

DISTRICT COURT OF PEJA/PEC

AP.nr.110/10

10 November 2010

IN THE NAME OF THE PEOPLE

The Three-Judge panel of the District Court of Peja comprising EULEX Judge Malcolm Simmons as Presiding Judge, EULEX Judge Riku Jaakkola and Local Judge Salih Mekaj as panel members,

In the criminal case against

GANI ÇEKU, born on 31 January 1982, in Pejë/Peć, male, father's name Gazmend, mother maiden's name Safete Rizaj, Kosovo Albanian, residing in Fusha e Pejës, single, of poor economic status, secondary school education, previously not convicted,

Acquitted of having committed the criminal offence of *Grievous Bodily Harm*, in violation of Article 154 paragraph 1 point 3 of the Criminal Code of Kosovo (CCK), through the Judgment of the Municipal Court of Peja/Pec P.nr.560/09 dated 01.04.2010,

Deciding upon the appeal of the injured party Ragip Muriqi filed on 30 August 2010 and the appeal of the Municipal Public Prosecutor filed on 31 August 2010,

in a session held on 10 November 2010, in the presence of the acquitted Gani Ceku,

After voting and deliberating on the 10 November 2010, issues the following

V E R D I C T

The appeals are **rejected as UNFOUNDED**.

The Judgment of the Municipal Court of Peja/Pec P.nr.560/09 dated 01.04.2010 is hereby MODIFIED *ex officio* and herein the defendant is acquitted of having committed the criminal offence of *Grievous Bodily Harm*, in violation of Article 154

paragraph 1 point 3 of the CCK, because it has not been proven that the accused has committed the act with which he has been charged.

R e a s o n i n g

On 27th November 2007, the Municipal Public Prosecutor of Pejë/Peć Indictment PP. no.1487/2007 with the Municipal Court of Pejë/Peć, against the defendant Gani Ceku, for having committed the criminal offence of *Grievous Bodily Harm*, in violation of Article 154 paragraph 1 point 3 of the Criminal Code of Kosovo (hereinafter "the CCK").

On 13th December 2007 the said Indictment was confirmed in Ruling KA.nr.96/07 of the Municipal Court of Pejë/Peć.

The main trial was held before the Municipal Court of Pejë/Peć on 5th and 12th March 2008. On 12th March 2008 Judgment P.nr.10/08 was rendered, convicting the Defendant of the criminal offence of *Grievous Bodily Harm*, in violation of Article 154 paragraph 1 point 3 of the CCK and sentencing him to 120 days of imprisonment.

On 9th July 2008, the District Court of Pejë/Peć, deciding upon the appeals of the defendant and the injured party, issued Decision AP.nr.49/08, rejecting both appeals as ungrounded and confirming the first-instance Judgment.

On 5th September 2008, the Defendant filed, with the Municipal Court of Pejë/Peć, a request for reopening the criminal proceedings, as new exculpatory evidence had been discovered. The new facts referred to a new eyewitness, Haki Lekaj and forensic expertise as to the injuries sustained by the defendant.

On 24th September 2008, the Presiding Judge requested the Defendant to provide the evidence supporting the new facts, as required by Article 444 (2) of the KCCP, within 8 days. As the defendant only acted on 13th October 2008, the court on 14th October 2008 dismissed the request for reopening the criminal proceedings through Ruling KP.nr.21/08, pursuant to Article 445 par. 1 item 5 of the KCCP, because of the non-compliance with the provisions set out under Article 444 of the KCCP.

On 13th January 2009, the District Court of Pejë/Peć, deciding upon the appeal against Ruling KP.nr.21/08 of the Municipal Court, through the decision Pn. no. 142/08, granted the appeal, annulling the Ruling of the Municipal Court and sending the case for reconsideration.

On 6th February 2009 the Municipal Court of Peja/Pec after reconsidering the case and considering the advices of the District Court of Peja/Pec, issued Ruling KP.nr.1/06, by which the request for reopening the procedure was dismissed.

On 26th February 2009 Gani Ceku filed a new request for reopening the procedure.

On 04th May 2009 the Three-Judge panel of the Municipal Court of Peja/Pec dismissed the request.

On 27th July 2009 the District Court of Peja/Pec acting upon the appeal of the Defendant issued Ruling Pn.nr.94/09, by which the appeal was approved, the ruling of the Municipal Court of Peja/Pec was modified and the reopening of the criminal procedure was allowed, considering that the new facts were relevant and had to be taken in consideration.

Herein a new criminal case was opened in the Municipal Court of Peja/Pec (P.nr.560/09).

On 8 December 2009, the President of the Assembly of EULEX Judges, deciding upon the request of the injured party for taking over the case, assigned the case to EULEX Judges.

The main trial was conducted on 17, 18 and 31 March, and 1st April 2010. The trial panel was comprised of two EULEX Judges and one Local Judge.

On 1st April 2010 the trial panel issued the Judgment P.nr.560/09 by which Gani Ceku was acquitted of having committed the criminal offence of *Grievous Bodily Harm* in violation of Article 154 paragraph 1 point 3 of the CCK.

It is against that Judgment that the injured party Ragip Muriqi and the Municipal Public Prosecutor filed appeals on 30th and 31st August 2010 respectively.

The injured party appeals the first instance judgment on the ground of a fundamental violation of the criminal procedure Code including, inter alia, the absence of an Enacting Clause

in the Judgment, incomprehensible reasoning and a failure to consider the Injured Party's Closing Statement, a wrong and/or incomplete determination of the factual bases including, inter alia, the evidence of Haki Lekaj and contradictions/inconsistencies with the evidence of other Defence witnesses, a failure to give proper credit to the evidence of Visar Muriqi and violation of the Criminal Code.

The Public Prosecutor appeals the first instance judgment on the grounds of a wrong and incomplete determination of the factual bases including, inter alia, the date of diagnosis of the injury suffered by the Injured Party and the legal basis upon which the First-Instance Court acquitted the Defendant.

At the time of the incident the Defendant was a police officer in the service of the Kosovo Police.

When he testified before the court on 18 March 2010 Haki Lekaj, referring to the night of 13/14 August 2007, said he was en route home when he saw and subsequently spoke with the Defendant, Sadat Gjogoviq and Xhevat Ibraj. The witness described seeing a white Volkswagen Golf 2 being driven from the centre of the town and making a U-turn in the street. He said the Defendant stopped the vehicle. He testified he heard the Defendant tell the driver to get out of the vehicle. The Defendant had to repeat his request. The driver of the vehicle refused to comply with the Defendant's instructions. There is no dispute that the driver of the Golf was the Injured Party.

The Witness described seeing the Defendant open the door of the vehicle and, again, he asked the driver to get out. He said the driver of the vehicle lifted his arm towards the police officer's face whereupon the Defendant grabbed the driver by his left shoulder and a short scuffle ensued. Another police officer, Sedat Gjogoviq, intervened and assisted the Defendant restrain the driver against the police vehicle. The Defendant and Officer Gjogoviq handcuffed the driver and put him in the police car.

Sadat Gjogoviq's evidence was not heard at the first trial in 2008 as he was absent abroad. The trial panel ruled that hearing him was not necessary.

When he testified before the court on 5 March 2008 Xhevat Ibraj stated that on the night of 13/14 August 2007 he was on duty with the Defendant and Sedat Gjogoviq. He did not see

the moment the Defendant stopped the Golf 2 nor did he hear any subsequent conversation between the Defendant and the Injured Party. He saw the Defendant push the Injured Party against the Golf 2 and search him. He said he assisted the Defendant to handcuff the Injured Party and place him in the police vehicle.

The Injured Party testified on 5 March 2008 that on the night in issue he was driving his Volkswagen Golf 2 motor vehicle and was accompanied by his cousin Visar Muriqi. He described his vehicle being stopped by the Defendant. He said the Defendant asked him to present his identification documents. There was no suggestion by the Injured Party that the Defendant's conduct at that stage was anything other than courteous and professional. He said he handed the documents to the Defendant through the open window of his vehicle. He said he asked the Defendant the reason for stopping him. The Injured Party testified he did not know why he had been stopped by police. He said he was not drunk and had not been driving fast.

He said he tried to inform the Defendant of his direction of travel and did so by pointing. He testified the Defendant hit him twice on the hand. He testified the Defendant instructed him to get out of the vehicle. He said he refused and asked the Officer to verify his documents first. He said the Defendant again instructed him to get out of the vehicle immediately and at this point the injured party said he opened the door of the vehicle to get out and then the Defendant grabbed his left arm and turned it behind his back. He said the Defendant kicked him in the abdomen and pushed him to the ground, he then said he was then violently assaulted by the Defendant. He testified he was then pulled up off the ground and pushed against the vehicle. He said other officers assisted the Defendant and he was then handcuffed. He testified the Defendant used pepper spray. He testified that en route to the police station the Defendant punched him twice in the face.

The Injured Party was examined on 15 August 2007 by a neuro-psychiatrist. In his report, the specialist diagnosed trauma to the Injured Party's head and says this was consistent with his being hit with a stick on his right arm, neck and back.

Visar Muriqi who had been travelling in the vehicle with the Injured Party when it was stopped by the Defendant testified on 12 March 2008. He said the Defendant stopped their

vehicle and asked the Injured Party for his documents. He said the Defendant subsequently hit the Injured Party twice on the hand. He gave no explanation for the Defendant so doing. He testified the Defendant ordered the Injured Party to get out of the vehicle. He made no mention of the fact the Injured Party, on his own testimony, had refused to do so until the officer had verified his documents. He testified the Injured Party was alighting from the vehicle when the Defendant pulled the Injured Party by his arm and started to kick and punch him and pushed him down to the ground. The witness described the Defendant using pepper spray on the Injured Party and the Injured Party being restrained.

The Defendant testified on 31 March 2010 that on the night in issue he was on duty with Sedat Gjogoviq and Xhevat Ibraj, at the junction with the Stone Bridge, Peja. He described seeing the Injured Party's VW Golf 2 being driven at speed. He said he stopped the vehicle and spoke with the driver. There was no dispute the Injured Party was the driver. He said the Injured Party handed his documents through the open window. He said the Injured Party asked why he had been stopped. The Defendant testified he could smell alcohol and instructed the Injured Party to get out of the vehicle. The Injured Party refused. The Defendant testified the Injured Party requested that his documents be checked first. The Defendant said he repeated the instruction to the Injured Party to get out of the vehicle warning him that failure to comply meant defying the order of an official person and he could be arrested. The Defendant testified he opened the door of the vehicle and again instructed the Injured Party to get out. When he testified on 12 March 2008 the Defendant said it was the Injured Party who had opened the door of the vehicle. He testified he touched the Injured Party on the shoulder and again told him to get out of the vehicle. It appears the Injured Party's sudden movement surprised the Defendant who pushed the Injured Party and stepped back. It was the Defendants testimony the Injured Party fell to the floor. He then got up and a scuffle ensued during which the Defendants shirt was ripped and he suffered an injury to the fourth finger of his left hand. The Defendant used pepper spray to subdue the Injured Party. He was then assisted by other officers to restrain the Injured Party.

Saud Koliq and Hajdar Ahmeti were involved in the subsequent investigation of allegations of misconduct against the Defendant. Neither officer witnessed events on the night in issue.

There is no dispute that on the night of 13/14 August 2007 the Injured Party was the driver of a VW Golf 2 motor vehicle. A passenger in the said vehicle was Visar Muriqi. The said vehicle was stopped by the Defendant at the Stone Bridge in Peja. There is some dispute as to the reason for the stop. There is no dispute the defendant asked the Injured Party to produce his documents or that the Injured Party handed the documents to the Defendant through the open window of the vehicle. There is no dispute the Defendant asked the Injured Party to get out of the vehicle or that the Injured Party refused to comply with the Defendants instruction. Thereafter, many of the relevant material factual circumstances are disputed.

The Injured Party said the Defendant struck him twice on the hand. That is supported by the evidence of Visar Muriqi.

The Injured Party said that he (the Injured Party) opened the door of the vehicle to get out and at this point the Defendant grabbed his left arm and turned it behind his back. In his testimony Visar Muriqi said the Injured Party was alighting from the vehicle when he was grabbed by the Defendant. When he testified on 12 March 2008 the Defendant said it was the Injured Party who had opened the door of the vehicle.

The Injured Party said the Defendant kicked him in the stomach and pushed him to the ground before being restrained against the vehicle. Visar Muriqi testified the Injured Party was punched and kicked. The Defendant admitted he pushed the Injured Party who fell to the ground.

There was no dispute pepper spray had been used. The Injured Party and Visar Muriqi said the use of pepper spray was excessive. The Defendant said it was justified because of the Injured Party's aggressive behaviour towards him.

The Injured Party testified that en route to the police station the Defendant punched him twice in the face. There was no dispute the Defendant was driving the vehicle.

There is no dispute that on the night in issue a violent altercation took place between the Defendant and the Injured Party. It was the Injured Party's evidence that the incident was precipitated by the Defendant who was the aggressor. It

was the Defendants case that he was exercising his lawful function and that he acted reasonably.

According to the contemporaneous police records, that at 00.58am on 13 August 2007 police officers called the duty police officer and the following message was recorded

"We are coming towards police station with an arrested person for disobeying the order and assault on official person".

That record is important because it is a contemporaneous account of events on the night in question and obviates the possibility of later concoction by the Defendant.

The Defendant subsequently submitted a report for using force form-OC spray on the offender Muriqi. In that report the Defendant stated:

"While I was on duty with my colleagues, Sergeant Xhevat Ibra and Sedat Dzogovic the abovementioned offender (Ragip Muriqi), after disobeying order of an official person and because at the moment was suspected that he is under the influence of alcohol. After few continuous given orders ordering him to get out of his vehicle, the same one did not obey. At the moment when he wanted to get out of the car he attempted to hit me but I avoided this pushing him with the dominant hand, when the offender felt. At the moment when I went with my colleagues to handcuff him, he grabbed me on my shirt picking of the slug of the shirt and again attempted to hit me, but did not succeed. While I was trying to restrain him, the suspect achieved to catch one finger of the left hand. Seeing his physical preparation even through we were three colleagues it was not possible to put him under control using soft force empty handed. At the moment when the suspect injured my finger, and for this I have a medical report, immediately I have assessed and I have considered reasonably to use the spray trying to use in a small amount, only to make possible to put the suspect under control. After using the spray we immediately put the suspect under control and we arrested him."

That report is also important for the reasons already stated.

The Defendant was also examined on 13 August 2007 by Emergency in Peja/Pec and it was established that he had received contusion of the forth finger of the left hand. On 13 August 2007 the Defendant took one day sick leave.

On 14 August 2007 the Injured Party was convicted by the Minor Offences Court in Peja/Pec of driving his vehicle Golf under the influence of alcohol on 13 August 2007, at around 02.10am near the "Ura e Zallit" bridge in Peja/Pec.

It was found as a matter of fact the Injured Party had a blood/alcohol concentration of 1.38%. The legal limit for driving is 0.5%.

On 14 August 2007 a Ruling in case 4-7875/07 was issued in the Minor Offences Court whereby the Injured Party Ragip Muriqi was found criminally liable of committing a minor offence contrary to Article 226 (1) item 25 of the Law on Traffic Safety, and received a fine sentence of 85 Euros, as well as a preventive measure - ban on driving for a period of three months was imposed to the injured party, arising out of the incident on 13/14 August 2007.

On 14 August 2007 a Ruling in case 4-7876/07 was issued in the Minor Offences Court whereby the Injured Party Ragip Muriqi was also found criminally liable of committing a minor offence contrary to Article 18 (1) item 11 of the Law on Public Peace and Order for not obeying the police orders of getting out of the vehicle on 13/14 August 2007. He was given a fine of 80 Euros. However, on 5 September 2007 that Ruling was suspended. No explanation is given in the Ruling of 5 September 2007 explaining why the Ruling of 14 August 2007 had been suspended.

There was no dispute that at 4.45am on 13 August 2007 the Injured Party was examined in Peja/Pec Kosovo Police service. The medical checklist No9052, records no obvious signs of grave injuries; the diagnosis was: "Contusio corporis" or injury of the body.

There was no dispute the Injured Party was further examined on several subsequent occasions.

On 27 August 2007 it was established a fracture of major left *humerus* with a minor dislocation.

On 3 September 2007 the Injured Party was examined by two doctors from the Faculty of Medicine, Institute of forensics in Pristina who diagnosed fractures of *tuberculum maius* (greater tuberosity) of the left humerus, contusion of soft tissues of left shoulder joint, of the right shoulder region and back region and contusion of soft tissues of the pelvis region of the right side, caused by mechanic act of a hard and heavy tool, altogether are part of grievous body injury.

There was some dispute between the parties as to the precise genesis of the injuries suffered by the Injured Party. Clearly on the night in issue he was complaining of an injury.

Given its ordinary and natural meaning 'bodily harm' as defined in Article 154 of the CCK requires no explanation. 'Grievous' means no more and no less than 'really serious'.

If the injury about which the Injured Party complains and documented in the various medical reports was caused by the Defendant we are satisfied it was really serious.

It is unclear how the injury to the Injured Party's shoulder was caused. It is possible it was the result of his falling to the ground. It is equally possible it was the result of his being restrained. The evidence in this regard is equivocal.

The prosecution must prove that the Defendant acted unlawfully and that he either intended, or actually foresaw, that his actions on the night in issue might cause some harm.

It is not necessary to prove that the Defendant either intended or foresaw that the unlawful act might cause physical harm of the gravity described in Article 154. It is enough that the Defendant foresaw some physical harm, albeit of a minor character, might result.

In this case the Defendant was acting lawfully. He had observed the Injured Party driving in an erratic manner. He stopped the Injured Party and requested his documents. The Defendant smelled alcohol. He instructed the Injured Party to get out of the vehicle. The Injured Party refused. There is dispute as to precisely what happened thereafter. On the Injured Party's account of what followed the Defendant was the aggressor. His version of events is largely supported by his cousin who was a passenger in his vehicle. It was the

Defendants case that the Injured Party failed to comply with his instructions and then behaved aggressively towards him. Unfortunately there is no truly independent evidence of those events. Both the Injured Party and the Defendant suffered injury. Pepper spray was used. The contemporaneous police records record the moment the officers informed the Duty Officer of the incident and its nature. The Defendant made a report concerning his use of force and pepper spray.

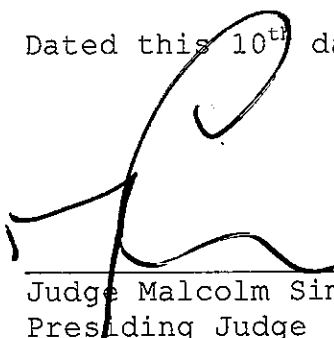
Police officer may use such force as is reasonable in the circumstances as the officer believed them to be at the time.

Taking into account all the circumstances of the case, including the nature and degree of force used and the Injured Party's conduct, we find that the use of force and its degree was reasonable.

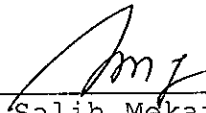
In the circumstances, it has not been proven that the Defendant committed the act with which he had been charged.


For the reasons stated herein it is decided as in the Enacting Clause.

Dated this 10th day of November 2010


Judge Malcolm Simmons
Presiding Judge




Judge Salih Mekaj
Panel Member


Judge Riku Jaakkola
Panel Member