

**DISTRICT COURT OF PEJA/PEC**

**P.nr. 29/08**

**Dt. 23 July 2010**

**IN THE NAME OF THE PEOPLE**

**THE DISTRICT COURT OF PEJA/PEC**, in the trial panel composed of the EULEX Judge Gianfranco Gallo as Presiding Judge, the EULEX Judge Riku Jaakkola and the Kosovan Judge Isa Kelmendi as panel members, assisted by the Recording Officer Robina Struthers, in the criminal case against the accused

VENTOR MAZNIKOLLI, son of Rexhep Maznikolli and Ruke Berisha, born on 05 February 1980 in the village Kosuriq, Peja Municipality, residing in Peja – “Myrte Zeneli” str. no. 14, Kosovo Albanian, of poor economic conditions, at liberty

charged, according to the Indictment PP. Nr. 437/03 dated 20 November 2003, and amended on 22 July 2010, with the following criminal offence:

*Provoked homicide contrary to Article 33 of the Criminal Law of Kosovo (CLK) committed on 23 August 2003, in Peja.*

After having held the main trial hearings in public on 2, 3 and 8 June 2010 and 21, 22 and 23 of July 2010 in the presence of:

- the accused Mr. Venter Maznikolli and his defence counsel Mr. Zenel Mekaj;
- the Public Prosecutor Mr. Ali Uka,
- the injured parties Kimete Belegu, Merita Nurcaj and Gezim Belegu;

after the trial panel deliberation and voting held on 22 of July 2010, pursuant to Art. 345 of the Law on Criminal Proceedings (LCP);

on 23 July 2010, pursuant to Article 351 of LCP, pronounces in public, the following

**Verdict**

Venter Maznikolli

is

**FOUND GUILTY**

*of Provoked Murder contrary to Article 33 of the Criminal Law of Kosovo (CLK) as to the murder of Xhafer Belegu committed, on 23 August 2003, in Peja, because after having been brought, not by his own fault, to a state of exasperation caused by a serious attack conducted by Xhafer Belegu against Rexhep Maznikolli, the father of the*

*defendant, he was provoked to take the life of Xhafer Belegu and shot at him by a pistol hitting the victim deadly on the right front of the trunk, thus causing his death.*

THEREFORE, the accused, is

### **SENTENCED**

To eight/8/years of imprisonment for the criminal offence of *Provoked Murder* contrary to Article 33 of the Criminal Law of Kosovo (CLK).

The time spent in detention on remand by the defendant, from 23 of March 2007 until 8 of May 2007, is to be credited against the punishment, pursuant to Article 351, Paragraph (1), item 6 of the LCP.

The accused shall reimburse the costs of criminal proceedings pursuant to Article 351, Paragraph (1), item 7 of the LCP with the exception of the costs of interpretation and translation.

### **REASONING**

#### **A. PROCEDURAL BACKGROUND – THE INDICTMENT**

On 21 November 2003 the District Public Prosecutor filed the indictment PP.no.437/03 against Vektor Maznikolli, charging him with the criminal offence of *Murder* contrary to Article 30 par. 1 of the Criminal Law of Kosovo (CLK), *Lenient Bodily Harm* contrary to Article 39 par. 2 of the CLK and *Illegal Possession of Weapons and Ammunition* contrary to Article 8 par. 8.5 in conjunction with par. 8.3 of UNMIK Regulation no. 2003/7.

According to the original indictment, on 23.08.2003, at approximately 17:00, in the yard of the victim, due to a quarrel that was ongoing between the family of the defendant and the family of the victim, the defendant intentionally murdered Xhafer Belegu.

After shooting at the victim, the defendant hit Sanije Hoxha, the sister of the victim, with the handle of his pistol.

The first main trial was concluded on 28 January 2004, by the judgment P.nr.354/03: the defendant was acquitted as to the criminal offence of murder, since it was considered that he had acted in necessary defense, whereas he was found guilty as to the criminal offences of *Lenient Bodily Harm* and *Illegal Possession of Weapons* and was convicted to 6 months imprisonment.

The Supreme Court of Kosovo, deciding upon the appeal of the Prosecutor, issued the judgment Ap.nr.423/2004, dated 27.01.2005, by which the first instance judgment was

amended as to the criminal offence of *Illegal Possession of Weapons*, confirmed as to the criminal offence of *Lenient Bodily Harm* and quashed as to the acquittal of the defendant in relation to the criminal offence of *Murder* and the case returned to the first instance court for retrial.

The retrial started on 22 January 2006: the defendant did not show up in the first hearing and therefore he was arrested and detention on remand was ordered against him for a period of two months.

On the 8<sup>th</sup> May 2007 the trial was concluded and the defendant was acquitted again because, according to the judgment P.nr.67/05, the murder was committed in necessary defense. By a separate ruling, detention on remand was terminated on the same day.

The Supreme Court of Kosovo deciding upon the appeal of the Prosecutor, issued a ruling Ap.nr.369/2007, dated 06.12.2007, by which the appeal of the Prosecutor was granted and the first instance judgment quashed: the case was sent back again to the first instance court for retrial, specifying that the case had to be decided by a different trial panel.

On 28.12.2009 the President of the District Court of Peja filed a request to EULEX to take over the case and on 21.01.2010, the President of the Assembly of EULEX Judges, after a hearing, decided that Eulex Judges took over the case.

## **B. COMPETENCE OF THE COURT**

### **1. Applicable Law, Competence and Panel Composition of the District Court of Peja/Pec.**

The indictment was filed on 20 November 2003. As it is well known, according to Article 550 of the KCCP, the criminal proceedings at first instance in which the indictment was filed before the date of entry into force of the PCPCK (6 April 2004), but which have not been completed by this date, shall be continued according to the provisions of the previous applicable law, meaning the Law on Criminal Proceedings of 1986.

In accordance with Article 23, paragraph 1 of the LCP in conjunction with Article 29 par. 2 sub par. 1 of Law on Regular Courts of 1978, District Courts shall have jurisdiction to adjudicate, at first instance, criminal offences punishable by imprisonment for more than five years.

In the present case the accused was charged first with *Murder* and afterwards the charge was modified in *Provoked Homicide* pursuant to article 33 of CLK, punishable with one to 10 years of imprisonment and it is undisputed that both criminal offences are within the competence of the District Court.

The criminal offences, according to the indictment, were committed in Peja and therefore the case falls under the territorial competence of the District Court of Peja.

The present case was assigned to EULEX Judges authority through a decision of the President of the Assembly of EULEX Judges on 21.01.2010, pursuant to article 3.3 and 3.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

## **2. The Main Session**

The main trial was held in public in the premises of the District Court of Peja on 02, 03 and 08 June 2010 and 21, 22 and 23 of July 2010 in the presence of the Public Prosecutor, the defendant, his defense counsel and the injured parties.

In accordance with the article 7 of LCP, international interpreters translated court proceedings and all court documents relevant to the trial from English into Albanian and vice-versa, as necessary.

## **C. SUMMARY OF EVIDENCE PRESENTED**

1. During the proceedings of the main trial, the defendant and the following witnesses were examined:
  - a) The defendant Venter Maznikolli, examined on 02 June 2010
  - b) Kimete Belegu, examined on 03 June 2010
  - c) Merita Nurcaj, examined on 03 June 2010
  - d) Sanije Hoxha, examined on 03 June 2010
  - e) Rexhep Maznikolli, examined on 08 June 2010
  - f) Rukije Maznikolli, examined on 08 June 2010
  - g) Dr. Bujar Berisha (expert witness), examined on 21 July 2010
  - h) Dr. Nazife Sulejmani-Hulaj (expert witness), examined on 21 July 2010
  
2. Statements, police reports and other documentary evidence read out during the trial sessions.

### *2. a) Documentary evidence and reports*

During the main trial, the following documents were read as evidence, pursuant to article 332 of LCP:

- Police Flash Report case number 2003-DA-2569 dated 23.08.2003;
- Police Officers Report case no. 2003-DA-2569 dated 23.08.2003 drafted by Officer Enver Seferi #4207;

- Police Officers Report case no. 2003-DA-2569 dated 23.08.2003 drafted by Officer Khaled Abu Zafar #11781;
- Police Officers Report case no. 2003-DA-2569 dated 23.08.2003 drafted by Officer Astrit Tolaj #2272;
- Police Officers Report case no. 2003-DA-2569 dated 23.08.2003 drafted by Officer Muhamed Çallakaj #2507;
- Medical Examination of the defendant Venter Maznikolli dated 24.08.2003, examined and drafted by Dr. Arif Ramosaj, medical general practitioner;
- Medical Report of the victim Xhafer Belegu dated 26.08.2003 drafted by Dr. Fatlum Maraska, surgeon;
- Release form with the history of the medical examination of Rexhep (Dine) Maznikolli dated 15.09.2003, drafted by Dr. Mithat Jakupi, orthopedist;
- Crime Scene Report dated 24.08.2003, sketch of the crime scene, legend and pictures of the crime scene drafted by Officer Cucë Kelmendi #3059;
- Vehicle Examination Report regarding victims Xhafer Belegu's vehicle "Opel Cadet" and defendants Venter Maznikolli's vehicle "Volkswagen Passat", drafted by Officer Riza Rexhiqi #3080 and Photo Album of the vehicle examination prepared by Officer Sokol Dedaj #4362;
- Criminal Denouncement against Venter Maznikolli dated 25.08.2003 drafted by Officers Isuf Haklaj #0065 and Sabahate Tolaj #2745;
- Autopsy Report of the victim Xhafer Belegu dated 24.08.2003 drafted by Dr. Marek Gasior and photo album of the autopsy prepared by Officer Sokol Dedaj #4362;
- Ballistics report dated 26.09.2003 drafted by Yuriy Nesterchuk and Çlirim Ajdini, ballistics experts;
- Report on gunpowder residue, protocol no. 518, dated 17.09.2003, drafted by Tsvetan Nishev, expert at the Research Institute of Forensics - Ministry of the Interior - Republic Of Bulgaria;
- Psychiatric Expertise dated 23 December 2003, drafted by Dr. Gani Rama.

## *2. b) Statements*

Pursuant to Article 333, Par. 2 of LCP, on the basis of the consensus of the parties (see the minutes of the hearing held on 08 June 2010), the following statements were read out as evidence, replacing the direct examination of the below witnesses:

- Statement of medical specialist Dr. Isa Kaliqani given in front of the trial panel dated 21.01.2004;
- Statement of forensic expert Dr. Arsim Gërxhaliu given in front of the trial panel dated 08.05.2007;

- Statement of ballistic expert Hazir Kelmendi given in front of the trial panel dated 08.05.2007;

#### **D. FACTUAL RECONSTRUCTION OF THE EVENTS**

In the following part of the reasoning the various statements will be presented in reference to the most relevant events of the present case.

##### **The relationship between Maznikolli family and Belegu Family**

According to the defendant, the relationship between the two families was not good<sup>1</sup>. The defendant<sup>2</sup> and his father Rexhep Maznikolli<sup>3</sup> recalled that before the war their family had a cow which sometimes defecated in front of Xhafer Belegu's house and for this reason the relationship between the two families became tense. The issue was never solved even though the houses where the two families lived were in front of each other.

The circumstance that the relationship between the two families was not good was also confirmed by the injured party Kimete Belegu.

##### **The quarrel related to hole in the street between the two houses and the shots fired by Xhafer Belegu.**

According to the injured party *Kimete Belegu*, a couple of days before the killing, a burst of the water pipes which were under the street in between the two houses occurred. On Friday, 22 August, one day before the killing, the maintenance from the water department came, fixed the malfunctioning and covered the hole with some soil.

Kimete stated that the hole actually was not filled properly and that, on the night of 22 August, her son had fallen with part of his car into the hole. The hole was in the street between the two houses, but closer to the gates of Xhafer Belegu's courtyard. The following day, in the afternoon, her husband Xhafer Belegu wanted to fix the hole. He put the working clothes on and took the wheel cart, went to get some soil and started filling the hole up. Kimete was on the balcony of her house with her daughter Merita Nurcaj and her sister in law Sanije Hoxha (from that position they had a clear view of the street and of the hole).

Soon after, Rexhep Maznikolli arrived on the spot and started to complain about the intervention of Xhafer which, according to Rexhep, might make the pipe burst again. Rexhep also stressed out that he had already paid 20 Euros for the repairing of the pipe. Then an argument started between the two men; Kimete saw Rexhep picking up an iron bar which was there and shouted at Rexhep: "*For god's sake, move away*".

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<sup>1</sup> Minutes of the main trial dated 02.06.2010 page 17 and 19.

<sup>2</sup> Minutes of the previous main trial dated 19.01.2004 page 5.

<sup>3</sup> Minutes of the main trial dated 08.06.2010 page 11.

According to Kimete, her husband Xhafer went inside the courtyard of the house and took his car, while Rexhep said to him: *"You dare not passing by car through here"* (meaning driving over the hole). Then she saw her husband drive the car and stop at the gate of the courtyard. She spotted him stretching his hand out of the left hand side window of the car and holding a gun in his hand. According to what was stated by Kimete in front of the panel, her husband shot once in the air as he saw Rexhep coming towards him with an iron bar in his hand, whereas in front of the Investigative Judge she affirmed that her husband shot twice in the air.

Confronted with her previous statement by the panel, she said that she had not heard others shot apart from the first one<sup>4</sup>, because, after the quarrel had degenerated, she was worried for her grandson and was looking for him. For the same reason, she could not see how Rexhep was wounded. When she returned on the balcony, she saw her husband driving back the car inside the courtyard, getting out of the car and going towards the garage. Then she realized that Rexhep had been wounded and saw the defendant entering her courtyard and pointing his gun at the people on the balcony.

According to the injured party *Merita Nurcaj*, on the critical day, she went with her father Xhafer Belegu to do some shopping and when they returned, Xhafer put on his working clothes, because he wanted to fill the hole. When Xhafer was working on the hole, Rexhep Maznikolli came out and started threatening her father. Therefore Xhafer went to his courtyard, took the car and drove it until the gates of the courtyard. When Xhafer approached the gate, Rexhep raised the iron bar and meanwhile her father Xhafer stretched his arm out of the car window and shot twice.

In front of the investigative judge the witness affirmed that her father shot once in the air. Confronted with her previous statement she said that she heard and saw her father shooting twice in the air, because she was looking at that direction.<sup>5</sup>

When she heard the gunshots, she immediately entered the house and headed towards the back of the house to take care of her son. Felt reassured that he was not in danger, she returned to the balcony, but the shooting had already ended.

In the police statement given on 1<sup>st</sup> September 2003, she affirmed that she had spotted her father shoot first in the air and then at Rexhep, but without any intention to kill. In fact, according to the witness, since Rexhep and Xhafer were very close, if the latter had really wanted to kill Rexhep, it would have been easy to do so. Confronted as to this part she did not deny having said the above words.<sup>6</sup>

According to witness *Sanije Hoxha*, on the critical day, an argument between her brother Xhafer Belegu and Rexhep Maznikolli occurred because of some water pipes. Xhafer and

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<sup>4</sup> Minutes of the main trial dated 03.06.2010 page 12:

*Presiding Judge: so you cannot recall how many shots in the air were fired?*

*Kimete Belegu: no at that moment I was lost.*

*Presiding Judge: after that shot in the air did you hear any shots fired by your husband?*

*Kimete Belegu: not any more except the one he shot from his car in self defence.*

*Presiding Judge: are you aware that the father of the defendant was wounded by four shots?*

*Kimete Belegu: earlier I said when he was wounded I did not see, but it was my late husband's sister who saw it.*

<sup>5</sup> Minutes of the main trial dated 03.06.2010 page 22.

<sup>6</sup> Minutes of the main trial dated 03.06.2010 page 26.

Rexhep were quarreling in the street in front of Xhafer's courtyard gate. Rexhep had a bar in his hand and approached Xhafer by saying: "*Look Xhafer, this has cost me 20 Euros to repair and if it's going to be broken, I'm going to break your head*". Then according to the witness, she interfered by saying to the neighbor: "*Dear neighbor, it's not a problem of 20 Euros, you go to your home, let's not make a big fuss about it*". She said so because, she had heard that another neighbor had been attacked by Rexhep and therefore was scared. Soon after she saw, from the balcony where she was, her brother Xhafer driving towards the gate of his courtyard. Then she saw Rexhep attempting to hit her brother Xhafer with a metal bar and Xhafer pulling his hand out of the car window and shot twice in the air.

In front of the Investigative Judge on 9<sup>th</sup> September 2003, the witness had reported that Xhafer had shot once in the air once and a second time at Rexhep's arm. Confronted as to the discrepancy, she denied having said that his brother had fired at Rexhep.<sup>7</sup>

According to the witness *Rexhep Maznikolli*, two days before the killing he had some problems with the water pipes. He had called the water department and the workers had fixed the malfunctioning for the price of 20 DM. On the critical day, when he got out of his house, he saw Xhafer Belegu filling with some soil the hole where the water pipes were and asked Xhafer not to step on it until it had hardened; Xhafer replied that, since the hole was in front of his door, he could do anything and when Rexhep repeated his request he replied: "*Wait, I will show you*". Immediately after he went to take his car while Kimete shouted at him: "*Don't do it, Xhafer*"; meanwhile Sanije went down the staircase and stood in front of the car to stop him, but slipped and fell hitting the bumper. At this point Kimete turned to Rexhep and told him to run away. Then Xhafer drove until the gates of his courtyard, rolled the car window down and pulled out his hand which was holding a gun. Rexhep told Xhafer not to shoot, but meanwhile he was hit by a bullet. Soon after, other shots were fired hitting Rexhep on his chest and left arm.

In front of the investigative judge, Rexhep stated that the first shot missed him, whereas the second hit him on his thumb. Regarding this discrepancy the witness explained that he was in the hospital and was obviously distraught when the investigative judge questioned him. Reminded that in front of the police he had given the same version, he argued that he was confused and could not remember.<sup>8</sup>

The witness then stated that, after having been hit, he had fallen on his knees and could hear his son Vektor shouting at Xhafer: "*Enough, drop the gun, don't you see you killed my father*"; the reply of Xhafer was the following: "*Come here and I will do to you the same as to your father*".

According to the witness *Rukije Maznikolli*, on the critical day she had asked her husband Rexhep to go and buy some things for the house. She had written it in a piece of paper and went out to give it to Rexhep. When she got out, she saw her husband near the hole talking to Xhafer. She could hear his husband uttering the following words: "*Neighbor, wait two more days until the soil sets down, don't step on it and then there would not be a problem*". Then she heard Xhafer responding: "*Neighbor, you want to interfere with things in front of my house, so wait there and I will show you*". Then Xhafer went

<sup>7</sup> Minutes of the main trial dated 03.06.2010 pages 32 and 33.

<sup>8</sup> Minutes of the main trial dated 08.06.2010 pages 5 – 6 and 13 – 14.

towards his car, got into it and drove toward Rexhep. At that time Kimete stood in front of Xhafer and said to Rexhep: “Run away”.<sup>9</sup> Then Xhafer’s sister, Sanije Hoxha grabbed Kimete by the arm and said: “Let him get him”. When Sanije pulled Kimete, she slipped on the side of the car.

Soon after Xhafer drove to the gate of the courtyard, rolled down the window and started shooting at Rexhep who fell on his knees and got covered in blood. She immediately entered the house in order to get some bandage for the wounds, saw her son talking on the phone and said to him: “Ventor rush out, Rexhep was killed, let’s take him to the hospital”. Ventor dashed out and while she was on the stairs she spotted Xhafer pointing the gun at Ventor and at his father and not letting Ventor help Rexhep. Then Xhafer shouted: “Where are you going” and fired some shots against Ventor.

In front of the Investigative Judge on 10 September 2003, the witness said that “as soon as Ventor had come to the street, Xhafer Belegu shot at Ventor two or three times, but Ventor quickly returned to the house and came out with a pistol in his hand”. Confronted as to the discrepancy, she did not confirm the above statement arguing that she could not understand what had been said by the investigative judge, since he spoke Bosnian.<sup>10</sup>

In front of the panel she could not remember how many shots were fired against Ventor, whereas in the two previous main trials (on 21.01.2004 and on 07.05.2007) she had stated that the shots against Ventor had been two or three.<sup>11</sup>

The witness added that, after the shots, Ventor hid behind a pillar and, while she was trying to help her husband, she heard her son shouting: “Neighbor drop the gun, you see you have killed my father”; then she heard Xhafer’s reply: “Ah, I will do to you worse than to your father” and he fired again two or three times at Ventor.

The defendant *Ventor Maznikolli* stated that he was in the living room of his house talking on the phone with his uncle when his mother entered and said to him: “Ventor, go outside and take your father to the hospital because he’s been shot”. He dashed out and saw his father on his knees, with the chest covered with blood. He lost himself. He approached his father in order to help him, but Xhafer started shouting at him saying the he will do him worse than to his father and pointed the gun at them and then started shooting. The defendant moved from where he was standing and hid behind the corner of the victim’s house, inside the courtyard and told Xhafer to drop the weapon, but Xhafer kept shooting.

### **The reaction of the defendant and the killing of Xhafer Belegu**

The defendant stated that, after Xhafer had shot at him, he pulled his gun from his waist and shot from behind the pillar twice. He did not check what had happened to the victim, but left the courtyard and went to help his father.

According to the injured party *Kimete Belegu*, after she had secured her grandson, she went back to the front of the house and could see the defendant enter her courtyard and

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<sup>9</sup> Minutes of the main trial dated 08.06.2010

<sup>10</sup> Minutes of the main trial date 08.06.2010 page 21.

<sup>11</sup> Minutes of the main trial dated 08.06.2010 pages 19 – 21.

point the gun at them. Her husband, after he had shot, had already driven the car back to the courtyard, got out of the car and was heading towards the garage and the garden at the back of the house. When she saw the defendant entering the courtyard, she shouted at him saying: “*God, my son*”. But the defendant went to edge of the house, leaned against the pillar and shot. Her husband was not shooting, since he was going to the back of the house. The injured party added that when the defendant was leaning against the wall, he addressed her husband the following words: “*Don’t run away*”.

According to the injured party *Merita Nurcaj*, when she returned to the balcony she saw the defendant who was still in the courtyard, close to the edge of the house.

In front of the investigative judge she said that she had heard when the young man said: “*Go and get the child*”. Confronted as to this part she did not remember having said such words.<sup>12</sup> Then she saw the defendant retreating towards his house and pointing the gun at the people on the balcony.

In front of the panel the witness said that she did not see whether or not the defendant had hit *Sanije*. During the first main trial, on 20.01.2004, she stated that she had seen *Ventor* at the corner of the house with the pistol; her aunt *Sanije* was next to him trying to cool him down, but *Ventor* hit her arm and head with the pistol. After having been confronted she declared that she stood by her previous statement.<sup>13</sup>

The witness *Sanije Hoxha* declared that she saw a man with a gun entering the courtyard, leaning against the pillar at the edge of the house and starting shooting at *Xhafer*. In the meantime her brother was firing at *Ventor* from the back of the house. Since this specific circumstance (the fact that the defendant and the victim were shooting at each other) had not emerged in her previous statements, she was confronted by the panel on the point (see minutes dated 3.6.2010, pages 33 – 39 and in particular pag. 37).<sup>14</sup>

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<sup>12</sup> Minutes of the main trial dated 03.06.2010 page 23.

<sup>13</sup> Minutes of the main trial dated 03.06.2010 page 25.

<sup>14</sup> Minutes of the main trial dated 03.06.2010 page 37:

*Sanije Hoxha: Based on what the police said regarding the cartridges and those shots I am pretty sure.*

*Presiding Judge: But you are making assumptions. You are supposed just to report on what you saw. Since you are not an expert you cannot make assumptions. Is that clear? You can imagine whatever you want.*

*Sanije Hoxha: Those are things I saw with my own eyes. I experienced those moments and since then I am suffering.*

*Presiding Judge: During the first main trial, you said “when Xhafer Belegu fired the pistol he was in the vehicle. I don’t remember how many times he shot. Ventor shot by his pistol. And yelled “don’t go away, don’t go away”. I don’t know how many times he shot. Then you added, Xhafer Belegu did not have anything in his hands”. These are your words. And at the second main trial you said exactly the same thing. So how can you say they were shooting at each other because you said he did not have anything in his hands? Sorry, you were not present at the second main trial, but at the first main trial you said that your brother, while Ventor was shooting at him had nothing in his hands. How is it possible they were shooting at each other since he didn’t have a pistol?*

*Sanije Hoxha: These are not my words I don’t know who added those words.*

*Presiding Judge: So you don’t stand by this statement?*

*Sanije Hoxha: From the first trial?*

*Presiding Judge: Yes.*

*Sanije Hoxha: I stand by the statement given at the first trial.*

The witness added that she had approached the defendant and had begged him by saying: “My son, don’t shoot, I could be your mother”; but Vektor went towards her and hit her on the neck with the handle of the gun.

According to the witness *Rexhep Maznikolli* when he fell on his knees he had already blacked out. He did not lose consciousness, but could not see whether Xhafer was on the car or not. In any case he could hear his son and Xhafer exchanging words and immediately after he heard three strong shots and two other smaller ones.

Rexhep affirmed that the shots were consecutive and that it was a matter of instants: the first three shots sounded the same as the shots fired at him. Soon after he had heard the shots, he had lost his consciousness.

According to the witness *Rukije Maznikolli*, Vektor had pointed the pistol at Xhafer and asked him to drop his gun, but Xhafer replied: “I am not dropping it”; immediately after he shot three times at Vektor who, only at the very end, reacted firing at Xhafer (the witness could not remember how many times)<sup>15</sup>.

### **The events soon after the shooting.**

The injured party *Kimete Belegu* explained that, after Vektor had shot at her husband, the defendant retreated walking backwards and pointing the gun at them. She dashed towards his husband and found him close to the garage.

The injured party *Merita Nurcaj* explained that when she had returned to the balcony and realized that the shooting was over, she saw Vektor behind the pillar at the edge of the house. She stated that when Vektor was leaving, he pointed the gun at her. She did not remember who else was in the courtyard.

The witness *Sanije Hoxha* stated that, soon after the gunshots ended, she heard her brother asking for water, while the defendant went to help his father.

According to the witness *Rukije Maznikolli* after the gunshots ended, Vektor came to help his father. Mother and son put Rexhep in the car and Vektor drove him to the hospital, while she entered her house.

### **3. Additional evidence and records acquired during the sessions of the main trial.**

The court *ex officio* requested the criminal record of the defendant from the District Court of Peja and from the Municipal Court of Peja. According to the record, the defendant had just one previous conviction as to the other criminal offences (*Lenient*

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<sup>15</sup> Minutes of the main trial dated 08.06.2010 page 19 – 20.

*Bodily Harm and Illegal Possession of Weapons and Ammunition*) committed the same day of the murder.

## **E. EVALUATION OF PRESENTED EVIDENCE AND LEGAL QUALIFICATION**

### **1. Factual findings and examination of the pieces of evidence**

After the presentation of the above testimonies and statements, as to the factual reconstruction of the events occurred on the crucial day of 23 August 2003, the following points can be considered as proven and not in doubt, based on the autopsy, the crime scene inspection, the testimonies of the witnesses and expert witnesses and the admissions of the defendant:

- On 23 August 2003 Xhafer Belegu was killed by Vektor Maznikolli who shot at him twice;
- The autopsy (see the autopsy report dated 8 September 2003) has established that the victim was hit by a gunshot on his chest and this wound caused his death;
- Xhafer Belegu, before being killed, shot at Rexhep Maznikolli, father of the defendant, causing him five wounds;
- The crime scene report has ascertained that, on the crime scene, five cartridges of caliber 7.62 and two cartridges of caliber 7.65 were found;
- The ballistic report dated 26 September 2003 has established the two cartridges caliber 7.65 mm were fired by the Star pistol 7.65 x 17 mm in possession of Vektor Maznikolli;
- The same ballistic report has ascertained that the five cartridges caliber 7.62 mm were fired by the Zastava pistol 7.65 x 25 mm in possession of Xhafer Belegu;
- On the crime scene, four cartridges fired by the pistol used by the victim were retrieved by the police close to the hole (the cartridges were marked in the sketch dated 24 August 2003 with the numbers 2, 3, 4 and 6) and a fifth cartridge fired by the same pistol was found close to the balcony of the victim's house (cartridge marked in the above sketch with number 7); two cartridges fired by the pistol used by the defendant (and marked in the sketch with the numbers 8 and 16) were retrieved in the courtyard of the victim's house and more precisely in the path leading to the garage);
- The expert witness Isa Kaliqani, orthopedist, examined on 21.1.2004 (his statement has been acquired in the current main trial on the basis of the consent of all the parties) stated that Rexhep Maznikolli had suffered five injuries caused by a firearm (one on his chest, two on his right arm, one on his hip and one on his left hand thumb);
- The expert witness Arsim Gerxhaliu, forensic expert, examined on 8.5.2007, (his statement has been acquired in the current main trial on the basis of the consent of all the parties) stated that four bullets hit Rexhep Maznikolli and that one of these bullets hit him twice (first on the chest and, after exiting, on the right arm).

These circumstances appear to be clear and not in doubt, notwithstanding the attempt of the injured parties to deny that Xhafer had shot at Rexhep. However the position of the 4 cartridges spent by the pistol of Xhafer and the wounds sustained by Rexhep make it clear and proven that he was wounded by the victim, who undoubtedly shot at him. On the other hand, also the fact that the defendant shot at the victim and killed him is uncontested.

Therefore, on the basis of the above circumstances, it is a question of assessing whether the defendant acted in Necessary Defence or, on the contrary, committed the criminal offence of Provoked Homicide, contrary to Article 33 of the CLK, or committed the criminal offence of Murder, contrary to Article 30 of the CLK (the above provisions of the CLK are more favorable than the correspondent provisions of the CCK and therefore the formers are the applicable ones).

Of course, in order to make a proper assessment, it is necessary to reconstruct thoroughly the conduct of the defendant and of the other main characters of the occurrence.

As it has already been pointed out, the crime scene report has highlighted that four of the cartridges fired by the pistol of the victim (indicated in the sketch with the numbers 2, 3, 4 and 6) were found close to the hole in the street, where the quarrel between Xhafer Belegu and Rexhep Maznikolli had started.

It is worth noticing that the above piece of objective evidence is utterly consistent with the narration made by all the witnesses as to the fact that the two men had started arguing when they were next to the hole and that the argument degenerated to the point that Xhafer Belegu started shooting.

In spite of what was said by the relatives of the victim (who stated that Xhafer did not shoot at Rexhep), it is clear from the wounds sustained by the latter (who was hit by four bullets) that Xhafer shot at least four times against Rexhep.

As to the shots fired by the victim, another cartridge (indicated in the above sketch with number 7) was fired by his pistol and retrieved at the crime scene inside the courtyard of the victim's house, close to the staircase of the balcony where Xhafer's wife and daughter were when the quarrel started.

As to this shot, it should be assessed first whether or not it was addressed to Rexhep or to Venter and whether or not it was the first or the last of the (at least) five shots fired by Rexhep (it is yet to be assessed whether he shot more than five times).

On the point, the relatives of the victim stated that the first shot fired by Xhafer was in the air and, in any case, was fired while Xhafer was in his car close to the gate of the courtyard of his house.

The ballistic expert Hazir Kelmendi (statement dated 8.5.2007, acquired in the current main trial on the basis of the consent of all the parties) clarified that the cartridge marked

with n. 7 in the sketch was fired by a person shooting from the left side of the garden, close to the staircase of the balcony of the victim's house.

Therefore the position of the shooter is absolutely incompatible with the one indicated by the witnesses when they described the first shot in the air. Therefore the shot n. 7 was not the first one fired by Xhafer, but most likely the last one, since it has been reported by all the witnesses examined on the point that Xhafer, after having fired from his car at the gate of his courtyard, drove the car inside the courtyard and went on foot towards his garage, close to which he was finally hit by the gunshots of the defendant.

Since Rexhep was hit by four bullets, in order to rely on the version given by the injured parties (meaning that at least the first shot was fired in the air), Xhafer should have shot three times at Rexhep from the gate and one last time from a position close to the balcony inside his house courtyard.

However this scenario appears to be highly unlikely: in fact the witnesses examined on the point have underlined that, after being shot, Rexhep fell on his knees and did not move any more. Therefore it would be very odd that Xhafer, after having entered his courtyard, had turned again towards Rexhep and had decided to shoot from distance against an opponent who was still and on his knees.

On the contrary, it is far more likely that he did not fire any shot in the air when he was at the gate of his courtyard, but from that position he shot four times at Rexhep, causing him five injuries. This reconstruction is somehow confirmed by the testimony of Rexhep himself, who, even though could not be precise as to the number of the shots fired against him, has always strongly denied that the first shot fired by Xhafer was in the air.

So what about the fifth shot fired by the victim? Was it fired at Rexhep or at Vantor?

Rexhep, in the statements given both during the investigative stage and in the main trial, affirmed that Xhafer, after Rexhep's son had appeared on the crime scene, started shooting a number of times at Vantor.

The fact that Rexhep shot at Vantor various times was also stated by the mother of the defendant (even though she could not specify, not even roughly, how many shots were fired) and by Sanije Hoxha who said that she heard several shots and therefore assumed that Vantor and Rexhep were shooting at each other.

On the other hand, the wife and the daughter of the victim strongly denied that Rexhep had fired against Vantor.

It is clear that all the testimonies must be handled with particular care, since all the witnesses have a strong parental relationship either with the defendant or with the victim and all the witnesses tend to lighten the responsibility of the next of kin and to increase the one of the opponent part involved in the accident.

The only exception to this tendency is Sanije Hoxha, who notwithstanding she was a relative of the victim, stated that Vantor and Xhafer were shooting at each other. However, as to this point the testimony of the witness must be considered as unreliable for the following reasons: first of all in all the statements she had given before the current

main trial (both during the investigative stage and during the previous main trials) she had never mentioned this pivotal circumstance before.

Furthermore, it turned out that the witness just heard some shots and for this reason she just assumed that Vektor and the victim were shooting at each other, since she could not see her brother who was at the back of the house whereas she was at the front of the house<sup>16</sup>.

Moreover no cartridges fired by Xhafer were found either in the path going to the garage or in the back of the house, meaning that the victim did not shoot while he was in the garden on the back of the house.

For the above reasons, the testimonies who affirmed that the victim and the defendant were shooting at each other do not appear to be able to confront effectively the solid and objective evidence that Xhafer shot throughout the entire incident just five times, since five cartridges fired by his pistol were found on the crime scene and that it is undeniable that (at least) 4 shots were addressed against Rexhep.

As to the fifth shot, it might have been addressed to Rexhep, but most likely it was aimed at Vektor who, after having realized that his father had been hit, was approaching the house of Xhafer holding a gun. Xhafer after having retreated inside his house courtyard and having realized that Vektor was coming after him fired once (it is the fifth shot, the one related to the cartridge number 7) against Vektor from a position close to the balcony and then went towards the garage and the back of the house.

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<sup>16</sup> Minutes dated 03.06.2010, pages 39-40:

*Presiding Judge: I was not completely accurate, in your previous statements you didn't mentioned that they were shooting at each other but on the other hand it is true that there is no sentence that says they didn't shoot at each other. You are right, I was not accurate. Again, I am asking, are you sure they were shooting at each other and if you are sure how do you know it?*

*Sanije Hoxha: My brother was in the garden and the defendant was in the edge of the house and in my opinion I made myself clear. And when someone attacks me in my home it is normal that I should defend myself.*

*Presiding Judge: So again, you are assuming. You say that they were shooting at each other because according to you when someone attacks you assume that it is normal that you respond.*

*Sanije Hoxha: Yes, correct.*

*Presiding Judge: Madame, can you say exactly how many shots you heard after the defendant entered the courtyard of your brother?*

*Sanije Hoxha: I think that you are asking me the same question. I have stated earlier that I didn't count the shots.*

*Presiding Judge: Okay they might have been 2-3-4 you were not capable of saying?*

*Sanije Hoxha: No, I am not able to say it.*

*Presiding Judge: So it might have been just one shot?*

*Sanije Hoxha: No it was not possible because with one shot he could have not been shot dead.*

*Presiding Judge: You mean your brother?*

*Sanije Hoxha: According to my opinion.*

*Presiding Judge: Is it possible that here were two shots?*

*Sanije Hoxha: I don't know. I didn't count.*

But regardless of the fact whether the shot was fired against Vantor or Rexhep, what is pivotal is that the shot related to the cartridge number 7 was the very last fired by Xhafer, since no more cartridges spent by his pistol were found on the crime scene.

As to the actions undertaken by the defendant, all the witnesses and even the defendant himself affirmed that he went out of his house, checked whether his father was still alive, entered Xhafer's courtyard and then hid behind the pillar on the corner of the victim's house (the pillar is marked with letter A on the sketch). And that he shot at the victim from that position while Xhafer was in the small alley inside the courtyard which leads to the garage of the house.

Bearing in mind the position of the cartridge marked with number 7 on the sketch, it appears undeniable that the above shot was fired before Vantor reached the victim's house and hid behind the pillar. If the shot was fired against Vantor, it was fired while he was approaching the victim's house.

On the alley leading to the garage just two cartridges were found (marked on the sketch with numbers 8 and 16) and both of them were fired by the pistol caliber 7.65 utilized by the defendant.

Therefore, from the objective evidence retrieved on the crime scene, it appears that the victim did not shoot at the defendant while the latter was hid behind the pillar.

On the point, it must also be borne in mind that, as it results from the ballistic expertise dated 26 September 2003, the magazine of the pistol utilized by the victim was empty, meaning that after having shot five times, Xhafer had clearly run out of bullets (and this is very likely the reason why he was retreating from the crime scene and going towards the garage) and when he was in the alley, he could not shoot any more at the defendant, even if he had wanted to.

It is worth mentioning that the wife of the victim stated in front of the panel that the defendant, before shooting at Xhafer, said to him: "*Do not run away*". On the point, the declaration of the witness appears to be sincere: it is perfectly consistent with what she said during the investigation and asked on the point by the Presiding Judge she promptly recollected the episode (and, frankly, it is unthinkable that Kimete Belegu, a woman not acquainted at all with the criminal law, intentionally lied and put in the mouth of the defendant the above words, in order to make the position of the defendant incompatible with the requirements of Necessary Defence).

An additional and objective support to reliability of the above reconstruction is given by the results of the autopsy and by the examination of the expert witness Dr. Gerxhaliu (see his statement given on 8 May 2007).

The expert witness stated that the direction of the projectile which killed the victim was from front to the back, from upward to downward and from the left side slightly to the right.

The pictures of the corpse of the victim, which show the entrance wound (positioned slightly below the right nipple) and the exit wound (positioned close to the right kidney and at a distance of 12 centimeters from the anatomical midline), lead to the conclusion

that the victim, when he was shot, was not completely in front of the defendant, but was partially turned towards the wall of the house.

The above position of the victim makes think that not only Xhafer was not shooting while he was in the alley leading to the garage, but that he was also heading towards the garage and, called by the defendant, was turning towards him when he was hit.

Therefore the assessment of the presented pieces of evidence can lead to only one conclusion: the victim was not attacking at all Vantor (as it is logical, since he had run out of bullets), but he was, on the contrary, retreating towards the garage and the back of the courtyard when he was shot by Vantor.

And the circumstance that while Xhafer was hit he was exactly in that alley is proven not only by the testimony of Kimete Belegu who said that she found her husband in that alley, laying on the ground; actually, the decisive evidence that the victim was there was given by the defendant himself who stated that he shot at Xhafer stretching his hand out of the pillar while he was hiding behind it. And from that position Xhafer could have been hit only if he had been in the alley leading to the garage.

The version given by the defendant and by his relatives that while Vantor was hiding behind the pillar, Xhafer was shooting at him is disavowed by the objective evidence that no cartridges spent by the pistol used by the victim were found in the alley leading to the garage (and the pivotal importance of this piece of evidence has been stressed by the Supreme Court in both the judgments issued on this case).

The defence counsel in his final speech suggested that it would be a mistake to rely on the crime scene report, since it might have happened that more than five shots were fired by the victim and that not all the cartridges were retrieved by the police.

This possibility, even though can not be disregarded in abstract, appears nevertheless highly unlikely. In fact the area where the events took place is a very restricted one, not wide, not grassy and therefore it is really unlikely that other cartridges were fired and not retrieved by the police.

Furthermore the police arrived at the crime scene not long after the incident (around 20 minutes after) and it is unthinkable that in that space of time the relatives of the victim might have removed wantonly some of the cartridges fired by the pistol of the victim in order to conceal evidence which might have been used against him.

Therefore it must be affirmed that, after having shot 4 times against Rexhep, Xhafer went towards his house, then shot one more time (most likely against Vantor) and after having run out of bullets was heading towards the garage and the back of his house when Vantor entered the victim's courtyard, hid behind the pillar of the house, addressed the above words to Rexhep and hit him on his chest with the lethal bullet.

On the point it is worth noticing that the fact that the injured parties have been reckoned as unreliable on the point that the victim shot in the air and not against Rexhep does not entail necessarily that their entire testimony must be discarded.

In fact it is a general principle that a deposition can be severable as to its reliability, meaning that the judge can reckon some parts of the statement as reliable, because corroborated by solid and objective elements of confirmation, and disregard other parts of the statement which are contradicted by secure elements. The assessment of unreliability as to the disregarded parts of the statement does not affect the credibility of the other parts of the statement found to be reliable.

After having assessed how the factual situation was, it must be evaluated whether or not the conduct of the defendant can be described as an act of Necessary Defence.

First of all, as to this issue, since the crime was committed when the CCK was not in force, it must be determined which of the provisions related to Necessary Defence is more favorable, Art. 9 of the CCSFRY or Art 8 of the CCK.

Between the two provisions, which must be evaluated not *in abstracto*, but in regard to their concrete application to the case, the most favorable appears to be Art. 8 of the CCK, since it does not require that the act of defence is absolutely necessary (it is true that, on the other hand, Article 9 of the CCSFRY does not require proportionality, which is instead envisaged in Article 8 of the CCK, but the constant jurisprudence as to Article 9 is in the sense that proportionality is nevertheless immanent in the provision).

According to Article 8 of the CCK, an act is committed in Necessary Defence when it is direct to avert an unlawful, real and imminent attack against the person reacting or against another person.

It is undisputable that the attack of the victim against the father of the defendant was unlawful, because not proportionate (it is not clear whether or not Xhafer had been attacked with an iron bar by Rexhep, but in any case his reaction was definitively disproportionate).

However, when Vektor started shooting at the victim, the attack against his father had already been concluded as well as the attack against Vektor himself, if there was any. Xhafer had run out of bullets and could not shoot any more; he was in his courtyard, going towards the garage and the back of the house and therefore was not attacking by any means the defendant.

Therefore not only there was no imminent attack against the defendant, but actually there was no attack whatsoever and Vektor was not in the situation to be obliged to defend himself or his father. Likewise there was no need for him to enter Xhafer's courtyard and go after the victim.

And neither can it be said that by shooting the defendant exceeded the limits of Necessary Defence. In fact, in order to exceed the limits it is necessary that the conditions for Necessary Defence exist, whereas, in the present case, due to the lack of any imminent or ongoing attack, the above conditions were utterly lacking, since the attack was already concluded when Vektor shot and there was no risk for a further one.

It is worth mentioning that the above conclusion is consistent with the jurisprudence related to Article 48 of the Criminal Law of Serbia, provision which is exactly the same as Article 33 of the CLK. In fact, according to that jurisprudence, if the attack of the injured party has already ceased by the moment when the accused fired and the reaction of the accused followed as a consequence of the state of severe exasperation to which he was brought by the behavior of the injured party, it is a matter of the criminal act of murder in a heat of passion and not of necessary defence (District Court in Belgrade, verdict K 172/91, 11 June 1991 and Supreme Court of Serbia, Kz 635/91, 8 October 1991).

Once excluded that the defendant acted in Necessary Defence, it must be taken inconsideration whether or not the homicide was committed under the conditions envisaged by Article 33 of the KCL, which is utterly correspondent to Article 48 of the CCK (and therefore the former provision is applicable, since it was the law in force at the time of the commission of the crime).

The elements of the criminal offence of Provoked Homicide are the followings:

1. That the perpetrator, at the moment when he committed the criminal act, was in a state of exasperation.
2. That the perpetrator through no fault of his own was brought in such a state by an attack or a serious insult by the killed person.
3. That the homicide was provoked.

First: the act has to be committed in the state of exasperation. This state has been defined by doctrine and jurisprudence as an exceptional mental state that substantially diminishes the capacity of a person to think and react in a normal way. More thoroughly it has been defined as a special *affective* mental condition of reduced consciousness and diminished capacity for thinking and reacting in a proper way, accompanied by external physical manifestations, conditioned by a strong emotional excitement of temporary character. In other words, the murder has to be committed in such an extraordinary mental state which by its intensity leads to such an agitation of the perpetrator that he or she, instantly and without any thinking, in a heat of passion, takes the decision to commit the murder and immediately acts accordingly.

*Affective* conditions could be sthenic, and these are the affects that boost mental and physical activity (rage, anger) or asthenic, *i.e.* affects that suppress and inhibit this activity (sorrow, fear and the like).

It is undisputed that the state of serious exasperation does not include pathological conditions of reduced consciousness, provoked by some kind of mental illness, or a special psychopathic structure of personality.

Second: an attack or a serious insult. The doctrine and the jurisprudence have defined the above concepts envisaged in Article 33 of CLK. In particular an attack it is understood as that kind of activity which endangers or damages the physical integrity of a person. However, an attack does not have to be always directed at the perpetrator of the criminal act: an attack could be directed at a person close to the perpetrator of the criminal act and

the term “close person” should not be limited only to close relatives, but other persons dear to the perpetrator should also be considered as such. It is obvious that a causal relation needs to exist between an attack and affective state, meaning that the attack has to come from the killed person. It is also clear that the perpetrator of the killing must have not provoked the attack by any means.

Third: the homicide must be provoked. Provoked homicide means taking the life of a person immediately after the provocation occurs. The question arises what is the longest time period that can elapse between the provocation and the homicide, in order for it to be provoked homicide. When answering this question one has to bear in mind that this act can be committed only for the duration of a serious exasperation. Normally, it lasts for a short time. In any case, between an attack and the committed homicide there needs to exist a continuity and the homicide must be “an immediate reaction to the unprovoked attack” (see, Supreme Court of Serbia, Kz<sup>1</sup>. No. I-1309/95 on 12 December 1995).

Once that the provision envisaged in Article 33 CLK has been analyzed, it appears clear and evident that the present case meets all the requirements of the Provoked Homicide.

In fact the expert witnesses stated that the murder was committed in a heat of passion by the defendant, as it results from the following abstract of the minutes of 21.7.2010:

*Presiding Judge: maybe you can add a bit more as to the definition of this particular mental state. According to your experience and what you have learned of this case, was the Defendant, after having seen his father attacked, in a mental state of such an intensity which instantly led him to take the decision of committing the murder without any further thinking?*

*Dr. Nazife Sylejmani: yes. We could say that he was in such a mental state of intensity to take a decision without thinking.*

*Presiding Judge: thank you, you have a completely different approach when you answer! I appreciate it when someone goes direct to the point. What about his capacity of his understanding the significance of his action? Was this capacity diminished or animated by a mental disturbance or a mental disease or not? I am talking about a pathological state.*

*Dr. Nazife Sylejmani: he was not suffering from any kind of psychiatric illness or disease.*

*Presiding Judge: but your assessment is that because of the attack suffered by his father and the relationship between the two families, he momentarily lost his capacity of the situation and took a momentary decision of committing the murder?*

*Dr. Nazife Sylejmani: yes I would say. Because at that moment when he shot at the person he had that moment of explosion of the affect, the affect exploded from his mind. In the sense of emptiness, he emptied the affect. Or discharged his affect. And promptly<sup>17</sup> after that the person might have had a kind of amnesia, partial, he may not be able to recall things in those moments.*

*Presiding Judge: your assessment that his capacity was diminished is also made because the Defendant kept on saying that he could not remember what had happened?*

*Dr. Nazife Sylejmani: no, we did not assess that based on what he said; we based ourselves on what he said and our reading of the literature. The literature says the following in those moments the person discharges his/her affect and after the discharge of the affect he suffers a sort of amnesia, and of course when it comes to the details of the event, he does not recollect in detail what happened.*

*Presiding Judge: this is what the literature says, of course. Since the Defendant apparently could not remember all the details you link together what was said by the Defendant and what the literature says? Of course, it is logical?*

*Dr. Nazife Sylejmani: yes it is like this. As my colleague told you we based our findings on the way he interviewed, the way we consulted the literature and we made our conclusions.*

*Presiding Judge: and what about the action of him hiding himself behind the pole, do you agree that this action can be defined as an instinctive action?*

*Dr. Nazife Sylejmani: yes it can be defined as that.*

*Presiding Judge: ok, Mr. Prosecutor, any questions?*

*Ali Uka, Local Prosecutor: no questions*

*Presiding Judge: the Injured Party any questions? Kimete Belegu any questions?*

*Kimete Belegu: no*

*Presiding Judge: the other injured party, Gezim Belegu any questions?*

*Gezim Belegu: no questions.*

*Zenil Mekaj, Defence Counsel: you have explored the topic quite a lot. I believe and I think that after all these attempts that now the issue is much more clear, in the expertise provided to us, in the part of analyses, this part deals more with the accumulation of the stress as a result of the previous relationship between those families, then it deals more with that than with the current case. When the late Xhafer Belegu wounded the father of the Defendant with six bullets, and at the moment when the Defendant realized that his father was wounded, this is the climax of the moment that resulted in his affect state. And this is not mentioned in this part of the analyses, therefore, my question would be: could the experts tell us if the main cause of the affective condition of the Defendant is the fact that his father had been wounded/injured in that attack? Whereas in relation to other circumstances, the other circumstances could be just secondary to this case.*

*Presiding Judge: Dr. Nazife Sylejmani, maybe you can answer this.*

*Dr. Nazife Sylejmani: in the condition analyses that we describe in our expertise, we bear in mind the previous relationship and status of the families and we drew the conclusion based on that, that a kind or sort of accumulation of affect has happened to this case. On the critical day, we saw that it was a discharge of emotional affect. So at that moment as the other party said there was a climax of all this affective charge and those moments, this affective charge discharged. So at the moment when he was not able to think logically, to control his actions and to control himself properly because at any time charging of the effects just searches the moment of discharge the effect. That was the moment that accumulation of affective or emotions happened to explode.*

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*Presiding Judge: I think the lawyer wants to know if the attack against the father of the Defendant was the classical drop that made the water leave the jar, or was it something so strong that it could be the main cause of the loss of capacity of understanding the consequences of his actions.*

*Zenil Mekaj, Defence Counsel: was it the main cause?*

*Dr. Nazife Sylejmani: yes we can say it was the main cause.*

*Presiding Judge: do you agree also Dr Bujar Berisha?*

*Dr Bujar Berisha: yes*<sup>18</sup>

The above conclusions are substantially confirmed by the expertise made by dr. Gani Rama and dated 23 December 2003 (the above expertise, performed during the first main trial, has been acquired in the current main trial on the basis of the consent of all the parties): *“The certain moment on the critical day has been alike ‘ the single drop that empties the full glass’ and therefore has caused affective and motoric discharge finally resulted with murder. Actually the defendant who all the time prior the occurrence was only an observer, due to the preconditions of the committed act, has been strongly impacted of affective state that resulted on reduction of consciousness on the critical moment by occluding his critical and logical thinking hence reacted impulsively and violently ( state of psycho temporary disorder ).*

*Based on the content of paperwork of the case file and examination of the defendant Venter Maznikolli I conclude that the defendant doesn't suffer any of permanent psychic disorders and there are no findings of stumbling of his mental development. During the examination he displays the phenomena of reactive depression as a result of current situation”.*

It is also undeniable that the perpetrator through no fault of his own was brought in such a state by an attack or a serious insult by the killed person, because Venter reacted against Xhafer after he saw his father wounded and covered with blood out of the shots fired by Xhafer. It is worth mentioning that Venter, on that day, was not at all involved in the dispute related to the hole and therefore he did not provoke by any means the reaction of the victim.

And finally the actions performed by Venter were immediately subsequent the attack of the victim and were ignited and caused by the shots fired by the latter against the father of the defendant.

Since the conduct of the defendant must be qualified as Provoked Homicide, the panel is relieved from the obligation to assess whether or not the conditions for the criminal offence of Murder exist.

On the point, as an *obiter dictum*, it is worth mentioning that the qualification given by the prosecutor is not binding for the judge, as it is foreseen in Article 386 of the KCCP. The code does not specify whether or not the judge is bound when the requalification would be in detriment of the defendant (for instance from Provoked Homicide to Murder).

Therefore in according to the interpretative principle *ubi lex voluit, dixit, ubi noluit, tacuit* (where the law wanted to regulate a matter it did it, when it did not want it did not), it should be assumed that the judge is free to reclassify the criminal offence regardless of the fact that it is in detriment of the defendant.

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<sup>18</sup> Minutes of 21.7.2010, pages 12 – 14.

However, the judge has to take in consideration the principles envisaged by the ECHR, convention which, according to the Article 22 of the Constitution of Kosovo, is directly applicable in the territory of Kosovo and, in case of conflict, has priority over other laws.

In particular, as to the possibility for the judge to reclassify the charge, the provisions of Art. 6, par. 3 item a and b of the ECHR must be taken in consideration. The above provisions state that the defendant has the right to be informed of the accusation against him and has to have adequate time for the preparation of his/her defence.

On the point the jurisprudence of the ECRU (*Drassich vs Italy*, 11.12.2007) has indicated that if the judge has the power to reclassify the charges (and it must be noted that in the above case it was a requalification *in peius*), the defendant must be granted the right to be informed about the possibility of a different qualification of the charge (on the basis of the same conduct) proposed by the prosecutor, giving also the possibility to the defendant to argue and to defend about the eventual new qualification.

Therefore in the present case, if the court had intended to reclassify the charge from Provoked Homicide to Murder, the defendant should have been informed about this possibility in order to allow him to defend himself also on the basis of the above different qualification.

## **2. Motions of the Parties**

No motions have been presented by the injured parties.

Upon the request of the Defence Counsel the statements given by the defendant before the police on 23<sup>rd</sup> and on the 25<sup>th</sup> August 2003 were ruled out from the case file, since no warnings were given to the defendant according to article 218 of the Procedural Code.

## **F. DETERMINATION OF PUNISHMENT**

When imposing the criminal sanction, the court has to bear in mind both the general purpose of punishment - that is to suppress socially dangerous activities by deterring others from committing similar criminal acts - and the specific purpose of preventing the offender from re-offending.

In the present case the Panel came to the conclusion that, this was a serious and grave criminal act committed against a person who was not any more attacking either the defendant or his father and that was retreating towards the garden and the garage of his house.

Since the victim was not willing to undertake any imminent attack, it appears that the motive to commit the offence was mainly to take revenge for the wounds sustained by the father of the defendant. In fact, there was no necessity at all for Vantor to commit the crime, but, anyhow, he was eager to avenge his father.

On the point, it is worth mentioning that the circumstance that the murder was committed in a heat of passion does not exclude to take in consideration the reasons and the motives for the murder.

In fact, even though the capacity of evaluation and understanding of the defendant was diminished, it does not mean that his motivation can not be evaluated in order to calculate the punishment.

And the motivation appears to be evil and pushed only by revenge purposes.

Also the behavior of the defendant after the commission of the offence is not completely in favour of the defendant: in fact, if it is true that he behaved correctly during the present main trial, in the second main trial he had to be arrested in order to assure his presence in front of the court, showing therefore no sign of repentance for having killed a person.

On the other hand the circumstance under which the act was committed, meaning the fact that the father of the defendant had been attacked, can not be taken in consideration as a mitigating circumstance, since it has already been evaluated in order to qualify the criminal offence as Provoked Homicide.

Moreover, in order to determine the fair punishment, it must be taken in consideration that in order to take his revenge the defendant did not hesitate to threaten women unarmed and event to hit one of them.

Therefore the punishment deemed as fair is eight years of imprisonment taking in consideration the above indicated aggravating circumstances and the fact that there are no mitigating circumstances.

The time spent in detention on remand by the defendant, from 23 of March 2007 until 8 of May 2007, is to be credited against the punishment, pursuant to Article 351, Paragraph (1), item 6 of the LCP.

## **G. COSTS**

Since the accused was pronounced guilty, he has to reimburse the costs of criminal proceedings with the exception of interpretation (Article 351, Paragraph (1), item 7 of the LCP). A separate ruling on the amount of the costs shall be rendered by the court when such data will be obtained.

## **H. COMPENSATION CLAIM**

At the beginning of the main trial the injured parties have been reminded of the possibility to file a motion to realize a property claim within the criminal proceeding, but they declared that they did not intend to file a property claim. Therefore the court did not have to make a specific decision on the issue.

**Legal Remedy**

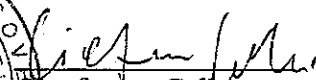
Authorized persons may file an appeal in written form against this verdict through the District Court of Peja/Pec to the Supreme Court of Kosovo within fifteen days from the date the copy of the judgment has been served.

Recording Officer

  
Robina Struthers



Presiding Judge

  
Gianfranco Gallo