

MUNICIPAL COURT OF PRISTINA

P. No. 514/09

IN THE NAME OF THE PEOPLE

The Municipal Court of Prishtina, in the trial panel composed of:

- 1) EULEX Judge, Mr. Francesco Florit, as presiding Judge,
- 2) EULEX Judge, Mr. Ferdinando Buatier de Mongeot, as panel member,
- 3) Local Judge, Ms. Shadije Gërguri, as panel member,

assisted by the court recorder undersigned below, in the criminal case against:

Tomë Gashi:

For committing the criminal offence of: Attacking official person performing official duties pursuant to the Art.317, par. 2 in relation to para 1 and para 4 of the CCK;

Avni Zogiani and Lorik Pustina:

For committing the criminal offence of: Obstructing official person performing official duties, pursuant to the Art. 316 par. 3 in conjunction with par. 1 and 5 and Art. 23 of the CCK; and

Bekim Mengjiqi:

For committing the criminal offence of: Light bodily harm, pursuant to the Art. 153, par.2 in conjunction with par. 1 item (iii) of the CCK

After having held the main trial, in the presence of the Public Prosecutor, the accused, and the injured parties on 14, 25, 27 and 28 of May 2010;

Taking the in consideration the amendment of the indictment made by the Prosecutor in the course of the session 28 May 2010;

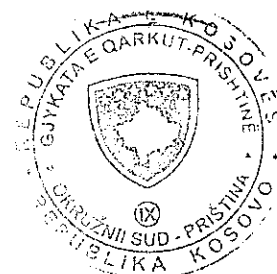
after the panel deliberation held on 28 of May 2010, based on the Article 390 and 391 KCCP;

pronounces the following:

JUDGMENT

Tomë Gashi is found guilty for the criminal act of:

Attacking official person performing official duties pursuant to the Art.317, par. 2 in relation to para 1 of the Criminal Code of Kosovo (CCK), with the exclusion of the circumstance of para 4 of the same article;



Lorik Pustina is found guilty for the criminal act of:

Obstructing official person performing official duties, pursuant to the Art. 316 par. 3 in conjunction with par. 1 CCK, with the exclusion of the circumstance of para 5 of the same article;

Bekim Mengjiqi is found guilty for the criminal act of:

Light Bodily Harm, as per Article 153 paragraph 1, Item 4, of the PCCK, with exclusion of the circumstance of para 2 of the same article.

Specifically

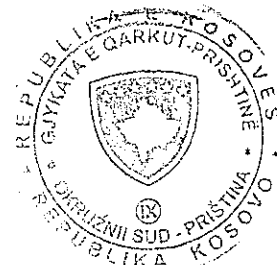
The Defendant Tome Gashi

1. On 26.10.2006, round 03:30 in Prishtinë/Priština, at "Dardania" Neighbourhood, "Bill Clinton" Street, at the hotel-bar "Route 66", he attacked a KPS officer, the injured person Lulzim Borovci, while the latter was performing his official duties of maintaining public security, in such a manner that, after the defendants Tome Gashi, Avni Zogiani and Lorik Pustina entered the above-mentioned bar and due to their misconduct towards other clients present in the bar, initially an altercation and then a physical quarrel started among them. In that event the police intervened and while they were attempting to separate and stop the above-mentioned, the defendant Tome Gashi reacted in a rude manner shouting swear, threatening and insulting words such as, "Fuck police officers' mothers, you are mean police officers and thieves, I shall kill you all", and he attacked the police officer/injured person Lulzim Borovci physically, grasped the upper part of his uniform and hit him with his right hand in the face near the left eye, and the defendant Tome resisted the handcuffing by clutching and pushing the officers with his hands, and during these acts they fell on the ground, as a result of which the above-mentioned injured person suffered injuries, such as a hematoma on the left arm, contusion in the head and left knee, qualified as light bodily injuries resulting in a temporary impairment of health;

- thereby he committed the criminal offense of Attacking Official Persons Performing Official Duties, as per Article 317, Paragraph 2, read together with Paragraph 1, of the PCCK.

The defendant Lorik Pustina

2. On the same date, time and location as described under Paragraph 1 of the enacting clause of the present Indictment, during the KPS Police officers' interviews on the



quarrel described under Paragraph 1, he obstructed the KPS police officers/injured persons Srg. Ali Sejdiu, police officers Mustafe Tahiraj, Ajet Ajeti, Lulzim Borovci and Labinot Ramadani, in performing their official duties of maintaining public security, in such a manner that, when he was stopped by the police, the defendant Lorik Pustina disobeyed the police officers' orders, insulted, swore and threatened the above-mentioned police officers verbally, and, while the police were trying to handcuff him, he pushed and clutched the latter by their hands and clothes, and afterwards he was handcuffed by the police;

- thereby he committed the criminal offense of Obstructing Official Persons in Performing Official Duties, as per Article 316, Paragraph 3, read together with Paragraph 1, and Article 23 of the PCCK.

The defendant Bekim Mengjiqi

3. On the same date, time and location as described under Paragraph 1 of the enacting clause of the present Indictment, the defendant Bekim Mengjiqi, while serving at "Route 66" Coffee-bar, during the quarrel caused by the defendants Tome Gashi, Avni Zogiani and Lorik Pustina against the clients in the coffee-bar as described in the present enacting clause, intervened by way of intermediation, but at one point, as he was threatened by the defendant Avni, who attempted to hit him, the defendant in question hit the defendant Avni with an ashtray, a tool capable of causing a bodily injury, on the back part of the head, thereby causing the latter a hematoma on the left neck area, and a scratch in the left forearm, which are qualified as light bodily injuries resulting in a temporary impairment of health;

- thereby he committed the criminal offense of Light Bodily Harm, as per Article 153 Paragraph 1, Item 4, of the PCCK.

Based on article 390, n.3 KCCP,

Avni Zogiani

In relation to the criminal acts listed above is found not guilty and is therefore acquitted.

For the above mentioned reasons the Panel issues the following:

SENTENCE

1. Tomë Gashi

Pursuant to article 317, par. 2 of the Criminal Code of Kosovo is sentenced to imprisonment of 6 months;

2. Lorik Pustina



Pursuant to article 316, par. 3 of the Criminal Code of Kosovo is sentenced to imprisonment of 3 months;

3. Bekim Mengjiqi

Pursuant to article 153, par. 1 n.4) of the Criminal Code of Kosovo is sentenced to the fine of euro 100.00;

Based on article 43 and 44 KCCP the sentences of imprisonment above imposed are suspended. The Panel orders that the punishments shall not be executed if the convicted Tomë Gashi and Lorik Pustina do not commit another criminal offence for the period of one year.

COST

Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) the convicted persons Tomë Gashi and Lorik Pustina shall pay the costs of the proceedings determined in 50.00 euro each while Bekim Mengjiqi will pay the costs determined in 30.00 euro.

REASONING

Procedural History

On 19 January 2007 the Public Prosecutor Imer Beka filed an indictment charging the four accused with different charges, namely attack and obstruction to official person performing an official duty and light bodily harm respectively.

The indictment was confirmed by the decision of judge Allten Murseli on 10 March 2008, after hearing the prosecutor, the accused and the defence counsels of the accused in the course of the hearing of confirmation of the indictment.

With request dated 19 March 2009, the President of the Municipal Court of Pristina, Mr. Nuhi Uka asked the President of the District Court of Pristina that the trial against the accused be transferred to a different Court. The request was based on the argument that one of the accused, Mr. Tome Gashi once was a judge of the Municipal Court and is currently a lawyer with a daily presence in the same Court, for his work. To avoid any risk of bias, it was suggested in the request, the change of venue of the trial would be appropriate.

With decision dated 27 April 2009, the President of the District Court of Pristina, Mr. Anton Nokaj delegated the Municipal Court of Ferizaj to try the case.

On 26 June 2010, the President of the Municipal Court of Ferizaj, Mr. Rifat Abdullahi requested the President of the Assembly of EULEX Judges to appoint EULEX judges to the case, stating that, for the position of Mr. Tome Gashi as advisor to the office of the



Primi Minister, the proper administration of justice suggested that the case was tried by international judges.

With decision dated 17 September 2009, following the hearing foreseen by article 4 of the Law on the jurisdiction, case allocation and case selection of EULEX judges and prosecutors in Kosovo (L. N. 03/ L-053), the President of the Assembly of EULEX judges assigned the case to a panel composed of EULEX judges.

The trial against the accused started on 14 May 2010. After the initial formalities and the reading of the indictment by the prosecutor, the examination of the witnesses started.

The trial was adjourned to 25, 27 and 28 of May 2010 for the further examination of the witnesses and of the accused.

Before the beginning of the final speech the Prosecutor asked the Court the permission to amend the indictment in the following terms: *"I would like to make an amendment for the qualification of the criminal offence Attacking Official Persons Performing Official Duties as per Article 317 paragraph 2 in relation with paragraph 1 of the PCCK. I would like to add paragraph 4. With regards to the criminal offence obstructing an official person whilst performing official duties, Article 316 paragraph 3 in connection with paragraph 1, I would like to add paragraph 5"*.

The Court eventually heard the final speeches of the Public Prosecutor, the Defence Counsels and the accused and announced the judgment in the course of the last session.

Legal and factual findings.

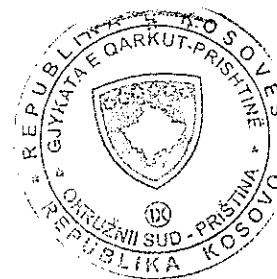
The indictment, in its original form, before the amendment requested and allowed at the last hearing has found substantial confirmation in the statements of the witnesses and in the documentation of the dossier.

With the exclusion of Avni Zogiani, who was found not guilty of the commission of the crime of obstruction of official person performing an official duty (art.316 CCK), the charges against the remaining accused are grounded.

The episode in which the four accused have been involved and that has been correctly described and qualified in the original indictment can be considered as a minor disturbance caused by specific circumstance, without any lasting consequence. An episode, as described in the indictment, which lasted less than one hour and that, as acknowledged by the same accused Gashi¹ consisted of few minutes of foolishness. *Semel in anno licet insanire.*

In essence, of the episode, two representations have been given in the course of the trial. On one side, the police officers who arrived at the crime scene declared that they were assaulted by Tome Gashi while they were accompanying Lorik Pustina and Avni Zogiani

¹ Minutes of hearing 25 May 2010, pg.



to the police station, while the accused Tome Gashi and Lorik Pustina asserted that there was no aggression at all by Tome Gashi and that, on the contrary, it was the police to overreact and to use an excessive force against Tome Gashi, when the latter asked the reason why Lorik Pustina was being accompanied to the police station.

Let's proceed with order and let us consider the development of the facts as described by the witnesses and the same accused.

It is uncontested that in the early hours of the 26 October 2006 Tome Gashi, Lorik Pustina and Avni Zogiani were at the restaurant Route 66 in Dardania. It is uncontested that Bekim Mengjiqi was in the restaurant as well, as a waiter.

In the statements² of the persons present in the restaurant (Dren Hajzeri, Veton Halili, Petrit Dushi and Kastriot Berisha) it is clearly described the disturbing and arrogant behaviour of Tome Gashi, Lorik Pustina and Avni Zogiani who spoke at loud voice and with improper language, causing embarrassment and annoying the other clients of the restaurant. The three (who were accompanied by an American Lawyer, Mr. Gregory Guy Smith) were shouting and speaking vulgarities and bad words; when requested by another client of the restaurant to behave properly, Avni Zogiani overreacted. At that point, the situation went out of control and a confrontation started amongst the client and Avni Zogiani, with the intervention of one or more waiters of the restaurant who tried to separate the contenders.

In this contest, Bekim Mengjiqi hit Avni Zogiani with an ashtray. The accused eventually confessed his action in the course of his examination³, justifying it with the need to resist to the aggression of the accused Zogiani. The closeness of Bekim to the scene and his handling of an ashtray are mentioned in the statement of Kastriot Berisha to the prosecutor on 1 November 2006.

What followed (the reaction of Avni Zogiani, the flight of Bekim Mengjici, the arrival of the police, the search and discover of the escapee in the back of the restaurant) is not contested as well.

After the arrival of the police the situation further escalated. Based on the converging declarations of the witnesses listed above, Avni Zogiani and Tome Gashi insisted that the police chased the person that had hit Avni Zogiani, with arrogant and provocative words (witness Veton Halili, statement 2 November 2006 "Tome Gashi said "You know who I am...?"; Petrit Dushi, statement 1 November 2006: "Tome Gashi ... left us and started to quarrel with the police, more arrogant in the beginning was Avni Zogiani who addressed us workers of the restaurant with the words: "You are dead"). The incapacity of the two accused (Gashi and Zogiani) to control themselves is so established, since the first moment, after the arrival of the police. This state of excitement and irritation is confirmed also by the testimony all the other witnesses of the trial and by the statements (read in

² Statements which can be used in evidence after the decision taken by the Panel in the course of the hearing 27 May 2010 ex art.368.1 n.3).

³ Hearing 27 May 2010, pg.17.



Court ex art.368.1, n.3 KCCP) given to the Prosecutor and to the Police by Dren Hajzeri, Veton Halili, Petrit Dushi and Kastriot Berisha.

What was the cause of the state of exaggerated animation and animosity affecting the three accused (Lorik Pustina, Tome Gashi and Avni Zogiani)? No doubt that the assault on Avni Zogiani contributed to cause it. But there was more. The Police officers who intervened indicate that the three had assumed alcohol and also if one of them uses words of caution (Lulzim Borovci, minutes of hearing 14 May 2010), others do not hesitate to state so in relation to Lorik Pustina and Tome Gashi (Labinot Ramadani, page 16; Cajup Selaci, pg.29 and 31). On the other hand, that Lorik Pustina, was not sober is confirmed by the same accused in his declaration given to the police at 4.37 a.m. of 26 October 2006, where he expresses his desire to give his version about the episode in another occasion, being too tired and under the effect of alcohol to do it few hours after the event.

But there is something more. To explain the aggressive behaviour of Tome Gashi contributes also his character, i.e. the specific psychological profile of the accused. The lawyer showed a sort of incapacity to control himself if under pressure, a feature that has emerged also in the course of the trial, when the Presiding judge had repeatedly⁴ to invite him to behave properly and to control himself. A tendency to assume a position of dominion, also when this is totally inappropriate and out of place; an excessive assertiveness that risks being counterproductive. A feature of Gashi's personality that is reflected in the expressions used by the lawyer against the police forces in the early morning of the 26 October 2006. Expressions like "you do not know whom I am", "I am Ramush's (i.e. Haradinaj's) man", "I will come with the Kalashnikov, I will put bombs in the police station", "what kind of policemen you are, you should go and sell jeans in Bulgaria" express a mix of bullying, arrogance, insolence and defiance that hardly goes along well with Tome Gashi's profession. A behaviour that the accused Tome Gashi repeated later in the hospital (cfr. statement of Selman Rexhepi, dated 1 November 2006, pg.2; and witness Ali Sejdiu, hearing 14 May 2010, pg.26) and at the police station.

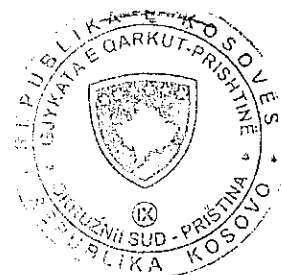
So, it is established that also after the arrival of the police the situation was tense and that the intervention of the officials was not enough to calm it down.

What happened then?

Here the accounts diverge: on one side there are the police officers who report the aggression of Tome Gashi and the resistance of the other two; on the other side, there are the accused' versions who blame the police's excessive use of force and the recourse to violence by the police officers (Lulzim Borovci and Ajet Ajeti, in particular) in the course of the arrest.

In conclusion, the behaviour of Avni Zogiani, as described by the officers, can not amount to the resistance described in the indictment: true, he shouted and cursed the officers from the start, asking them why they were not chasing the person that had hit him with the ashtray and had fled through the backdoor (Dren Hajzeri's, Petrit Dushi's

⁴ Hearing 27 May 2010, pg.9.



testimony) but then, when he understood that the suspect had already been accompanied to the police station south, he followed the police officers without resistance⁵

The behaviour of Lorik Pustina can not be described in the same terms. His opposition to be accompanied to the Police station is confirmed by Lulzim Borovci⁶, Labinot Ramadani⁷. He opposed resistance both when Avni Zogiani was accompanied to the police station and when Tome Gashi started the quarrel against the police officers, so that it was necessary to handcuff him.

On Tome Gashi, little remains to be said. All the police officers heard in the course of the trial as well as the other witnesses heard in the course of the investigation describe the futile aggressiveness of the accused towards the police and his refusal to the execution of the official duties. From this escalating verbal violence, the accused passed to physical violence when he realized that all his attempts to stop the transport of Lorik Pustina to the police station were vain.

Tome Gashi has asserted that he was the victim of the police officers. Now, that were the police officers to assault Tome Gashi and not the other way round, is not credible. It's a senseless version that must be regarded as a simple attempt to avoid criminal liability.

Why should have they? The police officers were in control of the situation by then, they were in much larger number than the assailant, they did not have any personal reason to assault Tome Gashi. In the course of the trial Tome Gashi tried to blame the police officers in various manner: of witness Ali Sejdiu, he contested the credibility on the basis of a long-gone episode⁸ negated by the witness; he alleged that the police officers assaulted him because they belonged to a group ("FURK"?) and one in particular because he was from Drenica and against Haradinaj....

Very confused allegations, that have no grounds and no credibility, if not else because all the police officers have negated knowing Tome Gashi before the episode of 26 October had occurred.

⁵ Labinot Ramadani, hearing 14 May 2010, pg.16 : "There was shouting; a young man was looking for the persons who assaulted him and didn't care if the police were there or not. I told him the person who assaulted him was in the police station; so, on the way to the police station, he came without problems and without hand cuffs"

Mustafe Tahiraj, pg.21 : "Presiding Judge: ... the behaviour of Avni Zogiani? Mustafe Tahiraj: At that moment he was aggressive".
Ali Sejdiu, pg.26: "I cannot remember the details. I know he didn't resist. Had he done so we would have to handcuff him. We accompanied him; two of us, a police officer and me escorted him all the way to the police station. I would conditionally say he was a bit aggressive as he was assaulted".

⁶ Lulzim Borovci, pg.8: I know that Lorik Pustina presented an obstacle to the arrest or the escort of Avni Zogiani, he didn't let the official person take hold of Avni Zogiani and escort him to the police station. That is when my supervisor required my assistance as he wasn't being allowed to do his duties. That is why I was isolated with Lorik Pustina when I encountered the other person".

⁷Labinot Ramadani, pg.14: "There was chaos between the remaining colleagues and Tome Gashi and Lorik Pustina. There I was helped by colleague from the traffic unit and together we handcuffed Lorik who later hesitated being escorted to the police station".

⁸ Minutes 14 May 2010, pg.27: **Tome Gashi:** Have I tried you for excessive misconduct abuse of powers as police officer as a Yugoslav police officer in the 90s? **Ali Sejdiu:** Neither yourself or anyone has tried me on any misconduct, ever. No file has ever been opened on me.



Based on the extension of the scratches on his face (as documented in the picture in the file), the accused Gashi has tried to argue that such kind of physical damage can not be the produced simply by falling on the pavement and that a further action must have been the cause of it. This, he said, confutes the version of the police officers, that he was not maltreated when laying on the ground and confirms his version, that when on the ground, a police officer stumped on his face before handcuffing him.

There is no element, beyond this argument and the deposition of Tome Gashi and Lorik Pustina, which corroborate the version of the lawyer. What's more, if also it were true (which is not admitted by the Panel, since there is not enough evidence, as said) it would be irrelevant to establish self defence or a defence based on the provisions of the last paragraphs of articles 316 and 317 CCP, as requested by the prosecutor with the amendment of the indictment (minutes of the last hearing, 28 May 2010, initial part).

However, necessary defence (art.8 CCP) and the waiver of punishment foreseen by article 316.5 CCP require that the action of the accused (which constitute the defence foreseen by art.8 or the offence foreseen by article 316.5 CCP) are made to avert and imminent attack (art.8) or to respond to a provocation (art.316.5), i.e. when the unlawful aggression on the accused life (necessary defence) or honour (art.316.5) is impending or has already been committed.

In both occurrences, the reaction of the accused becomes justified by the assault that has preceded, so that it would be unnatural and would be perceived as unfair the punishment.

But in the current case, if also we accepted Gashi's version, the action which allegedly caused the wounds on the accused' face was subsequent to the aggression of Tome Gashi and did not precede it. For this reason, the mechanism of necessary defence or the waiver of punishment can not play their respective role.

For the above mentioned reasons, the accused Tome Gashi, Lorik Pustina and Bekim Mengjiqi are found guilty for the crimes of which they have been charged in the indictment, while Avni Zogiani is found not guilty.

Few words on the punishment.

As seen, Tome Gashi is responsible for the commission of the attack on an official person performing an official duty. More precisely, paragraph 2 of article 317 CCK is in question, since the offence has resulted in light bodily injury to the policed officer Lulzim Borovci, as required by the norm and proved by the medical documentation in the *dossier* and by the testimonies of the victim himself and of his colleagues.

The minimum punishment foreseen by the law is six months. For the fortuity of the event and the specificity of the circumstances which have lead to it, the punishment imposed on the accused Tome Gashi is limited to the minimum. On the other hand, there are no



reasons to recognize diminishing circumstances: still in Court, the accused showed no regret for what he did, still convinced to be on the right side.

Lorik Pustina is responsible for obstructing an official person performing an official duty. More precisely, paragraph 3 of article 316 CCK is in question, since the offence was committed against an official performing his duties of maintaining public order, as required by the norm and implicit in the circumstances of the event.

The minimum punishment foreseen by the law is three months. For the fortuity of the event and the specificity of the circumstances which have lead to it, the punishment imposed on the accused Lorik Pustina is limited to the minimum. On the other hand, there are no reasons to recognize diminishing circumstances: as in the case of Tome Gashi, the accused showed no regret for what he did, still convinced to be on the right side.

Based on article 43 and 44 CCK, the sentences of imprisonment above imposed are suspended. The Panel orders that the punishments shall not be executed if the convicted Tomë Gashi and Lorik Pustina do not commit another criminal offence for the period of one year.

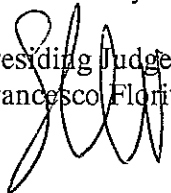
Bekim Mengjiqi has inflicted a light bodily harm on Avni Zogiani, in the terms of article 153.1, n.4 CCK. A fine of Euro 100,00 is an appropriate punishment for the light violation incurred.

COST

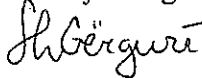
Pursuant to Article 102 paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP) the convicted persons Tomë Gashi and Lorik Pustina shall pay the costs of the proceedings determined in 50.00 euro each while Bekim Mengjiqi will pay the costs determined in 30.00 euro.

Date: 28 May 2010

Presiding Judge
Francesco Florit



Panel Member
Shadije Gërguri



Panel Member
Ferdinando Buatier de Mongeot



The court recorder
Eriona Bitri-Brading

