which the crime is committed, it will be qualified as an aggravated murder. However, in the view of the panel, a distinction should be drawn between cases where the offences are classified as aggravating due to this statutory provision, and cases where there are otherwise no aggravating factors present. In this case, apart from the fact that two persons were deprived of life which as noted above is an element of the qualified murder, the crime itself does not contain any elements that could be considered in addition as aggravating.

31. The Supreme Court finds that the sentence imposed by the second instance Court was excessive for the following reasons: the absence of aggravating factors; the extent of the mitigating factors, namely, the previous good character of the defendant, his expression of remorse and in particular the fact that the defendant was provoked by the victims who, as established by the first instance court, had dragged the defendant from the land which he considered to be his. The Court took into consideration that the victims in this case showed no respect towards the defendant. The actions of the victims, in dragging the defendant out of the land, and in the circumstances of the case, can be considered as provocative and highly distressing.

32. In light of the above, the Supreme Court finds that the sentence of twenty five (25) years imposed by the second instance court is excessive and in its place imposes a sentence of twenty (20) years of imprisonment. Credit against this sentence is given for the time already spent in custody.

33. In imposing this sentence, the Supreme Court took into consideration other sentences imposed by the Courts for the same offences based on similar facts. The Supreme

Court is mindful of the need for consistency in sentencing and the need to take into account the role of the first instance courts in reflecting the concerns and attitudes of the local community.

IV. CONCLUSION OF THE SURPEME COURT OF KOSOVO:

For the reasons above, the Supreme Court of Kosovo has decided as in the enacting clause of this judgment.

Supreme Court of Kosovo

PML-KZZ 111/15, date 25 February 2016

Presiding judge:

Dariusz Sielicki

EULEX Judges

Recording Clerk:

Adnan Isufi

EULEX Legal Advisor

Members of the panel:

Elka Filcheva-Ermenkova

EULEX Judge

Sulejman Nuredini

Supreme Court Judge