

IN THE DISTRICT COURT OF PEJA/PEC
Case Number P. 87/11
3 June 2011

IN THE NAME OF THE PEOPLE

The District Court of Peja/Pec, in the trial panel composed of Judge Malcolm Simmons as Presiding Judge and Judges Gunnar Oyhaugen and Sali Berisha as Panel members and Court Recorder Svetoslava Savova, in the criminal case against Atdhe Bekaj (hereinafter "the Defendant"), charged pursuant to Indictment PPS. number 109/2010 dated 25 January 2011 with the criminal offence of Aggravated Murder under Article 147(9) of the Criminal Code of Kosovo, after holding a public trial on 05, 06, 07, 13, 15 April, 04, 24 May, 02 and 03 June 2011, at which Ms. Merita Bina-Rugova appeared for the Prosecution, the Injured Party was not present and un-represented throughout the main trial, but prior to the close of the evidential proceedings and thereafter was briefly represented by Enver Nimani, Haxhi Cekaj, Gafurr Elshani and Aziz Rexha appeared for the Defendant, and at which the Defendant was present throughout, after voting and deliberation, on 03 June 2011 took and publicly announced the following

JUDGMENT

The Defendant Atdhe BEKAJ, born on 24 April 1979 in Peja, residing at TMK Street, son of Bajram and Rrushe Bekaj, maiden name Ahmetaj, citizen of Kosovo, primary school education, single, profession labourer, of average financial situation, with no previous convictions, in detention from 21 October 2011 is

GUILTY

Because:

On 31 January 2005 at approximately 11.25 on the main Peja-Decan Road, on TMK street in Peja, near the Hotel Park, using a Browning M - 1911 hand gun of 9 x 19mm caliber,

with serial number 200819, at close range shot Sadik Musaj who sustained one gunshot wound to his left shoulder and one gunshot wound to the left side of his abdomen with an exit wound on the right side of the front of his lower abdomen as a result of which the said Sadik Musaj died on 1 February 2005 at Camp Bondsteel in Kosovo. The Death Certificate records the cause of death as Hemorrhagic Shock caused by the gunshot wounds to the abdomen and neck.

It was a chance meeting between the Defendant and Sadik Musaj on 31 January 2005 during which an argument ensued between them. Although Sadik Musaj was unlawfully in possession of a handgun and a hand grenade the Court finds the Defendant was not acting in necessary self defence when he shot Sadik Musaj.

The Defendant fired at least four bullets from his gun. Two of those bullets were fired at close range and hit Sadik Musaj. Two bullets struck the premises of Te Taka.

Thereby, the defendant committed the criminal offence of *Murder* under Article 146 of the Criminal Code of Kosovo.

Therefore, pursuant the provisions of Articles, 6, 11, 15, 31, 32, 33, 34 items 1 and 2, 38, 64 par 1, 65 par 1, 73 par 1, 99 par 1, Article 146 of CCK and Articles 99 par 1, 2 items 3, 4, 6, par 3, 102 par. 1, 328 par 1, 385 par. 1 and 2, 386 par 2, 387 par 1 and 2, 391 and 392 of the KCCP, the defendant is

SENTENCED

To a term of imprisonment of FIFTEEN (15) years

Pursuant to Article 391 paragraph (1), subparagraph (5) and Article 278 Paragraph (7) of the KCCP, the time the Defendant has spent in detention from 21 October 2010 until 3 June 2011 onwards shall be credited against the punishment.

Pursuant to Article 102 paragraph (1) in conjunction with Article 99 paragraph (1) and (2) subparagraphs (3), (4) and (6) of KCCP the Defendant shall reimburse the costs of these criminal proceedings in the amount of 800 (eight

hundred) Euro's, and the Scheduled Amount of 100 (one hundred) Euro's.

The Injured Party may pursue a claim for compensation through the civil courts.

REASONING

A. Procedural background

i. The Indictment

It was averred in the Indictment that on 31 January 2005 at around 11.25 am in Peja, near the Park Hotel, the Defendant intentionally deprived of life Sadik Musaj, the motive of the act being unscrupulous vendetta because Sadik Musaj was a witness against the so called "Dukagjini Group", criminal case P 190/02 at the District Court in Peja, concerning the death of his brother Sinan Musaj for the murder of whom the Defendant's uncle has been found guilty along with some other persons. Specifically, it was averred that while Sadik Musaj was walking along the street with , several steps behind because of the little space in the sidewalk, the Defendant who had noticed the late Sadik Musaj from the opposite side of the road, approached him by passing from the other side of the road and when he approached the victim, by means of a revolver "Browning" M-1911, serial number 200819, 9 mm caliber, from a distance of 10-15 cm shot at him by on the left part of the stomach and then again on the left part of the chest and doing so he touched his jacket by the barrel of the revolver. The victim fell down and one day later he passed away at the "Bondsteel" camp hospital as a consequence of hemorrhagic shock sustained by the injuries from the fire shots. Defendant managed to escape even though witness shot towards him several time.

Herein according to the prosecutor, the defendant committed the criminal offence of *Aggravated Murder* pursuant to Article 147 (9) of CCK.

The Indictment was confirmed on 01 March 2011.

ii. Competence of the Court and Panel Composition

In accordance with Article 23 (1) of CPCK, District Courts have jurisdiction to adjudicate at first-instance criminal offences punishable by imprisonment of at least five years or those offences punishable by long-term imprisonment.

In the present case the Defendant was charged with Aggravated murder under Article 147 (9) of the Criminal Code of Kosovo, an offence punishable by imprisonment of at least 10 years or long-term imprisonment.

The criminal offence, according to the Indictment, was committed in Peja, which is in the territory of the District of Peja. Therefore, in accordance with Article 27 (1) of CPCK, the District Court of Peja has territorial jurisdiction to adjudicate in this case.

No issue was raised by the parties regarding the jurisdiction of this Court.

Furthermore, pursuant to Article 3 of the Law on Jurisdiction Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter "the Law on Jurisdiction"), EULEX Judges assigned to criminal proceedings have jurisdiction and competence over any case investigated or prosecuted by the Special Prosecutor of the Republic of Kosovo.

Since the present case was investigated and the Indictment filed by the Special Prosecutor of Kosovo the Trial Panel of the District Court of Peja/Pec was correctly composed of a mixed panel of two EULEX Judges and one Local Judge in accordance with Article 4.7 of the Law on Jurisdiction.

No issue was raised by the parties regarding the composition of the panel.

B. The main trial

i. Evidence administered during the main trial

During the course of the main trial the following witnesses were heard and the following evidence was administered

i.i Witnesses

B Z

G G

B T

A G

B U

S B

M M

A D

I S

A B

Defendant

i.ii Witness Statements

Statements of _____ dated 31 January 2005, 1
February 2005, 3 February 2005, 12 February 2005 and 8
November 2010.

Statement of _____ dated 29 December 2010.

Statements of _____ dated 31 January 2005, 1 February
2005 and 2 February 2005 and 11 November 2010.

Statements of _____ dated 31 January 2005 and 12
November 2010.

Statements of _____ dated 31 January 2005 and 15
November 2010.

Statements of _____ dated 31 January 2005 and 25
November 2010.

Statements of _____ dated 31 January 2005 and 18
November 2010.

Statement of _____ dated 7 February 2005

Statement of _____ dated 25 February 2005

Statement of _____ dated 26 February 2005

i.iii Documentary Evidence

Crime Scene Report

Forensic report and Plan of Locus dated 31 January 2005

Photographs of locus

Autopsy Report MA 05-020 dated 02 February 2005

Report of Examination of clothing worn by _____

Report of Examination of clothing worn by Sadik Musaj

Report of the Examination of BMW registration DK 24927

Ballistics Report dated 2 May 2005

Ballistics Report dated 6 January 2011

The Crime Scene Report, Forensic report and Plan of Locus, Photographs of locus, Autopsy Report, Report of Examination of clothing worn by _____, Report of Examination of clothing worn by Sadik Musaj, Report of the Examination of BMW registration DK 24927, Ballistics Report dated 2 May 2005 and the Ballistics Report dated 6 January 2011 were agreed by the parties.

Death certificate of Sadik Musaj dated 01 February 2005 issued by Camp Bondsteel in Kosovo

Verdict in Case number CC 190/02 dated 17 December 2002.

Report of police officer Halil Dreshaj undated on the handover of the firearm in the possession of _____

Report of police officer Halil Dreshaj dated 8 February 2005 on the handover of the victim's firearm in the possession of

Report of police officer Vedat Rexhaj dated 31 January 2005 on the handover of the victim's firearm in the possession of

ii. Witness testimony before this Court

The Prosecution proposed calling . He was examined by the Prosecutor on 29 December 2010. He was duly summonsed to attend before this Court but failed to do so. Upon the agreement of the parties his statement was admitted into evidence.

In his statement referred to the conviction in 2002 of who was convicted for his part in the unlawful detention and subsequent unlawful killing of Sinan Musaj. The Prosecution put in evidence the Verdict of the District Court of Peja in Case number CC 190/02 dated 17 December 2002.

There was no dispute that is the Defendants uncle and Sinan Musaj was the brother of Sadik Musaj.

In his statement stated that, during the trial of those accused of the unlawful killing of Sinan Musaj, Sadik Musaj threatened one of the defendants saying he would avenge his brothers' death stating "I will eat your heads". It is unclear on the face of that statement if was present when he heard those words allegedly spoken by Sadik Musaj.

The Defence called . He was interviewed by police on 7 February 2005. He testified before this Court on 13 April 2011.

In his statement of 7 February 2005 he said he is a hairdresser and the owner of ". He had known Sadik Musaj since 2000. He regularly cut his hair.

Te is on the South-West side of the road. It is on the same side of the road as the Park Hotel.

In his statement he told police that at approximately 11am on the day in issue Sadik Musaj arrived in his shop to have his hair cut. He was accompanied by a person he knew as " ". The Court finds " " is reference to . When he testified before this Court he said he could not recall if they arrived together.

In his statement described Sadik Musaj sitting in the chair furthest from the door. When he testified before this Court he could not recall precisely where Sadik Musaj sat. He thought he might have sat in one of two seats in the middle of a row of four seats.

In his statement he said stood near the door. He said that was their "usual" practice. When he testified before this Court he could not recall on how many occasions in the past Sadik Musaj had been accompanied by

The Prosecution called . He was interviewed by police on 31 January 2005, 1 February 2005, 3 February 2005 and 12 February 2005 and examined by the Prosecutor on 8 November 2010. He gave evidence before this Court on 6 April 2011.

He described his relationship with Sadik Musaj as friends. He said they met often. He denied he was the so-called "bodyguard" of Sadik Musaj although that was clearly implied by the defence and the evidence of .

When he testified before this Court he said that at approximately 10.30am on 31 January 2005 he met Sadik Musaj at Te . He said Sadik Musaj was alone. They remained there for approximately 15 minutes.

Referring to the plan annexed to the police forensic report (hereinafter referred to as "plan of the locus") described leaving Te with Sadik Musaj and walking towards the stone bridge - toward the city center.

There was snow on the footpath. They walked in single-file, a few paces in front of Sadik Musaj. He thought he was walking approximately 5-6 up to 10 meters in front of Sadik Musaj.

He described the Defendant walking towards him. He could not recall if the Defendant had crossed the road. They

passed each other. He said he thought he heard Sadik Musaj say something to the Defendant. He did not hear what was said. He said he turned around. He said he saw Sadik Musaj slap the Defendant across the face. He described the Defendant pulling out a handgun. He said he pulled out his gun. He could not recall if he pulled out his gun before the Defendant fired the first shot. He said it happened very quickly. He described Sadik Musaj bending over and then falling to the ground. He said he did not see a gun in Sadik Musaj's hand. said he fired into the air.

In the statement gave to police on 31 January 2005 he described how he and Sadik Musaj walked along the road. He said

"...[the Defendant] passed on the opposite side of the road. I know this person by sight but I never spoke with him...He moved and passed by me, I continued without any suspicion, in that moment I saw... [the Defendant] grabbed Sadik by his jacket and shot in his direction I think 2 or 3 times. Then I turned fast and he shot at me too..."

When he was interviewed on 31 January 2005 did not mention having heard Sadik Musaj say anything to the Defendant. It was his evidence it was the Defendant who grabbed Sadik Musaj. He did not mention Sadik Musaj slapping the Defendant. Indeed, it appears on the face of his earlier statement that he turned only upon hearing shots.

In his statement to police on 1 February 2005 he described the Defendant crossing the road towards him. He said

"After we passed by each other he was walking normally while he was passing the victim I heard the firearm shots. When I turned back my head I saw that the defendant was carrying the weapon by which he fired two bullets or three. I do not remember. In that moment victim fell on the ground while the suspect pointed the pistol in my direction and he fired two or three times."

When he was interviewed on 1 February 2005 again did not mention having heard Sadik Musaj say anything to the Defendant. Again, he made no mention of Sadik Musaj having

assaulted the Defendant. It appears also from this statement that he turned only upon hearing shots.

In his statement to police on 3 February 2005 he described the Defendant crossing the road towards him. He said

"He passed me and he was on my back. I recognized his face. I then turned round and at that time I saw [the Defendant] standing side by side with Sadik. I was about 3 meters away from them.

[The Defendant] was standing slightly behind Sadik, to Sadik's left, they were directly next to each other. [The Defendant] was slightly taller than Sadik. [The Defendant's] body was facing the rear left side of Sadik. I saw [the Defendant's] right hand holding a pistol at [the Defendant's] shoulder height and it was pointing to the rear of Sadik's left shoulder. The muzzle of the pistol was almost touching Sadik's shoulder. The pistol was held at an angle to the horizontal, pointing slightly downwards. I saw a shot from the pistol held by [the defendant]. Sadik immediately moved closer to [the Defendant] and they were facing each other. Sadik appeared to crouch down, still facing [the Defendant]. I saw [the defendant] with the pistol still in his right hand and it was now at Sadik's stomach height. The pistol was facing towards Sadik and was pointing at Sadik's left side. I heard another shot. Sadik fell to the ground facing [the Defendant] and Sadik seemed to fall with his knees hitting the ground first. While Sadik was being shot I pulled a pistol out of my waist band on the trousers I was wearing. I thought my life was in danger from [the Defendant] who just shot Sadik. I saw [the Defendant] then point the weapon at me and fire at me."

was asked if Sadik Musaj was armed. In reply said

"No. I saw both of Sadik's hands and he was not holding a pistol. He was not holding anything."

Again, he did not mention in his earlier statement having witnessed Sadik Musaj assault the Defendant. He made no mention of having heard Sadik Musaj say anything to the Defendant.

When he was interviewed by police on 12 February 2005 stated

"[the Defendant]...passed me by without saying any word. Then I heard the shot. Before [the Defendant]...shot at Sadik he didn't say a single word to him or to me. There was no argument, no quarrel, no insult and no bad words. No conversation at all. To me the shots were a complete surprise"

When he was examined by the Prosecutor on 8 November 2010 he said the following

Prosecutor: "what happened to Sadik when [the Defendant] approached him?"

: "After he approached Sadik I heard like a noise, like they were having an argument, this lasted very short, only 2-3 seconds and then I heard the shot"

Prosecutor: "What did you do on these critical moments?"

: "When I heard the shots I turned back and saw Sadik half lying down."

Prosecutor: "Did Sadik have something in his hands?"

: "No, I did not see anything".

Prosecutor: "Did he say anything?"

: "No, I did not hear him"

...

Prosecutor: "What was the distance between sadik and the shooter?"

: "Very close distance..."

The Prosecution called . He was interviewed by

police on 31 January 2005, 1 February 2005 and 2 February 2005 and examined by the Prosecutor on 11 November 2010. He gave evidence before this Court on 6 April 2011.

described how, on 31 January 2005, he received a telephone call from the Defendant. The Defendant asked him to help him start his car. At approximately 9.30am went to meet the Defendant at his home address.

When he gave evidence before this Court he said he went in his car with the Defendant to visit the Defendants brother who was in hospital. They subsequently returned to the Defendants car that was parked on the Peja-Decan road. There was no dispute that the Defendants car was a BMW motor vehicle with registration number DK 24927. confirmed that when they returned to the vehicle it was parked in the position indicated on the plan of the locus.

They could not start the car. It appears the battery was flat. testified the Defendant went to get some jump leads. said he sat in the drivers' seat of the Defendants vehicle and waited for him to return. There was no dispute the vehicle was facing in a South-Easterly direction on the South-West side of the road. When he testified before this Court he said he had a clear and unobstructed view of the road ahead.

described the Defendant walking toward the "vehicles shop" on the other side of the road. The shop is clearly depicted on the North-East side of the road on the plan of the locus, opposite the pharmacy Bardha.

When he testified before this Court he said he saw the Defendant returning to the vehicle "less than ten minutes" later. When he testified before the Prosecutor on 11 November 2010 he said "around 2 minutes". When he was interviewed by police on 1 February 2005 he said "not more than 5 minutes".

When he testified before this Court he described the Defendant walking towards him. He said he heard someone shouting "stop, stop". He said he did not see who was shouting. He said he saw Sadik Musaj following the Defendant and behind him. He described Sadik Musaj grabbing hold of the Defendant and turning him around to face him. He said he saw Sadik Musaj and putting their hands towards their belts. He thought they

were reaching for weapons. He said he did not see a weapon in Sadik Musajs' hand. He did not know who fired the first shot.

When he was interviewed by Police on 31 January 2005 he described what happened shortly after the Defendant left to go to the vehicle shop

*"...after a short time I heard the shootings and there were three or four shootings. **Then** I got out of the vehicle and noticed ...[the Defendant] running towards me carrying a pistol in his hand...When he was near me he told me: "Run away from here!". He continued running"*

On the face of that statement, did not see the Defendant returning until after he heard gunshots. He did not tell police about any altercation between the Defendant and Sadik Musaj. He did not say Sadik Musaj had grabbed the Defendant. He did not say Sadik Musaj had put his hand towards his belt as if he were reaching for a gun.

Indeed, when he was interviewed by police on 1 - 2 February 2005 he said he did not see anything. He made no reference to any alleged altercation between the Defendant and Sadik Musaj. In fact, it appears it was gunshots that first caught his attention

Prosecutor: *"What happened after you heard the shots?"*

: "...[the Defendant came] running towards me...He told me "Run, don't stay here". He was also carrying a weapon..."

When he was interviewed by the Prosecutor on 11 November 2010 he said

Prosecutor: *"Did you see...[the Defendant] leaving?"*

: "I did not see him when he left but when he was returning I heard the noise I heard when the victim said "stop"..."

That contradicted the evidence gave before this Court when he said he did not know who had shouted "stop".

However, in other respects the evidence gave on 11

November 2010 was consistent with the evidence he gave before this Court

Prosecutor: "How did events unfold, what have you seen?"

: "...Sadik grabbed...[the Defendant] by his arm"

Prosecutor: Did you see anything in Sadik's hands?"

: "No, I saw nothing in Sadik's hands while I saw a revolver in the hands of his companion"

Prosecutor: "Despite the word "stop" did you hear anything else?"

: "No, I heard nothing else"

...

Prosecutor: "At the moment Sadik grabbed...[the Defendants] by his arm was...[the Defendant] holding anything?"

: "I saw...[the Defendants] revolver"

...

Prosecutor: "Did you notice if the third person undertook anything?"

: "I saw his revolver but I could not tell who fired the shots"

was consistent throughout his evidence when he stated he had not seen a gun in the hands of Sadik Musaj.

The Prosecution called . He was interviewed by police on 31 January 2005 and examined by the Prosecutor on 12 November 2010. He gave evidence before this Court on 7 April 2011.

In his statement to police on 31 January 2005 Turjaka described how on the day in issue he was in a vehicle with two colleagues and was driving. Referring to the plan of the locus

described how [redacted] stopped the vehicle on the South-West side of main Peja-Decan road close to the butchers shop depicted on the plan.

As [redacted] was parking the vehicle he described hearing a noise. He said he thought their vehicle had hit something. Having alighted from the vehicle he saw Sadik Musaj lying a short distance from the rear of their vehicle.

When he testified before this Court he described the victim lying face-down in the road. He said the victim was lifted from the road in the same face-down position. The victim was carried in that position and put into the rear of their vehicle. He described what happened next

[redacted] : *when they picked him up to put him in our DRC vehicle I heard a noise of metal dropping on the ground.*

Gafurr Elshani: *What was that?*

[redacted] : *I suppose it was a weapon, it was black in colour.*

Presiding Judge: *You saw it?*

[redacted] : *When they picked him up, something fell and I saw this object fall to the ground and heard the sound.*

...

[redacted] : *When they lifted him up I saw something from the middle part of the body fall to the ground.*

When he was interviewed by the Prosecutor on 12 November 2010 he said

"...something fell from the victims belt"

He was asked about this when he testified before this Court

Judge Gunnar Oyhaugen: *I noticed in your statement before the Public Prosecutor you had stated something*

fell from the victim's belt on the ground.

: That is the middle.

Judge Gunnar Oyhaugen: I understand, could you observe if this pistol, or metal object, was attached to the belt?

: All I know is that from the position he was lifted up the object fell from the middle of the body.

When he testified before this Court was sure the gun fell from the "middle" of Sadik Musajs' body. Given the victim was lifted off the ground still face-down it is unlikely he saw the gun in Sadik Musajs' belt. It appears that was a mere assumption.

The Prosecution called . He was interviewed by police on 31 January 2005 and examined by the Prosecutor on 15 November 2010. He gave evidence before this Court on 7 April 2011.

In his statement to police on 31 January 2005 described how on the day in issue he was in a vehicle with two colleagues and . He said was driving.

He described the vehicle in which he was being carried parking on the South-West side of the road near the butchers shop. He said there was a lot of snow although the road itself was clear.

In his statement to police on 31 January 2005 he said as the vehicle was being parked he heard a noise that he thought was the sound of firecrackers. As they alighted from the vehicle he saw Sadik Musaj lying in the road behind their vehicle.

When he testified he described two or three persons subsequently lifting Sadik Musaj off the ground and carrying him to their vehicle.

When he was interviewed by the Prosecutor in November 2010 he described how, as Sadik Musaj was lifted off the ground, someone said "his pistol dropped". He clearly saw the gun because he described it as being "dark colour".

When he testified before this Court he described how, as the victim was lifted off the ground, he heard what he described as "the weight" of a gun hitting the ground. He said he saw the gun on the ground.

The evidence he gave before the prosecutor on 15 November 2010 was, in all material respects, the same.

The Prosecution called . He was interviewed by police on 31 January 2005 and examined by the Prosecutor on 25 November 2010. He gave evidence before this Court on 7 April 2011.

In his statement to police on 31 January 2005 described how on the day in issue he was driving a vehicle and accompanied in that vehicle by his colleagues and . In that statement he said he stopped the vehicle opposite the pharmacy Te Taka.

In his statement given on 31 January 2005 described hearing three or four shots as he was parking the vehicle. When he testified before this Court he said he heard 1 or 2 shots.

In his statement given on 31 January 2005 he said he did not think the sound was that of a firearm. He alighted from the vehicle and saw Sadik Musaj lying a short distance behind their vehicle. He assisted other persons putting Sadik Musaj into their vehicle. When he testified before this Court he described how Sadik Musaj had been lying face-down in the road. He was carried in the same face-down to their vehicle.

In his statement given on 31 January 2005 he said as they were carrying him towards their vehicle he saw what he described as a black pistol falling from Sadik Musajs' body.

When he testified before the prosecutor on 25 November 2010 he was asked if he had seen the pistol fall from Sadik Musajs' body. In reply he said

"No, but later I heard that his revolver had fallen down. I did not see that revolver..."

However, importantly, he testified

"...I have explained to the Public Prosecutor already that when we grabbed him by legs and others by shoulders, the hands of the victim were hanging loose and the gun was not on his, otherwise I would have had noticed."

When he testified before this Court he denied he had seen a gun fall to the ground.

The Prosecution called . He was interviewed by police on 31 January 2005 and examined by the Prosecutor on 18 November 2010. He gave evidence before this Court on 7 April 2011.

When he testified before this Court he recalled passing three men who appeared to be arguing. They were swearing. Having past the group he heard a woman say words to the effect "stop them". He described hearing a gunshot. He turned around and saw one of the men on the ground. He said he did not see a gun. The other two men had gone.

made a statement to police on 31 January 2005 only a matter of hours after the incident. When he testified before this Court he confirmed the signature on the statement was his. The statement contained a declaration that it had been read to him. Given that when he testified before this Court his recollection of events was poor, the Court chose to accept as more reliable the version of events as recorded in his statement given to police on the day in issue.

In his statement to police on 31 January 2005 described seeing three men apparently talking in the street near the Hotel Park. He passed the three men. He then heard a gunshot. He turned and saw one of the men falling to the ground. A second person was holding a gun. stated

"...this person with a pistol shot in person that was lying, three more times"

Counsel for the Defendant raised an issue before the Court regarding an addendum on the second page of the Albanian version of Mr. statement. That addendum contained, inter alia, the words

"...the armed person shot three more times at the person that was falling down"

The addendum was written on that part of the second page that had been crossed-through. The purpose of crossing through the unused part of a page on which a statement is written is to prevent later additions being made to the statement.

could not recall if he had made or dictated the addendum or indeed if it had been done prior to his signing the statement.

It would not be unusual to make an addendum at the end of a statement. It would be irregular to make such an addendum in that part of any statement that had been crossed-through. It would have been preferable to make a supplemental statement.

However, the addendum was not entirely prejudicial to the Defendant. In the statement, referring to the Defendant, stated *"...this person with a pistol shot in person that was lying, three more times"*. It was his evidence the victim was lying on the ground when he was shot "three more times". This was qualified in the addendum wherein it is stated the victim was shot three more times as he was *"falling down"*. Clearly it would be more prejudicial to the Defendant if he shot Sadik Musaj as he was "lying" on the ground as opposed to when he was "falling" to the ground.

In his statement to police on 31 January 2005 described how, as Sadik Musaj was being placed in a vehicle, a gun fell from his body.

was examined by the Prosecutor on 18 November 2010. confirmed that he signed the record of interview. That record also contained a statement that the record had been read to him, that he understood it and that he signed it without remark.

When he was examined by the Prosecutor he described passing three men in the street. Despite hearing one of the men say "who the fuck are you" it appears he thought they were good friends.

He described hearing shots and he turned to see the victim

lying in the road. It appears from that interview he did not see the Defendant shoot Sadik Musaj.

said that as Sadik Musaj was being lifted from the ground and put into the vehicle a gun fell from Sadik Musaj. He said he thought the gun had been on the waist of Sadik Musaj. Clearly that was an assumption. He seized the gun and later handed it to police.

The Defence called . He had not previously given a statement to police or the prosecutor relating to the facts in issue. He testified before this Court on 13 April 2011.

When he testified before this Court he described how on the day in issue he was walking along the Peja-Decan road in the direction of Peja. He said he saw two people "fighting". He said his distance from them was approximately the length of courtroom. The Court finds the length of the courtroom is 10 to 12 meters. He said a third person started firing from a gun. He said he did not see either of the other two men carrying a gun. He said he heard shots but did not see who had fired. Later he saw blood on the ground but nothing else.

The Defence called . He had not previously given a statement to police or the prosecutor relating to the facts in issue. He testified before this Court on 13 April 2011.

He described how, on the day in issue, he was walking on the Peja-Decan road in the direction of Decan. He said he saw ahead of him a single male walking in the same direction. The Court finds this was the Defendant. He said he saw two men walking towards the Defendant. The first of the two men was taller than the second. The Court finds the first of these males was while the second was Sadik Musaj. was approximately 20 - 30 meters from them.

described the Defendant walking past whereupon Sadik Musaj grabbed the Defendant by his clothing. He described firing from a weapon. He said was the first to fire. He said the Defendant and Sadik Musaj also had weapons. He heard shots but he did not see which of them had fired.

The Defence called . He was interviewed by police on 25 February 2005.

On the day in issue he was with his brothers and at the hospital in Peja. was to have surgery that morning.

In his statement of 25 February 2005 he said it was his intention to travel to hospital in their BMW motor vehicle. However, the vehicle would not start. There was no dispute this was the vehicle about which had testified. He described the Defendant arriving at the hospital at approximately 11am. The Defendant took the keys to the said BMW. He then left. That evidence was not disputed by the Prosecution.

When he testified before this Court he said he later overheard a conversation about the shooting. He said he heard the name "Atdhe" mentioned. He had no reason to know at that stage it was his brother. He said he went to the scene.

In the statement he gave to police he said

"...we heard from some passers-by that Sadik Musaj was killed by a person called Atdhe. So we were curious to know if it was our brother Atdhe."

He said he was unaware of there being any problems between the Defendant and Sadik Musaj.

The Defence proposed calling . He was interviewed by police on 26 February 2005. His evidence was agreed by the parties. He said the Defendant arrived at the hospital between 10.30 and 11am.

In all material respects his evidence was the same as that of

In the statement he gave to police in February 2005 he referred to his having overheard the conversation during which he discovered Sadik Musaj had been shot by someone with the name "Atdhe". He said

"When I heard this I was concerned about my brother"

The **DEFENDANT** gave evidence before this Court on 15 April 2011. He had previously refused to answer police questions regarding the incident. That was his right.

There was no dispute that at the time of his arrest the Defendant was in possession of a Browning M - 1911 hand gun of 9 x 19mm caliber with serial number 200819. There was no dispute that was the weapon the Defendant used to shoot Sadik Musaj. The Defendant said he had the weapon to protect his personal property. He said his business premises had twice been broken into. He denied the weapon was for his personal protection.

He said that on the day in question he and _____ were attempting to start a BMW motor vehicle registration number DK 24927. There was no dispute regarding the location of that vehicle which was clearly depicted on the plan of the locus.

The Defendant described, by reference to that plan, that he had crossed the road walking towards the "vehicles shop" that is depicted on the plan. As he did so a man bumped into him. He said "quite heavily". He said he turned to see who had bumped into him. As he did so he was grabbed by a second, shorter man. The shorter man who grabbed him said to him "stop", "Your life is finished. I will fuck your mother." He then punched the Defendant on the left side of his face. There was no dispute the shorter man was Sadik Musaj or that the man who had allegedly bumped into him was _____.

The Defendant said he did not know either man. He said he had never met or seen Sadik Musaj.

The Defendant said that as he was scuffling with Sadik Musaj he heard a shot. He said _____ was approximately three meters from him. He described what happened thereafter

"When the gun fired, the person who was scuffling with me put his hands on the gun and pulled the gun I then grabbed his hand and then we went around a little bit because he was trying to point the gun at my stomach."

The Defendant demonstrated how, using his left hand Sadik Musaj took hold of the Defendants right shoulder. He said he then heard a second shot. He said the shot was not

fired by Sadik Musaj. Upon hearing the second shot he said

"...having in mind the other person with a gun in his hand I realized I had no where else to go I tried to get away from him but he would not let go using his hand to hold and then I pulled out my gun."

It was his evidence that he drew his own gun after hearing the second shot.

However, later in his testimony the following exchange took place

Defendant: ... he was holding my shoulder I pulled the gun out and cocked it using one hand.

Presiding Judge: You were still facing each other at this stage?

Defendant: Yes

Presiding Judge: What happened then?

Defendant: That is when I heard the second shot..."

Clearly it was the Defendants evidence later that he drew his gun before hearing the second shot.

The Defendant said he fired his weapon in the direction of Sadik Musaj. He did not know how many shots he fired. He said he heard other shots being fired.

The Defendant was asked if he saw Sadik Musaj fall to the ground. In reply he said

"I am telling you that I was not in control I do not know what happened I panicked I did not know what was happening, I know when I left the place I was looking to get away quickly cause the other one had a gun too."

C. Evaluation of the evidence

The Court heard evidence of

and the Defendant. The prior statements of the above-mentioned witnesses were put in evidence. The prior statements of and were agreed and put into evidence.

The Court reviewed and assessed the Crime Scene Report, Forensic report and Plan of Locus dated 31 January 2005, Photographs of locus, Autopsy Report MA 05-020 dated 02 February 2005, the Report of Examination of clothing worn by , the Report of Examination of clothing worn by Sadik Musaj, the Report of the Examination of BMW registration DK 24927, Ballistics Report dated 2 May 2005, Ballistics Report dated 6 January 2011, Verdict in Case number CC 190/02 dated 17 December 2002, Report of police officer Halil Dreshaj undated, Report of police officer Halil Dreshaj dated 8 February 2005, Report of police officer Vedat Rexhaj dated 31 January 2005, death certificate of Sadik Musaj dated 1 February 2005 issued by Camp Bondsteel in Kosovo.

i. Findings of fact

There was no dispute that on 31 January 2005 on TMK Street, the main Peja-Decan road near the Hotel Park in Peja, Sadik Musaj was shot by the Defendant. It was the Defendants case that he acted in necessary self-defence.

The Prosecution conceded that the meeting between the Defendant and Sadik Musaj on the day in issue was mere chance.

The Defendant was arrested on 21 October 2010.

At the time of his arrest, the Defendant was unlawfully in possession of a Browning M - 1911 hand gun of 9 x 19mm caliber with serial number 200819. There was no dispute that was the weapon the Defendant used to shoot Sadik Musaj.

There was no dispute that five spent cartridge cases were found at the scene. Four of the cartridge cases were 9mm. The fifth was 7.62mm. The places where each of the

cartridge cases was found is marked on the plan of the locus as numbers 1 through 5 respectively. In addition a bullet hole was found in the window of the premises 'Te Taka'.

The Court finds that the cartridge cases recovered from the scene and to which reference is made on the plan of the locus as numbers 1, 2, 3 and 4 were fired from the Defendants gun.

The Court finds the projectiles recovered from the premises of Te Taka, and marked on the plan of the locus as 6 and 7, were fired from the Defendants gun.

The Court finds that Sadik Musaj was unlawfully in possession of a Sig Sauer P228 hand gun of 9 x 19mm caliber with serial number B234205. The ballistics report dated 2 May 2005 concluded that none of the cartridge cases or projectiles recovered at the scene was fired from this weapon.

No evidence was put before the Court the weapon found in the possession of Sadik Musaj had recently been fired.

The Court finds that at the relevant time Sadik Musaj was unlawfully in possession of a hand grenade.

The Court finds that on the day and at the time in issue was unlawfully in possession of a Crvena Zastava M - 57 hand gun of 7.62 x 25mm caliber with serial number 105532. The ballistics report dated 2 May 2005 concluded that the cartridge case recovered from the scene and to which reference is made on the plan of the locus as number 5 was fired from this firearm.

The autopsy of Sadik Musaj revealed three gunshot wounds. The first was an entry wound on the side of the left shoulder. The second was an entry wound on the left side of the abdomen. The third wound was determined to be a probable exit wound. None of the photographs annexed to the report depicts wound number "3". However, clarification is provided in the report of the forensic examination of the clothing worn by Sadik Musaj to which reference is made below.

The cause of death was recorded in the Autopsy Report as "gunshots to the trunk". The Death Certificate records the

cause of death as Hemorrhagic Shock caused by the gunshot wounds to the abdomen and neck.

The clothing worn by Sadik Musaj on the day in issue was the subject of forensic examination. That examination revealed three bullet holes. Two of those holes were determined to be entry holes while the third was an exit hole.

One entry hole was in the front left side of the jacket. The estimated firing range was 10 - 50cm's.

The second hole was an exit hole and was on the right side of the jacket. That hole was created by the bullet that passed through the lower part of Sadik Musajs' stomach in an almost straight line.

The third hole was in the right upper shoulder - neck area. The estimated firing range was 0. It was determined the muzzle of the firearm was in contact with or next to the jacket.

The bullet holes in the jacket worn by Sadik Musaj are consistent with the results of the autopsy examination.

Further, the evidence relating to the clothing worn by Sadik Musaj is consistent with his having been shot a close range.

An examination of the outer coat worn by revealed a penetrating hole to the left-hand front, several millimeters in diameter. Tearing of the fabric of the coat demonstrates the hole on the outside of the coat was an exit hole. Gunshot residue was found on the inside of the coat. The conclusion of the expert who conducted the examination was that the hole was a bullet hole and the wearer fired a weapon from under the coat.

The Prosecution put in evidence the Verdict of the District Court of Peja in Case number CC 190/02 dated 17 December 2002. One of the defendants in that case was

. He was convicted for his part in the unlawful detention and subsequent death in 1999 of, amongst others, Sinan Musaj.

There was no dispute that is the Defendants maternal uncle and Sinan Musaj was the brother of Sadik

Musaj.

was examined by the Prosecutor on 29 December 2010. Referring to the trial of those accused of the unlawful killing of Sinan Musaj, it was evidence that Sadik Musaj threatened the defendants saying he would avenge his brothers' death and stated "I will eat your heads". The parties agreed that his statement be admitted into evidence.

gave evidence that at approximately 11 am on the day in issue Sadik Musaj arrived in his shop to have his hair cut. He had been a regular customer since approximately 2000. He was accompanied by . stood near the door. It appears this was their usual practice.

It was the Defendants case that on the day in question he was walking in TMK Street. He described how, as he walked along the road, bumped "quite heavily" into him. He said he turned to see who had bumped into him whereupon he was grabbed by Sadik Musaj. He described the struggle that followed and Sadik Musaj pulling out a gun and attempting to point it towards his stomach. He said was the first to fire. He said he then shot Sadik Musaj. He said he did not know either man. That account of events is contradicted by the testimony of other witnesses.

It was the defence case that was the so-called bodyguard of Sadik Musaj. That might have been true.

The evidence gave before this Court contradicted his prior evidence in several important, material respects. When he testified he described the Defendant walking towards him. Sadik Musaj was walking a few paces behind him. He said he thought he heard Sadik Musaj say something to the Defendant. He did not hear what he said. He said he turned around. He said he saw Sadik Musaj slap the Defendant across the face. He described the Defendant pulling out a handgun. He said he pulled out his own gun. He could not recall if he pulled out his gun before the Defendant fired the first shot. He said Sadik Musaj did not have a gun in his hand. He said he fired into the air.

However, in the statement he gave to police on 31 January 2005 described the Defendant grabbing Sadik

Musajs' jacket and firing two or three times. He did not mention having heard Sadik Musaj say anything to the Defendant. He did not mention Sadik Musaj allegedly slapping the Defendant. Indeed, it appears from his earlier statement that he turned only upon hearing shots. That contradicted the evidence he gave before this Court.

In his statement to police on 1 February 2005 he said the Defendant walked past him and then he heard shots. He said he turned around and saw the Defendant with a gun in his hand. He did not mention then having heard Sadik Musaj say anything to the Defendant. Again, he made no mention of Sadik Musaj having assaulted the Defendant. On the face of that statement, it appears he turned only upon hearing shots.

In his statement to police on 3 February 2005 he described the Defendant walking past him. He said he turned around and saw the Defendant standing side by side with Sadik Musaj. He said he was approximately 3 meters away from them. That is consistent with the evidence the Defendant gave before this Court. He said he saw the Defendants right hand holding a pistol at the Defendants shoulder height and it was pointing to the rear of Sadiks left shoulder. The muzzle of the pistol was almost touching Sadik Musajs' shoulder. He said the Defendant fired. He said Sadik Musaj immediately moved closer to the Defendant and they were facing each other. He said Sadik Musaj appeared to crouch down, still facing the Defendant. He said the Defendant fired a second time at Sadik Musajs' stomach. He said Sadik Musaj fell to the ground whereupon he drew his weapon. He said the Defendant then fired in his direction. He said Sadik Musaj did not have a gun in his hand. Again, he did not mention in his earlier statement having witnessed Sadik Musaj assault the Defendant. He did not mention having heard Sadik Musaj say anything to the Defendant. That contradicted the evidence he gave before this Court.

When he was interviewed by police on 12 February 2005 said the Defendant walked past him. Then he heard a shot. He said there had been no conversation at all between the men. That too contradicted in several, important respects the evidence this witness gave before this Court.

When he was examined by the Prosecutor on 8 November 2010

he said he thought the Defendant and Sadik Musaj were arguing. That is supported by other witnesses. He said the argument lasted only 2 or 3 seconds. Then he heard a shot. He said he turned and Saw Sadik Musaj "half lying". That evidence is supported by the evidence of
Again, he said Sadik Musaj did not have anything in his hands.

When he was examined by the Prosecutor in November 2010 he said he fired 3 or 4 times. Police only recovered one shell case from a weapon of 7.62mm caliber. Given there was snow on the ground it is possible other shell cases may have been lost.

When he testified before this Court said he fired his weapon into the air. However, that is contradicted by the forensic evidence. Only one cartridge case from his gun was found at the scene. The examination of the jacket he was wearing at the time of the incident revealed that he had fired a weapon apparently concealed under his jacket. The bullet had passed through his jacket. It is unlikely he would have fired into the air through his jacket. One possible explanation is that ineptly shot through his own jacket as he hastily drew his gun - perhaps suggesting a degree of panic and, of course, not something would readily admit.

He told the police that he was up to 2 meters from Sadik Musaj when he was shot. Indeed, on one version of the Defendants evidence, fired twice before the Defendant drew his own gun. If that is correct and shot at the Defendant as he fought with Sadik Musaj he was a remarkably bad shot. As a matter of simple logic, one is more likely to be inaccurate when firing whilst being fired upon.

Did fire into the air as the Defendant fought with Sadik Musaj? That would be illogical if Sadik Musaj were the aggressor.

Some form of words was clearly exchanged between the Defendant and Sadik Musaj. That is supported by other witnesses. However, prior to his giving evidence before this, Court made no mention of Sadik Musaj having assaulted the Defendant.

. consistently denied Sadik Musaj had a weapon in his hand. Even were the Court to accept the evidence

gave before this Court that Sadik Musaj swore at and slapped the Defendant, the Defendants reaction in drawing a gun and shooting Sadik Musaj was wholly disproportionate.

When he testified before this Court described how, on the day in issue, he was assisting the Defendant start his car. The Defendant went to a nearby vehicle parts shop in order to get jump leads. sat in the drivers' seat of the Defendants car and waited for him to return.

He testified he saw the Defendant walking towards him. He said he heard someone shouting "stop, stop". He said he did not see who was shouting. He said he saw Sadik Musaj following the Defendant and behind him. That contradicted the Defendants evidence.

It was the Defendants case bumped into him and as he turned to face he was grabbed by Sadik Musaj. That contradicts the evidence of . Firstly, testified he saw the Defendant walking towards him and someone shouting "stop, stop". It was the Defendants case he was walking towards - and therefore away from - when bumped heavily into him seconds before he was grabbed by Sadik Musaj. Secondly, given it was the Defendants case bumped into him "quite heavily" it is inconceivable did not see that. Thirdly, given there was no dispute was walking in front of Sadik Musaj then, as a matter of simple logic, if the Defendant turned to face after he had bumped into him, would have been in front of Sadik Musaj and the Defendant and not "behind" Musaj as testified.

described Sadik Musaj grabbing hold of the Defendant and turning him around to face him. He made no mention of Sadik Musaj striking the Defendant. He said he saw Sadik Musaj and putting their hands towards their belts. He thought they were reaching for weapons. However, he said he did not see a weapon in Sadik Musajs hand. He did not know who fired the first shot.

In several, material respects the evidence gave before this Court contradicted his prior evidence.

When he was interviewed by Police on 31 January 2005 he did not mention seeing any altercation between the Defendant and Sadik Musaj. He did not mention Sadik Musaj apparently

reaching for a weapon. In fact, on the face of his earlier statement, his attention was not drawn towards the Defendant until after he heard gunshots.

When he was interviewed by police on 1 - 2 February 2005 he said he did not see anything. Again, he made no reference to any alleged altercation between the Defendant and Sadik Musaj. On the face of that statement, it appears it was gunshots that first caught his attention.

The evidence he gave to the Prosecutor on 11 November 2010 was in most material respects consistent with the evidence he gave before this Court.

The Defendant was arrested on 21 October 2010. It is not mere coincidence that his evidence before the Prosecutor approximately three weeks later was, in several important material respects, fundamentally different from his earlier evidence. His evidence to the Prosecutor in November 2010 and his evidence before this Court was clearly contrived to assist the Defendant.

was, however, consistent throughout his evidence when he stated he had not seen a gun in the hands of Sadik Musaj.

had not previously given a statement to police or the prosecutor relating to the facts in issue. He described seeing two people "fighting". He said a third person started shooting. He said he did not see either of the other two men who were fighting with a gun. Later he saw blood on the ground but nothing else. It was his evidence that fired first. He did not see a gun in the Defendants hand. He heard further shots fired but did not see who had fired. Had in fact witnessed the events in issue it is remarkable he did not see a gun in the Defendants hand. In essence, his evidence was simply that fired first.

had not previously given a statement to police or the prosecutor relating to the facts in issue. He said he saw two men walking towards the Defendant. was approximately 20 - 30 meters from them.

described the Defendant walking past whereupon Sadik Musaj grabbed the Defendant by his clothing. He too made no reference to bumping

into the Defendant as the Defendant had alleged. If had, indeed, bumped "quite heavily" into the Defendant it is inconceivable would not have seen that. He made no mention of Sadik Musaj apparently striking the Defendant. He said was the first to fire. He said the Defendant and Sadik Musaj also had weapons. He said he saw those weapons "later". He heard shots but he did not see who had fired. His evidence contradicted the evidence of other witnesses and was clearly contrived to assist the Defendant.

described how, having alighted from the vehicle he saw Sadik Musaj lying face-down in the road. He said he was lifted from the road in the same, face-down, position. He said as the Sadik Musaj was picked-up he heard the noise of metal dropping hitting the ground. He saw Sadik Musaj's gun on the ground. He described the gun falling from the "middle" of his body.

When he was interviewed by the Prosecutor on 12 November 2010 he said something fell from the victims "belt". However, given the victim was lifted off the ground still face-down it is unlikely he saw the gun under the victims' belt. It appears that was a mere assumption. He was in no doubt a gun dropped from the middle of the victims' body as he was lifted off the ground.

testified he saw Sadik Musaj lying in the road behind their vehicle. He described two or three persons lifting Sadik Musaj off the ground and carrying him to their vehicle. As Musaj was lifted he heard what he described as "the weight" of a gun hitting the ground. He said he saw the gun on the ground.

When he was interviewed by the Prosecutor in November 2010 he described how, as Sadik Musaj was lifted off the ground, someone said "his pistol dropped". He clearly saw the gun because he described it as being "dark colour".

described how Sadik Musaj had been lying face-down in the road. He was carried in the same face-down position to their vehicle.

Importantly, he testified that as Sadik Musaj was lifted off the ground and carried to their vehicle Musaj's arms were hanging loose and he was not holding a gun.

In his statement given on 31 January 2005 he said as they were carrying him towards their vehicle he saw what he described as a black pistol falling from Sadik Musajs' body.

When he testified before the prosecutor on 25 November 2010 he denied he had seen a pistol fall from Sadik Musajs body. He said he heard a gun had fallen from his body.

When he testified, recalled passing three men who appeared to be arguing. He described hearing a gunshot. He turned around and saw one of the men on the ground. He said he did not see a gun. The other two men had gone. However, his recollection of the events on the day in issue was vague.

made a statement to police on 31 January 2005 only a matter of hours after the incident. Given that when he testified before this Court his recollection of events was poor, the Court chose to accept as more reliable the version of events as recorded in his statement given to police on the day in issue.

In his statement described seeing three men apparently talking in the street near the Hotel Park. This contradicted the Defendants evidence. Rather than bumping into the Defendant and thereafter his being immediately grabbed by Sadik Musaj as alleged by the Defendant, it was evidence that the group was arguing. Clearly he did not initially see a struggle. Indeed, thought they were friends.

It was evidence that he walked past the group. He then heard a gunshot. He turned and saw one of the men falling to the ground. A second person was holding a gun. stated "*...this person with a pistol shot in person that was lying, three more times*". That statement was qualified by an addendum wherein said "*...the armed person shot three more times at the person that was falling down*". He made no mention of the Defendant having a gun in his hand.

In his statement to police on 31 January 2005 described how, as Sadik Musaj was being placed in a vehicle, a gun fell from his body.

was examined by the Prosecutor on 18 November 2010

no reference is made to his having seen the Defendant shoot Sadik Musaj. He told the Prosecutor that as the victim was being lifted from the ground and put into the vehicle a gun fell from the victim. He thought the gun had been on the victims' waist. Clearly that was an assumption. He seized the gun and later handed it to police.

The Court found _____ to be an honest witness. When he testified before this Court his recollection of events on the day in issue was, at best, vague. He was clearly doing his best to assist the Court but his recollection of events was significantly impaired by his poor memory and the passage of time since the events about which he was being asked to testify. The Court considered more reliable the statement _____ gave to police on 31 January 2010.

It was the Defendants evidence Sadik Musaj had a gun in his hand as they struggled. That evidence was supported by _____. However, the Court did not accept that evidence. None of the other witnesses saw Sadik Musaj with a gun in his hand. No evidence was put before the Court Sadik Musaj fired a single shot. That is surprising given the struggle as described by the Defendant. Indeed, it was only as Sadik Musaj was lifted off the ground that a gun dropped from his body.

Had Sadik Musaj had a gun in his hand as he fought with the Defendant it is surprising his gun was not found on the ground next to or under his body. _____ testified that when Sadik Musaj was carried to the vehicle his hands were hanging free and he did not see a gun. It was the evidence of several Prosecution witnesses that it was as Sadik Musaj was carried to a vehicle that his gun fell from his body. The most probable explanation is that the gun was in the waist band or otherwise secreted about the person of Sadik Musaj as he was lifted off the ground.

The Defendant denied knowing Sadik Musaj. He said he had heard the name but had never met him and did not know him by sight. Several witnesses testified they heard the Defendant arguing with Sadik Musaj. That lends some support to the Prosecution case they knew each other.

The Defendant admitted carrying a gun which he said was in order to protect his property. The Defendant owned a car wash. He denied he carried it for personal protection.

The comments made by both _____ and _____ when they learned about the shooting of Sadik Musaj are interesting.

When he was interviewed by police on 25 February 2005 _____ said

"...we heard from some passers-by that Sadik Musaj was killed by a person called _____. So we were curious to know if it was our brother _____."

When he was interviewed by police on 26 February 2005 _____ said he heard the name _____ mentioned. He said

"When I heard this I was concerned about my brother"

Again, that lends support to the Prosecution case that the Defendant knew Sadik Musaj.

The Prosecution put in evidence the Verdict of the District Court of Peja in Case number CC 190/02 dated 17 December 2002. One of the defendants in that case was

_____. He was convicted for his part in the unlawful detention and subsequent death in 1999 of, amongst others, Sinan Musaj. Having been convicted of that offence _____ was sentenced to a term of imprisonment of three years.

There was no dispute that _____ is the Defendants maternal uncle and Sinan Musaj was the brother of Sadik Musaj.

Sadik Musaj gave evidence for the Prosecution at the trial of _____

In his statement to police _____ said that during that trial Sadik Musaj threatened the defendants saying "I will eat your heads". This threat might have lent support to the defence case that the Defendant was acting in self-defence. However, the Defendant said he had never met Sadik Musaj and did not know him by sight.

The Defendant lied when he said _____ bumped into him. None of the witnesses testified to that fact. The Defendant lied when he said he was immediately grabbed by Sadik Musaj. Witnesses described the Defendant arguing with Sadik Musaj. The Defendant lied when he said Sadik

Musaj drew his gun. Only testified he saw a gun in Sadik Musajs' hand. That evidence was contradicted by other witnesses. Indeed, several witnesses testified they saw a gun fall from Sadik Musajs' body as he was being carried to the car. testified he did not see a gun in Sadik Musajs hand as he was lifted from the ground. The Defendant lied when he said fired first. He gave contradictory evidence about the first and second shots he said were fired by . If were aiming at the Defendant it is inconceivable he would have missed his target from such a short distance not once but twice. If fired into the air one has to question why if Sadik Musaj was the aggressor. Taking into account all the evidence in this case the Court finds the Defendant was not acting in necessary self defence.

The Defendant denied he knew Sadik Musaj. Several witnesses testified they heard the Defendant arguing with Sadik Musaj on the day in issue. That lends support to the Prosecution case they knew each other.

The Court is satisfied the Defendant knew Sadik Musaj. It is obvious from the fact they argued on the day in issue there was some animosity inter se. No evidence was put before the Court that the murder was the product of that animosity rather than revenge for the earlier conviction of . That might well have been the motivation. However, the Court is not satisfied to the required standard of proof that was, indeed, the motivation. For that reason the Court has excluded the Defendants conviction under Article 147 (9).

The Court has also excluded Article 147 (4) and (5).

Pursuant to Article 147 (4) a defendant may be convicted of Aggravated Murder if s/he deprives another person of his or her life and in doing so intentionally endangers the life of one or more persons. The Defendants fired four shots in a crowded street. Two projectiles struck the premises of Te Taka. However, the Code provides the defendant must act "intentionally" - not recklessly.

Pursuant to Article 147 (5) a defendant may be convicted of Aggravated Murder if s/he deprives another person of his or her life while acting ruthlessly and violently. The Court is satisfied the Defendant was acting violently. The Court is not satisfied the Defendant was acting ruthlessly.

The Court finds that on 31 January 2005 at approximately 11.25 on the main Peja-Decan Road, on TMK street in Peja, near the Hotel Park, using a Browning M - 1911 hand gun of 9 x 19mm caliber, with serial number 200819, at close range shot Sadik Musaj who sustained one gunshot wound to his left shoulder and one gunshot wound to the left side of his abdomen with an exit wound on the right side of the front of his lower abdomen as a result of which on 01 February 2005 the said Sadik Musaj died at Camp Bondsteel in Kosovo. The Death Certificate records the cause of death as Hemorrhagic Shock caused by the gunshot wounds to the abdomen and neck.

It was a chance meeting between the Defendant and Sadik Musaj on 31 January 2005 during which an argument ensued between them. Although Sadik Musaj was unlawfully in possession of a handgun and a hand grenade the Court finds the Defendant was not acting in necessary self defence when he shot Sadik Musaj.

The Defendant fired at least four bullets from his gun. Two of those bullets were fired at close range and hit Sadik Musaj. Two bullets struck the premises of Te Taka.

Thereby, the defendant committed the criminal offence of *Murder* under Article 146 of the Criminal Code of Kosovo.

D. Determination of punishment

When imposing the criminal sanction, the court has to consider the general purposes of punishment, including deterrence, prevention and protecting society.

On the day in issue the Defendant was unlawfully in possession of a loaded Browning M - 1911 hand gun of 9 x 19mm caliber with serial number 200819 in a public place which he used to murder Sadik Musaj. The Defendant showed no remorse for the criminal act. He lied when he said he acted in self defence. The Court has taken these factors into account as aggravating features when determining the level of punishment.

As to the mitigating circumstances, it must be taken in consideration that the data from the criminal register

indicate that Defendant was never convicted and also his behavior during the trial was exemplary.

The punishment, taking in consideration both the aggravating and the mitigating circumstance, shall be a 15 fifteen (15) years of imprisonment.

The time already spent in detention on remand is to be credited in the sentence.

E. Costs

Pursuant to Article 102 paragraph (1) in conjunction with Article 99 paragraph (1) and (2) subparagraphs (3), (4) and (6) of KCCP, the Defendant shall reimburse the costs of these criminal proceedings in the sum of 800 (eight hundred) Euros and the Scheduled Amount in the sum of 100 (one hundred) Euros.

F. Compensation Claim

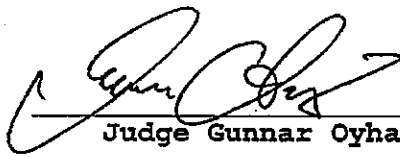
The Injured Party was not present at trial and was unrepresented. Pursuant to Article 108 par 1 of the KCCP the Injured Party has the right to pursue a property claim against the Defendant.

For the reasons stated herein we hereby render this Judgment.

Dated this 3rd day of June 2011.




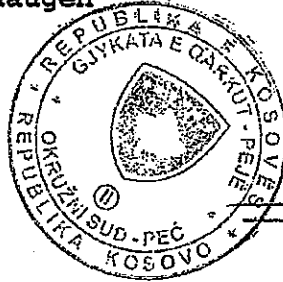
Judge Malcolm Simmons
Presiding Judge



Judge Gunnar Oyhaugen



Judge Sali Berisha



Svetoslava Savova
Court Recorder

LEGAL REMEDY: Pursuant to Article 398 (1) of the Criminal Procedure Code of Kosovo, the authorized persons may file an appeal against this Judgment within fifteen (15) days of the day the copy of the judgment has been served. The appeal must be filed in written form through the District Court of Peja/Pec to the Supreme Court of Kosovo.