

DISTRICT COURT OF PRISHTINË/PRIŠTINA

P Nr. 10/2007

27th of March 2009

IN THE NAME OF THE PEOPLE

The District Court of Prishtinë/Priština, in the trial panel composed of:

EULEX Judge, Mr. Francesco Florit, Presiding
EULEX Judge, Mr. Andrea Cruciani,
Local Judge, Mr. Hamdi Ibrahim,imi,

assisted by the court recorder Liz Bateman

in the criminal case against:

1) Feriz Gashi, son of Hysni and Elfete (maiden name Beqa), born on 10th October 1974, in Pristina, with permanent address in "Tirana" str. no number, Shtime, unemployed, married, father of two children, completed secondary school, poor financial situation, Kosovo Albanian, in detention since 22nd April 2006 charged with Aggravated Murder pursuant to article 147 paragraph 1 items 4 and 11 of the Provisional Criminal Code of Kosovo (PCCCK) and Unauthorized ownership, control, possession or use of weapons pursuant to article 328 paragraph 2 of the PCCCK

2) Hysni Gashi, son of Aziz and Ajshe (maiden name Zogaj), born on 6th August 1949 in village Pjetershtice, Lipjan Municipality, with permanent address in "Tirana" str, no number, Shtime, tailor, married, father of eight children, completed secondary school, poor financial situation, Kosovo Albanian, in pretrial detention from 22nd April 2006 until 9th January 2007 and then in house detention from 10th January 2007 until 12th May 2008, charged with Incitement to commit the criminal act of aggravated murder, pursuant to articles 24 and 147 paragraph 1 items 4 and 11 of the KCCP,

After the trial held on 11th, 12th, 19th February and 4th, 5th, 12th, 24th and 27th March 2009, in the presence of the Public Prosecutor Mr. Lulzim Sylejmani, the Accused and their Defence Counsels Bajram Tmava (for Feriz Gashi) and Fazli Balaj (for Hysni Gashi), publicly announces the following:

JUDGMENT

1) **Feriz Gashi** is found guilty

of the criminal act of Aggravated Murder, contrary to article 147, par. 1. subpar. 4 and 11 of CCK, and of the criminal act of unauthorized possession, and use of weapon, contrary to the Article 328, par. 2 of CCK

2) **Hysni Gashi** is found guilty

of Incitement to commit the criminal act of Aggravated Murder contrary to article 24 and 147, par. 1, subpara. 4 and 11 of CCK.

Because the two accused have been found guilty of the criminal acts as charged in the indictment filed by the Public Prosecutor and specifically:

Feriz Gashi

1. On 22 April 2006 around 09:30 hrs in Shtime, "Tirana" str. in the terrace of "Prestigj" café bar intentionally deprived of life the now deceased, Vezir Bajrami and Aziz Xhelili, and also in the same street and along the same café bar he has attempted to deprive from life: Burim Bajrami, Kadri Bajrami, Ekrem Ferati, Besnik Ferati, Rifat Imeri, Hamdi Hasani, Xhemajl Smajli, Ibrahim Halili, and also has endangered the life of different persons in the said location and apartments nearby this location, all of this he has done being motivated because of disagreements between his family and Kadri Bajrami and Ekrem Ferati about a dispute of a land parcel, which is at the same location in Shtime, "Tirana" str, where there is a house with two business facilities, and which were used for dwelling and working by the defendant Feriz Gashi and his family since 1999, after the war in Kosovo, and which, the injured parties, Ekrem Ferati and Kadri Bajrami had bought from a Serb owner, and while the owners, Ekrem Ferati and Kadri Bajrami on the same day, 22/ 04/ 2006 around 09:30 hrs had organized to demolish the abovementioned facilities, called "Cami", with an excavator and while the injured party, Burim Bajrami was unloading the excavator from a truck trailer on the road opposite these two facilities, the defendant, Feriz, hidden in the same facilities, having with him an automatic gun of "Type-68" with serial no. 10232985, of 7.62x39 mm caliber and three hand grenades of unknown type, that he was keeping without a valid permission from the authorized organ, initially he shoots some times with his automatic gun at the direction of the excavator cabin, where Burim Bajrami was, and along the truck trailer, where Kadri Bajrami and Ekrem Ferati were, then he continues to shoot continuously and without interruptions also towards the terrace of the coffee-bar "Prestigj", which is located at the opposite side of "Cami" business facilities, beyond "Tirana" str, in a distance of 20-25, where there were sitting in a table the now dead Vezir Bajrami and Aziz Xhelili. After he shot about 57 times consecutively, he threw three hand grenades towards the mentioned street, of which one falls nearby a KPS police officer, Ibrahim Haliti, luckily without explosion. As a consequence of these shootings with automatic gun in these parts of the location and around it, the now deceased, Vezir Bajrami has been shot by a bullet at the left front part of his chest, while, the now deceased, Aziz Xhelili has been shot with three bullets, two bullets at the upper part of his right arm and one bullet at the right part of his chest. As a consequence of the mechanic action of the bullets, both of them experienced shock and hemorrhage and because of this, both of them passed away on the same day, whereas the

injured party, Albiona Jashari, who was in her apartment by a window, has been hit by those shootings with a bullet on her head causing severe bodily injuries. Furthermore, Besnik Ferati has been hit by a bullet on his left arm thus causing severe body injuries, then also as a consequence of the shootings in the hard parts of concrete, Hamdi Hasani and Xhemajl Smajli were hit on their head by pieces of concrete, thus causing light body injuries; Burim Bajrami was shot with a bullet on the knee of his left leg, while Ekrem Ferati was shot with a bullet on his right ear; Rifat Imeri was shot with two bullets on the left side of his head behind his ear, thus causing body injuries. After the shootings were finished the police arrested the defendant and in this case they found and confiscated his automatic gun.

Hysni Gashi

2. On 22 April 2006 in the morning hours, "Tirana"str. in Shtime, in the house where he was living with his family, he intentionally incited his son, Feriz Gashi (now the defendant) to commit the criminal act of "Aggravated Murder" as in all circumstances described in count 1 of the charge of this indictment, and he has done all this being motivated by a disagreement that he had with the parties, Kadri Bajrami and Ekrem Ferati, who had earlier bought legally a part of this immovable parcel from a Serb owner, in which there are two business facilities a the name "Cami"; and which have been usurped by the defendant Hysni, and a house in which the defendant Hysni was living with his family members since 1999, in that way that while Kadri Bajrami and Ekrem Ferati on 22. 04. 2006 around 09:30 hrs had organized the activities of demolishing these two facilities that are located along "Tirana"str. in order to have space for them and use this for their needs, and when the defendant Hysni was back from the Police Station of Shtime, some times before, and being aware of the fact that these two shops were going to be demolished that morning, has persuaded his son, the defendant Feriz Gashi that if the family members of Kadri Bajrami and Ekrem Ferati attempted to demolish the mentioned facilities, to shoot with automatic gun and in no way to allow the demolition of them, for the sole reason so as not to release the said parcel and facilities from his factual possession, and that was how it really happened, when on the same day, 22. 04. 2008 around 09:30 hrs the defendant Feriz Gashi has deprived from life with his automatic gun, the now deceased, Vezir Bajrami and Aziz Xhelili, and also has attempted to deprive from life all the injured parties as mentioned in count 1 of the charge of this indictment causing them body injuries.

For the above mentioned reasons the Panel issues the following

SENTENCE

- 1) Feriz Gashi

Pursuant to article 37 of the Criminal Code of Kosovo and article 147 paragraph 1 items (4) and (11) is sentenced to imprisonment of 25 (twenty five) years;

Pursuant to article 38 and article 328 (2) of the CCK is sentenced to imprisonment of 1 year;

Pursuant to Article 71 paragraph 1 and 2 item 2 of the Criminal Code of Kosovo the defendant Feriz Gashi **shall serve an aggregate term of imprisonment of 25 (twenty five) years and 6 (six) months.**

The time Feriz Gashi spent in detention on remand from 22 April 2006 until the judgment becomes final will be counted as part of the imprisonment sentence pursuant to Article 73 of the CCK

2) Hysni Gashi

Pursuant to article 38 and article 24 of CCK in connection with Article 147 paragraph 1 items 4 and 11 of CCK **is sentenced to imprisonment of 20 (twenty) years.**

The panel ordered detention against Hysni Gashi until the judgment becomes final with immediate effect.

The time Hysni Gashi spent in detention on remand/house detention from 22 April 2006 until 12 May 2008 and from today until this decision becomes final will be counted as part of the imprisonment sentence pursuant to Article 73 of the CCK.

PROPERTY CLAIM

The accused, cumulatively and jointly, shall compensate the injured parties Gojart Bajrami, Nazif Xhelili, Burim Bajrami, Kadri Bajrami, Besnik Ferati, Rifat Imeri, Hamdi Hasani, Xhemajl Smajli, Albiona Jashari, Fitim Ferati, for the damages caused. The data provided in the criminal proceedings does not afford a reliable basis for either a complete or partial award; the Court therefore instructs the injured party to file a civil suit for the entire claim pursuant to article 112 (2) of the KCCP.

CONFISCATION

Pursuant to article 60 of the CCP and 489 of the KCCP the automatic gun Type 68, with serial number 10232985, caliber 7. 62mm x 39 mm is confiscated.

COST

Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) the convicted persons shall pay the costs of the proceedings. The provisions of Article 100 paragraph 2 of the KCCP shall be complied with and a separate ruling on the amount of the costs shall be issued.

REASONING

I. Procedural History

On 25th April 2006 the Public Prosecutor filed the ruling to initiate the investigation, PP No. 239-1/06, with the District Court of Prishtinë/Priština against the following suspects: **Feriz Gashi**, for the criminal acts of aggravated murder, attempted aggravated murder, unlawful possession of weapons and causing general danger; **Hysni Gashi**, for the criminal act of threat; **Izjah Beqa**, for the criminal act of unlawful possession of weapons; **Sami Gashi** for the criminal act of causing general danger; **Kadri Bajrami** for the criminal acts of unlawful possession of weapons and obstructing official persons in performing official duties. In the same ruling, also **Burim Bajrami**, **Ekrem Ferati** and **Rifat Imeri** were listed as suspects for the criminal act of unlawful possession of weapons.

On 21st September 2006 the Public Prosecutor expanded the investigation against **Hysni Gashi** to include the crime of Incitement to commit the criminal act of aggravated murder.

On 20th October 2006 the pre trial judge of the District Court of Pristina, Drita Hoxha, extended the investigation for additional six months against all the suspects as listed above.

On 10th January 2007 the Public Prosecutor terminated the investigation against the following suspects: Izja Beqa, Ismajl Beqa, Sami Gashi, Blerim Gashi, Ekrem Ferati and Rifat Imeri for the criminal acts mentioned above.

On the same day, the Public Prosecutor filed an indictment at the District Court of Prishtinë/Priština against **Feriz Gashi**, for the criminal acts of Aggravated Murder and Unauthorized ownership, control, possession or use of weapons and **Hysni Gashi** for the criminal act of Incitement to commit the criminal act of aggravated murder.

On 6th March 2007 the confirmation judge of the District Court of Prishtinë/Priština, Selman Bogiqi, conducted the confirmation hearing and confirmed the indictment against Feriz Gashi and Hysni Gashi for the criminal acts listed in the indictment.

The trial commenced on 18th June 2007 before a panel composed of five judges (presiding judge Elez Hoxha). Further sessions were held on 10th September, 15th October, 26th November, 8th January 2008, 25th February, 27th March and 21st April 2008.

During the last hearing, the presiding judge Elez Hoxha scheduled a crime scene visit for the 15th May 2008 and a further trial session on 23rd June 2008.

However, the session on the 23rd June was never held and a new presiding judge was assigned to the case, Mr. Mejdi Dehari.

Following a letter of the accused Feriz Gashi asking the case to be tried by EULEX judges, the presiding judge Mejdi Dehari on 3rd December 2008 sent a letter to EULEX judge Francesco Florit and handed over the case file for consideration by the EULEX judges at the District Court of Pristina.

On 12th December 2008 the President of the Assembly of EULEX judges, Maria Giuliana Civinini, issued a ruling approving the request to assign EULEX judges to the case pursuant to article 3.3 of Law no. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo. With the same ruling, she appointed EULEX judge Francesco Florit as presiding judge and EULEX judge Andrea Cruciani as a panel member.

The main trial commenced on 11th February 2009 before the trial panel in the composition outlined above.

At the presence of the accused, their counsels, the injured parties and their representatives, the presiding judge has confirmed that the trial panel has been constituted in accordance with the law. The jurisdiction of the EULEX Judges in this case is based on the provisions of Article 3 of the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo. No objections have been raised by the parties as to the composition of the Panel.

During the same session, the indictment was read by the public prosecutor; the defendants have been asked if they pleaded guilty or not guilty. All the accused have pleaded not guilty on all counts.

On the same day the Court heard the testimonies of witnesses and injured parties Rifadije Jashari and Xhemajl Smajli.

On 12th February 2009, after the end of the examination of Xhemajl Smajli the Court heard the Witnesses Burim Bajrami, Rifat Imeri and Hamdi Hasani.

On 19th February 2009 the court heard the testimonies Kadri Bajrami, Fitim Ferati, witnesses Ibrahim Halili and Agni Musliu.

On 4th March 2009 the court heard the testimonies of witness Naser Tershani, Dr. Tefik Gashi as Medical forensic expert and Police Sergeant Lutfi Rraci as Fire arms examiner – ballistic expert.

On 5th March 2009 the court heard the testimony of witness Shaip Mujota and entered into the record as evidence the following:

1. Chain of custody

2. Report of crime scene
3. Sketch of crime scene with the explanation
4. The recommendation (Rekomandimi, in Albanian, attached to the police report)
5. Document which is the description of the pictures Number 1 – 376
6. Report from the police unit of Ferizaj
7. Autopsy report
8. Description of photographs from the autopsy
9. A photo album of autopsy with 91 pictures
10. A further report from the crime scene
11. A sketch of 27 April 2006
12. 2nd report of chain of custody
13. A further list of pictures dated 27 April 2006
14. Recommendation
15. Criminality Report dated 22 April 2006
16. Further list of Pictures dated 27 April 2006
17. 33 pictures
18. Medical report written by Dr Tefik Gashi dated 18 – 20 June 2007
19. Ballistic report which is dated 25 August 2006.
20. Statement of Besnik Ferati
21. Court decisions and documents relating to the civil claim regarding the property.

On the same session, the court proceeded with the examination of the defendants. Feriz Gashi and Hysni Gashi requested that the panel excluded the public, pursuant to article 329 paragraph 4 of the Kosovo Criminal Procedure Code (KCCP). The request was accepted within the limits of article 330 of the KCCP. Hysni Gashi gave his statement while Feriz Gashi decided to remain silent for the assumed insufficiency of the measures.

On 12th March 2009 the examination of the accused Hysni Gashi continued.

On 24th March 2009 the court heard the final speeches. At the end of the hearing, the defendant Feriz Gashi asked the panel to be excused from being present at the announcement of the judgment. Permission was granted.

On 27th March 2009 the panel announced publicly the judgment. In the absence of Feriz Gashi, the judgment was communicated to him in the detention center where he was restricted.

Factual findings and Assessment of Evidence

The Court deems that the facts described in the indictment have been proven and that the accused are guilty for the charges listed in the indictment.

In the course of the trial the events which took place in Shtime on the 22nd of April 2006 have been described fully by the witnesses with a further, substantial contribution of the same accused Hysni Gashi in the course of his examination. In

addition to that, the documents collected by the Public Prosecutor and contained in the *dossier*, further illustrate the facts and corroborate the evidence collected by the Court

In the course of the trial, the main facts (the shooting spree on the critical day, which caused the death of two and the injuries of a number of people) have been put in a kind of context, in a wide scenario which included facts happened since many years ago, from the end of the conflict (June 1999), up to the eve of the shooting spree.

In this line, the whole story of the controversy surrounding the property of the persons involved in the trial as accused, victim (Vezir Bajrami) or witness (Kadri Bajrami) was exposed. Through the words of the same accused, the starting point of all what happened afterwards (the occupation of a property on 16 June 1999, as stated in the course of the hearing of the 5th March 2009, pg. 16, English version) was established. The civil lawsuits that ensued and the various attempts to bring to execution the decisions of the Municipal Court of Ferizaj and of the District Court of Pristina were illustrated, as well as the numerous meetings, discussions, mediations that the two sides in the course of the years repeatedly had, in the vain attempt to find a solution to their contrast.

This technique of presentation of the facts in a broad painting, sustained by the prosecutor and substantially accepted by all the defenses, had two aims, it can be understood.

First, it offered the opportunity to the Court to learn the facts of the case progressively and comprehensively, with the advantage, for example, of giving a complete insight of psychological aspects of the accused (for instance, the insistence of Mr. Hysni Gashi to find a solution, at least at the beginning; his pertinacity in refusing to admit his 'original sin', the initial occupation without a title, at the end) and of the victim (the final resolution of Kadri Bajrami summarized in the sentence: "Once I was born and once I die": reported by the accused Hysni Gashi in the course of the trial hearing of 5 March 2009).

Second, it laid the base of the responsibility for incitement by Hysni Gashi. A kind of responsibility which can hardly be proved by the statement of a witness (who should have heard the father delivering the murderous order to the son...) but which, on the contrary, is substantiated by numerous elements which have found in the presentation of the evidence adequate grounds, as will be said later.

In the end, the technique of presentation of the facts through the 13 witnesses has turned out to be positive, if also, at times, lengthy (for the need of the translation).

And it can only be credited to the lawyers, to their experience and their kindness, even in the most difficult moments that a trial always experiences, to have contributed loyally to the ascertainment of the facts in a fair manner.

In general, the examination of the 13 witnesses has not suffered much for those contrasts and conflicts amongst the parties that sometimes affect the examination of the testimony-givers, with repeated objections or requests of clarifications, with reiterated recourse to the inevitably tedious mechanism of confrontation of the witness with previous statements given to the investigators or to the prosecutor. There has not been either the need to confront two witnesses, nor have we assisted to excessive number of leading questions.

Need not to say, this has contributed greatly to a serene atmosphere in Court during the unfolding of the sessions.

All in all, the witnesses appeared to be reliable in the description both of the circumstances that preceded the critical day (i.e. the aspects of the civil controversy between Gashi and Bajrami) and of the facts of the 22nd April 2006.

The majority of the witnesses (8 out of 13, including the expert witnesses) were substantially neutral and did not have any reason to favour one faction or the other.

Witnesses as Rifadije Jashari (mother of the little Albiona) Xhemajl Smajli (owner of the Fast Food), Ibrahim Halili (police officer), Agni Musliu (passer-by) or Naser Tershani (owner of the 'cafeteria Prestigj') may have had their personal reasons of resentment against whom they identify as the cause of their damage. But they didn't have any prejudice or bias based on family relations.

Likewise, Fitim Ferati, if also loosely related to the Ferati clan (he is a third cousin of Ekrem Ferati, as he stated), was present only because in the adjacencies of the crime scene he owns a shop that he was going to open, as everyday, when the shooting started.

Dr. Tefik Gashi and Lutfi Raci can be hardly contested, as expert witnesses. Their natural independence (they examined facts *ex post*, they are 'institutional' or 'neutral' professional) was corroborated by the competence they showed in the course of the examination. Their examination was not contested.

About the remaining bunch of witnesses, it can not pass unnoticed that they belong to the same family or that they are in some way linked by family ties. Kadri Bajrami, besides being involved in the civil dispute, was brother of the deceased, Hamdi Hasani is father in law of Kadri Bajrami, Burim Bjrani is nephew of Kadri Bajrami

Nonetheless, their testimonies were not contested on aspects concerning the long quarrel between the Bajrami and Ferati, on one side and the Gashi, on the other. Also on the circumstances of the shooting, their versions are substantially corroborated by other material evidence, as we will have the opportunity to see at a later stage.

On the remaining witnesses (Rifat Imeri and Shaip Mujota), little rests to say.

The first one puts forward a confused request of compensation of damages (for unlawful detention and physical damages) but has given a simple and honest account of the facts.

The second one gave testimony on an episode which took place after the events as described in the counts. The circumstances of which the witness was heard were not crucial and essential for the comprehension of the facts.

It does not seem to be necessary, at this point, to scrutinize in depth the issue of the civil dispute on the ownership (by Bajrami and Ferati) and the (unlawful) occupation of the land by the Gashi: the converging reconstructions of the facts by the witnesses matched with the declarations of the same accused Hysni Gashi who, in the course of the examination, on the 5th and 12th March, scrupulously detailed, with surprising memory, each relevant date in the saga.

Suffice it to say that it emerged as uncontested and uncontroverted the illegal nature of the occupation of the land by Hysni Gashi, originated by an initial occupation *de facto*, only permitted or authorized by the Military Authority (Finn Kfor) but never legally ratified afterwards. A possession of the land *sine titulo*, never followed by a written agreement to buy/sell the property between Hysni Gashi and 'Radomir' (a Serbian or Montenegrin, owner of the property). In that precarious legal situation it was obviously impossible, for Hysni Gashi, to be on the right side in a legal controversy: indeed, both at the first instance and at the appellate level, Hysni Gashi lost, as the documents confirm (decision of the Municipal Court of Ferizaj and of the District Court of Pristina). The execution of the decision, no matter if unsuccessful for the resistance of the accused, who returned back in the premises previously evacuated, was but the natural consequence.

What is the point to elaborate more on the issue? What's the need to illustrate in greater details the unfolding of the procedure or the steps and the attempts made by the parties to find an alternative form of resolution of the controversy, away from the tribunals, away from the interference of the judiciary?

The same accused listed a number of dates: for example the 16th June 1999, as said; or the 4th February, meeting with Agency Habitat and issue of a permission; or the beginning of 2001, the arson of the premises; still, the 6/7th February 2001, phone call with the owner and decision to buy; or the tragic (for Gashi) date of the 19th August, when the agreement between the owner and Ekrem Ferati for the purchase of the land at an higher price started the quarrel. Many other dates were added by the accused and (sometime) by the witnesses. But, again, it makes little sense, if any, to repeat them here, for the fundamental reason that no attempt or mediation can be brought as justification or mitigation of what happened in Shtime in the morning of the critical day.

The events that preceded the shooting may help to put things in a kind of perspective, but don't offer a legal justification to the action of the shooting and to its consequences (the death of Vezir Bajrami and Azizi Xhelal).

What happened in Shtime, Tirana road, in the morning of the 22nd of April 2006 has been described with sufficient precision by the witnesses. The narration of the accused Hysni Gashi has completed the description of the facts and has clarified some missing points.

In the minutes that preceded the tragic epilogue, a number of people, for different reasons, were present or arrived at the crime scene.

Xhemail Smajli was working at the back of his shop, a fast food place.

Burim Bajrami described the moments in this way, in the course of the hearing of 12th February 2009: His stated that his presence in Tirana street, in front of the coffee shop Prestigj was just before 9 o'clock, awaiting the arrival of the excavator. He was having a coffee and at the table next to him was Vezir Bajrami, Kadri Bajrami and Hamdi Hasani. He got in the excavator and lowered it onto the street. He described his position stating that the excavator was facing the premises Cami and that it was parallel with the Cami premises if facing the direction of Prizren and that the distance between the excavator and the Cami premises was roughly 4 meters.

Rifat Imeri, heard the same day, did not even arrive at the place where he was directed (cafeteria Prestigj, for a coffee) that the shooting started at about 10 to 15 meters before he arrived at the cafeteria and that the gun shots were coming from his right hand side.

Hamdi Hasani, in the course of the same hearing, testified that on the day in question, being Saturday, he sat at the coffee shop whilst it was being cleaned, his table was near a cement pillar. He then met the now deceased Dr Vezir Bajrami and had coffee together. Dr Bajrami had promised him to take him to his village; whilst they were chatting Aziz Xhelili joined them. He stated that they had heard two gun shots and then immediately another four shots coming from outside the window where they were sitting. He stated that he saw the defendants at the window with their guns directed towards the coffee shop and when he had mentioned this fact to Dr Bajrami, he had responded that the war is over and he did not believe that they were going to shot at them.

Kadri Bajrami was questioned on 19th of February and he described the moments leading to the incident. He had left his home at 08.30 hrs in the morning together with Vezir Bajrami. He has seen the defendant Hysni Gashi near the Police station. Kadri Bajrami and Vezir Bajrami had coffee whilst waiting for the excavator that arrived at about 09.30. He had helped lower the machine onto the ground; Burim Bajrami was

the driver of the excavator. Once the excavator was down and Kadri Bajrami was pulling the ramps then continuous shooting occurred from the direction of Cami premises.

Witness **Fitim Ferati** stated in his testimony that he had witnessed the arrival of the excavator whilst chatting to Besnik, after he had his coffee he left the bar and his position was opposite the Cami premises. He heard the rounds of firearms when the excavator was lowered.

Witness **Agni Musliu** stated that he had walked from the place where he parked his car; nearby the coffee shop Prestigj and Margiona café he had met Dr Vezir Bajrami. Dr Bajrami had invited him to have coffee. They had coffee together. He enquired with Dr Bajrami as to the reason why the doctor was in town on a Saturday, since this was not usual for the doctor. Dr Vezir Bajrami replied that he had come to see his brother and the workers that were to demolish the building. He then had left the Prestigj coffee shop and went to Marigona to see if his friends had arrived. He had seen the excavator loaded onto a tractor adding that it stopped right in front of Cami premises. He testified that he had heard two rounds of gunshots that were fired. One was directed at the excavator and the other was directed at the people.

About the modalities in which the shooting took place, some things are clear, while others retain a degree of uncertainty and confusion caused by differences in the versions given by the witnesses.

So, it is uncontested that the fire was open from the Cami workshop, the place which had been used and was still being occasionally used as a workshop by Feriz Gashi. It is undisputed as well that the aims of the shooter were the excavator which had been just unloaded from the lorry onto the tarmac of Tirana Road and the clients of the Cafeteria Prestigj.

As it can be seen also from the pictures accompanying the police report, the windows of the workshop were blinded with newspapers but the window frames were partially open.

On the origin of the shooting, the statements of the witnesses are clear. Such as the testimony of Agni Musliu (trial session of 19 February 2009 at page 29) stating that there were two rounds of gunfire, one aimed at the excavator and the other at the people. He testified that the direction of the fire was from the Cami premises. He stated that there was glass window and he saw one automatic weapons firing.

Other witnesses (Fitim Ferati, Hamdi Hasani, Naser Tershani) confirm that Vezir Bajrami and Aziz Xhelili were shot while seated and didn't have the possibility to escape, caught by surprise.

Fitim Ferati explains that the first shots hit the columns of the building where the cafeteria Prestigj is located, causing debris ('splinters' is the word used by the Court interpreter) to hit his face.

There is confusion, however, on the number of the shooters.

Again, Agni Musliu: *"There were glass windows, and I saw then one automatic weapon fired at the excavator and the other fired at the people... One of the automatic weapons fired at the excavator and the other fired at the people who were in Prestige café bar"*.

On this point, the witness has unhesitatingly repeated his version, also when Mr. Fazli Balaj rightly observed: *"Could you tell the witness that there is a ballistic report in the case file that clearly states that 57 bullets (more correctly 'shells' or 'casings' as clarified in the course of the examination of Mr. Lufti Raci, the ballistic expert- note of the writer) inside the Cami building came from the same automatic weapon?"*.

Indeed, the expert witness Lufti Raci confirmed that the shells of long barrelled weapon found at the crime scene were coming from a single weapon, not from two. The expert witness, officer Lutfi Raci, testified that in total 57 shells **were fired from the type 68 automatic weapon**. None of the shells were fired from the weapon AK 47. The expert could not say whether AK 47 was silent but he confirmed that he did not receive any shells from this weapon to be examined.

Another witness refers to a plurality of shooters, from the 'Gashi side'. This is Hamdi Hasani, on page 32 during the trial session of 12 February 2009 where he testified that from the gunmen, he recognised Hysni Gashi and his father, there were three of them and all had weapons. He further stated that the defendant Feriz Gashi was not in the house but in the Cami premises.

Rifat Imeri as well, mentions the presence of *"two or three kinds of gun"* (trial session of 12 February 2009 pg.24), but, specifically asked by the Prosecutor, explains: *"I noticed one machine gun (long barrelled, automatic weapon, note of the judge)"*.

The burst of fire started from the premises occupied by the Gashi family, this is clear.

It prompted the immediate reaction of those present on the crime scene. Some unnamed policemen, Burim Bajrami and Kadri Bajrami reacted to the attack.

The intervention of the policemen in the shooting (two, at least), to protect the public order, as well as the participation of Burim and Kadri Bajrami, are confirmed from different sources.

About the police action, there is a plurality of statements of witnesses; for Burim and Kadri Bajrami, there's the open recognition in Court, an open confession, of the detention and use of the weapons (which had lead, in separate procedures, to their conviction, since the possession of weapons was unlawful).

In the defense lawyers' version, other unidentified person(s) intervened.

The presence of further, unidentified gunmen on the crime scene, if not excluded at all, finds a weak confirmation.

No witness confirms that anybody (apart from Burim and Kadri Bajrami) took side for the Bajrami family, shooting.

In the ballistic report as well, it is difficult to find strong elements of support to the defense' assumption.

The expert witness, Lutfi Raci, in the summary made in Court of the report, explained that he received four weapons for the examination, plus a conspicuous number of cartridges, shells (also called casings), bullets and fragment of the said. But he further explained (hearing 4th March 2009, pg.20) that, from the examination of the projectiles and of the parts of projectiles handed over to him, it emerged that at least 6 weapons had been used in the course of the shooting. And he further explained that a weapon (the AK 47, the automatic gun seized in the car Opel with which Burim Bajrami had arrived to the crime scene) had not been used in the occasion (obviously, it was extracted from the boot of the car only after the end of the shooting).

Of the four weapons given for the examination, none was for official use, i.e. none was used by the policemen. One (the AK 47) didn't shoot because was in the boot of Burim Bajrami's car. Of the three left, one was the Type 68 and the other were two pistols. The Type 68 was used by someone from the Gashi family while the pistols, it is easy to conclude, were used by Burim and Kadri Bajrami.

It's true that from the examination of the projectiles and parts of them, the expert witness concluded that six weapons shot, but this may have multiple explanations.

First, it may have been a further policeman since a conspicuous number of them was present (8).

Second, it's not possible to establish on which side the unknown gunman was staying. In other words, it is arguable that more than one individual shot from the Gashi family.

In any case, the issue is of little importance, since it doesn't change significantly the representation of the events that has emerged from the collection of evidence and that depicts an exchange of fire in which few individuals were involved.

Furthermore, the picture that emerges confutes two of the main lines of defense.

Indeed, on the development and modalities of the shooting spree, two points have been suggested by the defence counsels in favour of the accused.

The first one states that initially a single warning shot or few, distanced, warning shots were fired from the Cami workshop towards the air, to disperse the gathering of people and to stop the excavator, in the attempt to prevent the mounting problems before they really started. But, the argument continues, the few shots triggered a disproportioned reaction from the members of the Bajrami family, who were all came to the crime scene fully armed. What followed afterwards –it is the conclusion of the argument- was not foreseen, was surely nor expected and much less desired or wanted by the Gashi family.

The second argument starts form the observation that both families, Ferati and Bajrami, were gathering in the center of town armed. This means that they both were ready to fight, conscious of the possible consequences. Morally, it is argued therefore, the Bajrami-Ferati group and the Gashi family were on the same level and they should be treated in the same manner.

The two arguments are not grounded and are not acceptable.

The first (a disproportionate reaction to a warning shot) is not corroborated by the testimonies, which chorally refer about an uninterrupted initial sequence of shots (with various *nuances*) and not of single shots. The witness (Hamdi Hasani) refers to the six initial shots which had as an immediate effect not to warn but to catch by surprise Vezir Bajrami, which indeed was hit from the very first shots. Furthermore, it cannot be understood how warning shots towards the air could be fired from inside the workshop: the pictures which accompany the Police report clearly show that this option is practically impossible for the presence of a porch in front of the workshop. Moreover, why shooting, when it is easily foreseeable, for the thread of past incomprehension amongst the parties, that this would have prompted a fierce reaction?

The second argument (the two groups/families were ready to fight and so they are morally on the same level) is not realistic and, anyway, doesn't bring us anywhere.

It is not realistic because it is not true: if it can be admitted that some of the representative of the Bajrami family approached the crime scene armed and prepared to face some sort of resistance from the family occupying the premises that were going to be demolished, this does not mean that they could foresee the real size of the conflict that ensued and much less that they had planned an armed action. Otherwise, Burim Bajrami would not have left the AK 47 in the boot of the car and the family members would not have gathered peacefully at the Cafeteria Prestigj to sip a coffee waiting the excavator.

What's more, even if proven (which is not) the argument would not bring the Court to the conclusion suggested by the defense Counsels, i.e. that *in bello* (Latin for 'in case of war/conflict') different levels of responsibility can not be identified and that all those involved must be subject to the same moral judgment. This is a conclusion that can not be shared in general and that can not surely be applied in the present case.

The reaction of Burim and Kadri Bajrami was mere self-defence, called 'necessary defence' from the Criminal Code of Kosovo and foreseen by article 8.

Of the necessary defence, the reaction had all features:

- 1) there was the need 'to avert an unlawful, real and imminent attack': the attack from the workshop 'Cani' was not justified or lawful; it was not speculative or imaginary, it was playing havoc with the excavator and the clients of the Cafeteria and had tremendous destructive potential on everything/everyone within the fire range; imminent implies synchronicity or, at most, immediate contiguity/proximity in time, which there was, since the reaction immediately followed the action, to interrupt it and prevent further shooting.
- 2) 'from himself... or another person': it was not enough, for Burim and Kadri Bajrami to try and escape or to hide: other members of the family were being under attack and had to be protected. The need to stop the shooting was not a personal need, it was an exigency of an extended group of people.
- 3) proportionality: the standard is surely respected. Welcome at the crime scene by the fire of an automatic weapon sweeping the street, Burim and Kadri Bajrami were well within the range of proportion in reacting with the pistols they were bearing with themselves.

Burim and Kadri Bajrami acted in self defence. What else should they have done? Waiting to be shot as it had just happened for the two victims?

Their reaction was not criminal in nature and, for no profile, can 'compensate' or 'diminish' the action by which it was caused.

If also we admitted that the reaction by Burim and Kadri Bajrami was unlawful (which was not), the outcome would not change: an unlawful reaction doesn't make the unlawful action which caused it lawful, in the same way in which a mistake can not be redressed by another mistake.

In conclusion, none of the justifications offered to the consideration of the Court by the defence Counsel are pertinent.

After the examination of the evidence related to the shooting spree, it's now time to turn to the central issue of the responsibility for causing it, the identification of the responsible.

The Court observes that the determination of the responsibility of the two accused implies rather different standards of assessment.

On one side, there is the charge brought against Feriz Gashi, for a criminal activity which has taken place, so to speak, *en plein air*, without any reluctance or caution to hide or protect, blatantly in the presence of people, many of them police officers involved in official duties.

On the other side, the charge against Hysni Gashi is for an activity of instigation or incitement, an activity that has an external manifestation.

Starting from Feriz Gashi, it is worth noticing that since the beginning the major suspects have been concentrated on him: he was the oldest son, the only who had a specific, personal interest in the preservation of the workshop (used also as a warehouse), naturally close to Hysni Gashi, the main interested in the civil suit, so to adsorb and suffer the frustrations coming from his sense of impotence for a unfavourable situation which he was unable to control.

Who else could be the main suspect? The father? Too old for such a bloody vendetta, too cold and too intelligent for the brutal and unsophisticated modalities of execution of the crime.

A cousin of Feriz, a brother of Hysni? Too detached form the interests at stake to have a direct involvement in a crime of such magnitude.

Who else?

And indeed, all evidentiary elements point toward Feriz' responsibility. Basically, they are the following:

- 1) the confession of the accused himself. Feriz Gashi, for personal reasons, has opted for the silence in the course of the examination in Court. Fearing possible reactions, he refused to answer the questions of the Prosecutor. This does not affects the declarations that he gave before. The right to silence is a privilege accorded to the accused for obvious reasons (*nemo tenetur se detegere*) but once a statement has been given, with the guarantees provided for by the law, the successive choice not to speak (in court or elsewhere) does not result in the revocation of the previous statement.

Article 156 KCCP foresees that a statement by the defendant given to the investigative authorities is admissible evidence in court if lawfully taken. In the current case, there is no question on the legality of the statements, all rule having been respected. No exception has been raised by the lawyer of Feriz Gashi or by the accused himself.

Apart from the ritualy of the statements, the provision (article 156 KCCP) does not impose any limitation to the use of the statement of the accused and, for what

it matters now, does not forbid their use in case the accused chooses to remain silent at the trial stage. In other words, for the case under observation (statement with declarations of the accused that at the trial stage chooses to remain silent), does not exist a rule similar to the one outlined in article 368 KCCP for the witness that at the trial stage refuses to speak.

Article 368 KCCP provides a mechanism in case a witness 'refuse to testify at the main trial without a lawful reasons'; in this situation, the norms says, "(the) record(s) containing the testimony of (the) witness(es) may be read according to a decision of the trial panel".

It is understood that the mechanism doesn't operate when the witness is exempted from the duty to testify (e.g., ex art.160 KCCP), i.e. when he has a privilege.

There is no analogous provision for the case of the statements of the accused who chooses to remain silent in the course of the trial.

When a situation is not specifically regulated, legal thinking only knows two rules to fill the *lacuna legis*: the analogy (*ubi eadem legis ratio, ibi eadem legis dispositio*) or the argument *a contrariis* (*ubi lex voluit dixit, ubi noluit, tacuit*).

Now, the similarity, as said, is only apparent and, consequently, the limitation imposed to article 368 KCCP to the usage of evidence collected before the trial stage should not be applied by analogy to the statement of the defendant given to the police or to the prosecutor in the course of the investigation. The position of the accused is different from that of a witness. The suspect, even in the investigative stage, is assisted by the lawyer and, properly speaking, is not subject to cross examination, since he is never bound to say the truth or to answer. He has an unrestricted faculty to remain silent, while the witness has a general duty to speak and exemptions for the witness are exceptional. All in all, a totally different position that does not allow to find the conditions to apply analogy.

In the end, the Court believes that article 156 KCCP gives sufficient legal justification for the use of the statements of the accused as evidence also if not confirmed by the accused that at the main trial preferred to remain silent.

On 10 May 2005 the defendant Feriz Gashi was questioned by the public prosecutor Lulezim Sylejmani. He stated that after he saw that the excavator was lowered onto the ground, he entered his house and took the weapon AK-47 from his room. He entered the Cami premises, with two (2) magazines carrying 30 and 25 bullets, he also admits to possessing three (3) hand grenades. He admits to have fired a burst of fire, 5-6 shots, from the window of Cami premises. He goes on to testify that his fire was returned by fire from the other side. Facing fire he returned the fire with more shooting. He was afraid that they would come and enter the Cami premises and his home. He describes that he saw the late Vezir Bajrami with a gun in his hand, he saw Kadri Bajrami and the driver of the

excavator (Burim Bajrami) with guns shooting at his direction, he also saw the late Aziz Xhelili but he did not have a gun. When his ammunition run out and he saw that these persons were coming closer to his position, he threw the hand grenade but the grenade did not explode. Then he loaded his weapon again and shot again in a burst of fire towards the direction of the assailants until his ammunition had run out, he admits that he does not know whom did his bullets hit. At this point he attempts to throw the second hand grenade, again it did not explode. However at this time his father, defendant Hysni Gashi, come out and reprimanded him. The third hand grenade was not used. These armaments were kept from the war as memorabilia. He goes on to say that the grave consequences of the shooting, including the deaths and injuries, he learned at the police station. He states that none of his family members were implicated in this incident.

The statements of Feriz Gashi in the course of the investigation, are largely confessional and if also the self-accusation is accompanied by naïve attempts to justify (by saying that he shot in the air and that the members of the Bajrami family were approaching and that at that point he felt scared by them), the presence of the accused in the workshop Cami and in the shooting, is undisputedly established.

2) The testimony of the witness Hamdi Hasani, reported above, who identified Feriz Gashi in '*Kadri's premises*' (the building owned by Kadri and that was going to be demolished, which is to say the Cami workshop) immediately before the shooting.

3) The declarations of Hysni Gashi on this point. In the course of the examination, when asked about the participation to the shooting of his son, Hysni Gashi has cautiously avoided to mention Feriz as the author of the shooting; even when asked directly, he was able to skip the point, ignoring the question or making recourse to eluding words.

Towards the end of the examination, however, he described what he did when he heard the shooting, explaining that he got out of his home, went in the garden, toward the direction from where the gunshot had come, met his son who was coming from the direction of the workshop with the automatic gun in the hand. At that point, he said, he grabbed the weapon from the hand of the son and, asked by the presiding judge if the weapon was warm, replied that the gun was extremely hot, like burning. This detail is conclusive for the affirmation of the responsibility of Feriz Gashi. With an expression familiar to the legal jargon of the United States of America and of other Anglo-Saxon Countries, it can really be said that Feriz Gashi was found with 'the smoking gun'.

As said above, the assessment of the responsibility of Hysni Gashi imposes a different reasoning.

He is charged for inciting the son to commit what Feriz actually did, i.e. to prevent at any cost, even with violence and death any attempt to enter in possession of the premises which had been (abusively) occupied for so many years by him (Hysni) and by other members of his family.

Article 24 KCCP, which establishes the parameter for the sanction of the incitement, doesn't give a definition of it. Consequently, it is preliminarily necessary to understand what concept lies behind this word.

Incitement can be defined as an activity directed to convince someone to take some action, to act. In a positive meaning it can include, for example, an encouragement given by a supporter to an athlete or a team, to put the highest effort at a crucial point of a match or contest, infusing him/them courage and a sense of belonging and trust in order to raise their sense of pride and dignity which helps the athlete to perform with more bravery. In a less positive meaning, the word is used to describe the action of a political leader when haranguing a crowd with rhetoric or inflammatory speeches to revolt or to pass from generic street protest to violence.

In both the situations illustrated above, the one who incites, by his action, tries to achieve something, to have something done that he, alone, would never be able or in the condition to achieve, for physical inadequacy (the sport event) or for limited number (the revolt is a group activity).

Moreover, condition for the incitement is the existence of a moral and psychological bond between the inciter and the incited, which gives the first the conviction (at the level of rational knowledge or by simple intuition) that his words will be followed. For this to happen, inciter and incited must share the same cultural background, have the same moral values or the same interests; they have to care for the same thing. Be it the flag of a football team, the honour of the family, or the crave for liberty, justice or, more prosaically, for better living conditions, if the incitement falls on deaf ears, if the sense of belonging to the same condition is missing, the incitement is void and ridiculous, like simple words uttered to a wall. For this reason, rousing speeches generally refer to rhetoric or, better, symbolic images, being directed primarily to the heart of the individual or of a crowd rather than to the rational part of it.

Also a legal definition of incitement includes these features, consisting of the exhortation or stimulus to commit a crime. Also in the criminal field, moral suasion is required, as well as identity of interests and of cultural background between the one who incites and the one who is incited.

So, Hysni Gashi is accused for inciting the son to commit the crimes specified in the count against Feriz Gashi.

To understand the charges some preliminary considerations are needed.

It would be naïve to think that the incitement can be proven only through testimony or documents. The incitement to commit a crime consists prevaingly in a exhortation which is never done in public. Unless it consists of an inflammatory

speech directed to a group of people (for example, to assault a police station or to assault the Parliament of a Country), it is hardly conceivable that the instigation is expressed in public: in the same way of the agreement to commit a crime, which is almost never disclosed to others (who plans his crimes in public?), the incitement passes directly from the one who expresses it to the one who receives it. Exactly because it goes from a higher moral authority to an inferior, from the inspirer to the executor, the first one will use caution in delivering the shameful order to the second one.

In all the occasions when the incitement is made by a single individual and is directed to a single individual, like in the case described in the charges, where the assumption is that Hysni Gashi has instigated his son Feriz Gashi, there is no practical possibility that a witness may be found to confirm that the order was given, nor that a document containing the murderous order is found. Nobody, we think, is so stupid and naïve, to allow others to know that he is planning a crime and, even worse, that he is doing it through a proxy, since he doesn't have the audacity to do it on his own.

So, what? Should a Court renounce, in the absence of a witness, to assess the existence of the instigation? Should the request of justice coming from the victims and from the society be frustrated, simply because nobody has heard the mortal order being uttered, which is obvious?

The Court thinks that the outcome would be an easy escape in the vast majority of cases, where the close relation between the inspirer and the inspired prevents the possibility to know the exact exchange of words between the two.

The result would not be acceptable: the same perverted rules (of cultural nature: excessive sense of honour, value of property above life, uncritical obedience to the head of family, duty to carry out whichever order is given, no matter if criminal) which permit the inspirer to impose to a subjected member of the family to commit a crime, would safeguard him (the inspirer) from criminal responsibility. Indeed, the said codes of conduct impose to the inferior also an immoral sense of loyalty that bounds the executor to sacrifice alone, to protect the father, to guarantee immunity to the one from whom the order originated.

It is not a matter of prejudice against the accused; it's only that a more sophisticated approach is required in the assessment of evidence. An approach that permits to understand the events not relying simply on the direct statement of the witness or on the reading of a document, but rather on the analysis of the whole evidentiary material put at the disposal of the Court.

In this line, the following elements of judgment are crucial:

- 1) The descriptions of the long judicial and extrajudicial *querelle* that juxtaposed the Gashi family on one side and the Bajrami-Ferati on the other, have generally excluded Feriz Gashi. With the exception of one single occasion (in the last few days preceding the fatal event), Feriz Gashi was not admitted to the meetings and

the bargaining that unsatisfactorily tried to solve the contrast in a peaceful way. Present to the meetings there may have been some elderly people (expression that has been repeatedly used), respected members of the community, as mediators, but not the son. The same Hysni, father of Feriz, has strived to stress, in the course of the examination on the 24th March, that his son didn't have any weigh in those discussions and that he (Hysni) had not involved him (Feriz) in the dispute, since he (Hysni) was the head of the family. If this is so (as the Court is inclined to believe) the reasons for the murderous action of Feriz are incomprehensible if it is not admitted that Hysni informed the son of the last developments, on the day before the critical day, or few days in advance, communicating him that, despite his (of Hysni) long efforts to retain the possession of the land and of the workshop, the building was going to be demolished and the land to be surrendered to the opposing group in the following day. But, if Feriz had been constantly excluded until then, if he had never been involved until the very last moment, why should he have stepped in at that point? There is not a story of progressive exasperation of Feriz, of desperation for the loss of his workshop or of depression for loosing the family face; nobody refers about indicators of previous involvement of the son in the affairs of the father, of psychological participation in the sufferance of the family for the eviction of the property. In these conditions, is it acceptable that he took the initiative without the explicit consent of his father? Feriz (following the traditional Albanian lore) had accepted until then to live in the same house of the father, accepting a diminished autonomy in all decision regarding his family and his duties towards the family. Is it credible that, on the eve of the critical day, he changes completely his personality and decides autonomously to fix a dispute that pertains to his father without the moral support of the one who was the supreme authority until then? At the end of the day, the fact that he doesn't have a record of previous convictions, the circumstance that until the day before, he was a simple man, a respected citizen with an humble occupation, and the day after he was a brutal killer, will tell something about his personality, the incapacity to resist a psychological pressure to which he was not accustomed, his inability to bring to rationality an overwhelming situation with which he was not able to cope.

- 2) The argument that precedes, leads to the next one.

It is an argument *a contrariis*, based on a logical consideration.

Starting from the observation that in any aspect of the life of the family, the father (Hysni) was the undisputable authority and that he was the centre of all interests and decisions, it is not possible to find a rational justification for what has happened if we mentally subtract the presence and the role of Hysni from the events (also from the last unfolding, i.e. the crime). Why to kill, for the interest of whom? Is it thinkable that Feriz spontaneously kills, on behalf of another? It's quite evident that Feriz killed to protect the interests and the honour of the family and, so, of the supreme representative of the family, his father. He didn't kill to protect his own interest (revenge for the demolition of his workshop), at least that was not the main reason. This process (in psychoanalytical terms, a *transfer*, in the classic Freudian interpretation) can not have taken place without the backing

and the instigation of Hysni, whose interests, in the end, Feriz wanted to please and to serve. If Hysni, his personality and his role in the family is subtracted and undervalued, the crime doesn't have a sufficient motive, a rational or emotional base.

- 3) Burim Bajrami, Hamdi Hasani and other witnesses have confirmed (and the same Hysni has not confuted the circumstance) the episode that took place in the clinic of Vezir Bajrami, in the course of which Hysni threatened the victim with the words (Burim Bajrami, hearing 12.2.09) : "I've opened two graves ready and waiting. One is for you and one is for someone from the Ferati family". Analogous threat against those who were menacing to execute the decision of the Municipal Court of Ferizaj, had be expressed by the same accused Hysni to Rifat Imeri when the last had visited his (of Hysni) workshop to have some piece of cloth adjusted. These threats were not generic expressions of disillusion or frustrations, rather they were manifestations of a deliberation already taken and, then, channeled through the son.
- 4) The cultural factor. This point has been discussed at length in the course of the closing statements and before them. The argument started by noticing that the traditional Kosovo family is based on an accentuated centralization of power in the hands of the head of the family. The argument has been developed considering that is implicit in the duties of the male offspring the full respect of the paternal authority and the protection of the interest and of the honour of the family which are vested in the father exclusively. From this derives, the argument further goes, that, by way of explicit orders o simply 'with the eyes', it is possible to issue orders which can not be contested. This is a feature of the Albanian society, it's been said, in Kosovo or in Albania, which guarantees adhesion to the values of the family while protecting the individual as member of the family. Through the absolute obedience to these rules, which do not require being explicit, the greatest strength of the family structure is achieved.

The same Hysni Gashi, in the course of his examination has made reference to this ancestral social structure, when he said that his (extended) family is made up of more than 160 members, stating that he would have been in the condition to rake money from all the most prominent members of it in order to buy the occupied buildings.

For the purpose of this decision, it is not necessary to elaborate on the issue. The risk of generic 'sociologism', of common places based more on impressions than on facts is always present in this kind of analysis. However, it is quite clear that the entire story, with its tragic epilogue, is put in a scenario which is strongly permeated of traditional values and sometimes from perverted interpretations of these values. Loyalty to the family is good, but uncritical adhesion to the values expressed by a single individual is not; respect for the father is important, but when the father brings the son in the domain of illegality and brutality, he shouldn't be followed; protection of possession is necessary, but can not be

extended to goods which have been just de facto occupied, when they are retained unlawfully and against the decision of the Courts.

In the end, this is a supporting element of the decision of the responsibility of Hysni Gashi, which finds anyway other, stronger reasons to be stated, as seen before.

Another point must be addressed, in relation to the responsibility of Hysni Gashi. His defence Counsel, Mr. Fazli Balaj, has criticized the count against his client as unproven, axiomatic, just a reflex of a cheap sociological interpretation, a *cliché* on Kosovo culture and local family structure.

To substantiate this conclusion, the defence Counsel said that it is sufficient to consider that the incitement, pursuant to the charge, should have consisted in a specific order to kill two individuals and to wound a number of others, with the specific preliminary indication of the name of those to kill and of those to wound. Such interpretation is rudimentary and banal and can not be permitted.

The order given to the son, to act and prevent at any cost the eviction of the land that the Gashi family had occupied until then and the subsequent demolition of the workshop which guaranteed the living of the family, was a prescription that, when given, could not detail punctually the number of people to wound and of those to kill. The incitement, in itself, is an exhortation, an invitation that does not need to be specific.

The modalities of execution of the order were left to the discretion of the executor provided that the result is achieved.

The mental state that support the incitement, like the *mens rea* of the crime charged to Feriz Gashi, is a *dolus indeterminatus*.

In this psychological state, the will embraces the entire action and, if also the final dimension and each consequence of the criminal action may not be foreseen from the onset of the action itself, nonetheless they are within the boundaries of the original plan. More precisely, the aim of the action of Feriz Gashi (and of his father Hysni) was primarily to stop the dispossession of the property occupied by them and the profanation of the honour of the family. But this had to be done at any cost, also if this meant to kill and injury many individuals. The will of Feriz had only *accepted* that the massacre be carried out for the sake of an higher value, which was to retain the possession of the goods. Also if acceptance is involved, we are still in the domain of the intention, of a will that has weighted all factors, positive and negative, but has consequently taken a final determination to act.

This is true also for the incitement, which could not (how would it be possible?) foresee in advance the presence and the identity of numerous members of the Bajrami family nor outcome of the action of the son. Nonetheless, imposing to the son, to resist the demolition of the buildings where the workshop of the family was located, Hysni understood the consequences which would have followed and accepted them.

In conclusion, a mental state, a *mens rea* almost identical to Feriz' one.

Calculation of punishment:

In the determination of the punishment the Court will have to respect the limits provided for by law for the criminal offence, taking in consideration mitigating and aggravating circumstances as well as other criteria, e.g. the purpose of punishment, the degree of criminal liability, the motives for the commission of the crime, the degree of danger or the severity of the injuries caused, the circumstances in which the act was committed, the past conduct of the perpetrator, and, in the end, the personal circumstances of the perpetrator and his or her behaviour after committing a criminal offence. Eventually, the punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender as foreseen by article 64 paragraph 1 of the Criminal Code of Kosovo (CCK).

Feriz Gashi is responsible for two crimes, a multiple aggravated murder and unlawful possession of weapon.

For the first violation, the aggravated murder pursuant to article 147 item 4 and 11 of the CCK, the law foresees a punishment of imprisonment of at least ten (10) years or long term imprisonment while, article 37 paragraph 2 of the CCK, in turn, states that long term imprisonment means imprisonment for a term of twenty one to forty years.

For the second crime, article 328, par. 2 of CCK foresees a punishment of a fine up to 7.500 Euro or the imprisonment from one to eight years.

Starting from the more severe of the two violations committed by Feriz Gashi, the Court observes that the aggregated murders and injuries caused by him are particularly odious, heinous and vile.

Odious, because the modalities of the commission of the crime are disproportionate in relation to the interest that Feriz Gashi wanted to protect. The weapons and ammunitions that he prepared and brought with him into the workshop Cami was enough for a carnage of massive proportion and, indeed, only for lucky circumstances the shooting of 57 bullets with the automatic weapon from just few meters from the target (Burim and Kadri Bajrami were less than 10 meters away) has not caused more casualties.

Heinous, because Feriz Gashi showed total disrespect for other people's lives and for the physical integrity of collateral victims whom didn't have anything to do with the controversy and were just passers-by or were simply at the window (like the young Albiona Jashari) or had even been assisting in the mediation between the families (like Aziz Xhelili).

Vile, because the attack was unexpected, at least in the proportions and for the kind of weaponry used by the attacker (an automatic rifle and three hand grenades) against an undetermined group of people.

The Panel illustrated before the psychological background which compelled Feriz to act: a son living under the roof of the father, he was induced to act under the pressure of his father's suasion, to respect values and fulfil moral obligations that were passed to him by the father. Distorted values, must be added, or at least interpreted in a distorted manner, an ambit where the protection of property weighs more than human life and the integrity of the name and the face of the family can lead to the infringement of the law.

The Prosecutor has shown to the Court that Hysni and Feriz are united in the criminal enterprise by force of a will which is unique, an intentionality that passes from the first to the second transmitting to the executor of the crime (Feriz) the passions, frustrations, expectations of the inciter. It's something that glues the two family members in the same manner in which the values that are reflected in the criminal action glue the Gashi family.

The picture represented by the Prosecutor is reliable (as the Court has shown to believe) and representation must be brought to its natural consequences, by stating that this psychological element of unification between the father and the son, by which the second is the executor and the first is the mind behind the action, imposes the division of responsibility and not its multiplication. In other words, two people were involved, because they shared the same will, not like two individuals who decide to join their forces in the commission of a joint criminal enterprise, but rather, as a single individual, acting after taking the deliberation to kill. To Hysni the deliberation pertains, to Feriz the execution.

The argument that precede cannot bring to an automatic discount of the imprisonment, but is a circumstance that will be taken in consideration in the determination of the sentencing, which help the Court to put the criminal act in the proper perspective. As said before, Feriz Gashi doesn't have a record of previous convictions; until the day before, he was a simple man, a respected citizen with an humble occupation while the day after he was a brutal killer. This unexpected explosion of violence does not 'belong' to Feriz in the sense that in his previous live doesn't have precursors, signs of a violent nature, indicators of a boiling personality, prone to excesses and attracted by brutality.

The sentencing therefore must take all this in consideration and cannot be simplistically attracted in the heaviest part of the spectrum (close to the maximum of 40 years).

For the violation foreseen in article 328 of the Criminal Code, the additional term of one year in jail is adequate and is aggregated to the other term pursuant to article 71

paragraph 1 and 2 item 2 of the Criminal Code of Kosovo so to determine the final imprisonment of 25 years and 6 months.

In deciding on Hysni Gashi's punishment, the Court is bound by article 24 and 147 item 4 and 11 of the CCK that imposes a punishment of imprisonment of at least ten (10) years or of long term imprisonment. Article 37 paragraph 2 of the CCK foresees that the punishment of long term imprisonment is imprisonment for a term of twenty one (21) to forty (40) years.

Pursuant to article 38 and article 24 of CCK in connection with Article 147 paragraph 1 items 4 and 11 of CCK Hysni Gashi is sentenced to imprisonment of 20 (twenty) years, taking into account the role of inciter/instigator and his old age.

The time spent by the accused in detention on remand shall be included in the amount of the punishment.

Property claim

The claims filed by the injured parties find wide confirmation in the statements given by the witnesses and in the documents of the dossier. The nature and severity of the injuries are confirmed by the report of the expert witness and by his testimony in Court in the course of the hearing.

For this reason, the accused, cumulatively and jointly, shall compensate the injured parties Gojart Bajrami, Nazif Xhelili, Burim Bajrami, Kadri Bajrami, Besnik Ferati, Rifat Imeri, Hamdi Hasani, Xhemajl Smajli, Albiona Jashari, Fitim Ferati, for the damages caused.

However, the data provided in the criminal proceedings does not afford a reliable basis for either a complete or partial award.

As foreseen in article 112 (2) of the KCCP, the parties will have to file a civil claim in order to have a final assessment of the amount of the damages.

Confiscation

Pursuant to article 60 of the CCP and 489 of the KCCP the automatic gun Type 68, with serial number 10232985, caliber 7. 62mm x 39 mm is confiscated.

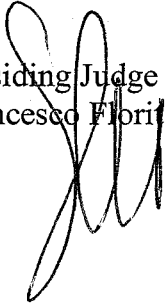
Costs of the criminal proceedings

Pursuant to Articles 102, Paragraphs 1 and 3, and 391, Paragraph 1 item 6), of the KCCP, the defendants are jointly liable for the costs of the criminal proceeding and must reimburse them according to a list of the costs which will be determined in due time.

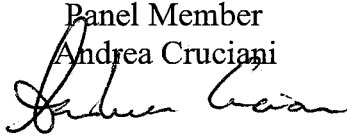
Pursuant to Article 100, Paragraph 2, of the KCCP, since the data of the amount of the costs is lacking, a separate ruling on the amount of the costs shall be rendered.

26th of March 2009

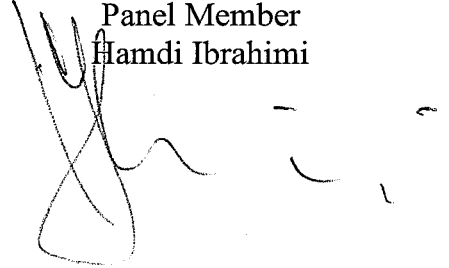
Presiding Judge
Francesco Florit



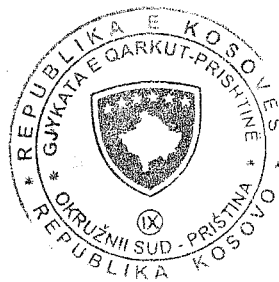
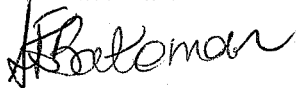
Panel Member
Andrea Cruciani



Panel Member
Hamdi Ibrahim



Recording Clerk
Liz Bateman



LEGAL REMEDY:

The parties have the right to appeal this verdict within fifteen (15) days of the day the copy of the judgment has been served pursuant to Article 398 Paragraph 1 of the Kosovo Criminal Procedure Code (KCPC) to the Supreme Court of Kosovo through the District Court of Prishtinë/Priština.