SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kž. No. 140/2011
Prishtinë/Priština
16 August 2011

[EDITED VERSION FOR PUBLISHING]

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 16 August 2011 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judges Francesco Florit and Martti Harsia, and Supreme Court Judges Marije Ademi and Emine Mustafa as panel members,

With Svetoslava Savova and Joseph Hollerhead as Court Recorder,

In the presence of the

International Public Prosecutor Gabriele Walentich, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsel Attorney-at-Law Ljubomir Pantovic for the defendant Vukmir Cvetkovic,

In the criminal case number AP-KŽ. No. 140/2011 against the defendant:

Vukmir CVETKOVIĆ, born on 12 August 1969 in Pejë/Peć, father's name , mother's maiden name , Kosovo Serb, last residence: Street , Klinë/Klina, former policeman, married, father of one child, economic conditions poor, in detention since 10 March 2009 (in Kosovo since 13 July 2010), currently held in the Detention Centre Mitrovicë/Mitrovica,;

In accordance with the Verdict of the 1st Instance District Court of Pejë/Peć in the case no. P. Nr. 285/10 dated 09 November 2011 and registered with the Registry of the District Court of Pejë/Peć on the same day, **the defendant was found guilty of the following criminal offenses:**

[i] On the 27th or 28th of March 1999, the defendant together with another individual, both wearing uniform and both armed, forced S and his family to leave their house in Kline/Klina and go to Albania;

[ii] On 27th or 28th of March 1999, the defendant wearing a uniform set on fire at least two houses in Kline/Klina – the house of N and the house of Z and K – by using a flame-thrower.

Therefore, according to the 1st Instance Verdict, the defendant has committed the criminal offence of War Crimes contrary to Articles 22 and 142 of the Criminal Code of the Socialist Federal republic of Yugoslavia (CC SFRY), in violation of Article 3 common to the four Geneva Conventions of 12 August 1949, and Article 1 and 17 of Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions,

And was convicted:

To seven years of imprisonment, thus deducting the time already spent in arrest and detention.

The Defense Counsel of the accused timely filed an appeal dated 25 February 2011 against the Verdict. It was asserted that the Verdict contains essential violations of the criminal procedure and erroneous and incomplete establishment of the factual state and as a consequence of both alleged reasons it was claimed that also the decision on the sentence and the expenses of the criminal procedure would not be correct.

The Legal Representative of the injured party Z , Av. Zeqir Berdyna from Peje/Pec replied to the appeal of the Defense Counsel on 15 March 2011 and proposed to reject the appeal as ungrounded and therefore to confirm the 1st Instance Judgment.

The OSPK, with a response dated 03 June 2011 and registered with the Registry of the Supreme Court of Kosovo the same day objected the appeal partially as being without merit and unfounded. The Public Prosecutor concluded to partially grant the appeal and to modify the enacting clause of the contested judgment

a) by modifying the legal designation of the committed offence as a criminal offence of "War Crimes against the Civilian Population"
b) by clarifying with reference to the respective qualification of the criminal offence as to Article 142 paragraph 1 and 22 of the FRY, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949; and Articles 1 and 17 of Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions
c) as to the elements of a criminal offence of War Crimes against the Civilian Population of Article 142agraph 1 of the FRY, in violation of Article 3 common to the four Geneva Conventions of 12 August 1949; and Articles 1 and 17 of Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions;

but to reject the other challenges raised in the remaining parts of the appeal, including the request to release the defendant.

Based on the written Verdict in case P, Nr. 285/10 of the District Court of Pejë/Peć dated 09 November 2011 (filed with the Registry of that Court on the same day), the submitted written appeal of the Defense Counsel on behalf of the defendant, the statements of the Legal representative of the injured party and the opinion of the OSPK as well as the relevant file records and the oral submissions of the parties during the hearing session on 24 November 2009, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 16 August 2011, hereby issues the following:

VERDICT

The appeal filed by the Defense Counsel Ljubomir Pantović on behalf of the defendant is hereby partially granted and the appealed verdict is modified as follows:

The criminal offence committed by the defendant is qualified as War Crimes against the Civilian Population pursuant to Article 142 paragraph 1 of the Criminal Code of Yugoslavia and in violation of Article 3 of the Fourth Geneva Convention of 12 August 1949 and Articles 1 and 17 of the Second Additional Protocol of 8 June 1977 to the 1949 Geneva Conventions.

As to the remaining parts, the appeal is rejected as ungrounded and the first instance judgment is upheld.

REASONING

Procedural History

1. On the 27th or 28th of March 1999, several individuals, all wearing Serbian uniform and being armed, forced S and his family to leave their house in Kline/Klina and go to Albania. Moreover, an individual wearing a Serbian uniform set on fire at least two houses in Kline/Klina – the house of N and the house of Z and K – by using a flame-thrower.

2. The witnesses S and M as well as E and P reported to UNMIK Police in 2005 that in both cases it was the defendant Vukmir CVETKOVIC who has committed the respective criminal offences in person. The witnesses stated that they have not reported earlier, since they have not seen the defendant around anymore until in 2005 they realized that he was back to Klinë/Klina, this time wearing a KPS police uniform.

A ruling on initiation of investigation was filed by the Public Prosecutor on 17 September 2007 against Vukmir CVETKOVIC and extended until 17 September 2008.

On 04 July 2008, the District Court of Pejë/Peć issued an Order for Arrest against the defendant.

On 08 July 2008 the Office of the International Public Prosecutor informed the District Court of Pejë/Peć that Vukmir CVETKOVIC had been located in Norway. Therefore, on 15 July 2008, the abovementioned Court issued a domestic wanted notice against him, and addressed the competent authority with a request to issue an international wanted notice.

On 21 July 2008, since the defendant was at large, the Public Prosecutor decided to suspend the investigation.

On 26 November 2008, the international wanted notice was issued and a red notice distributed by Interpol.

On 13 July 2010, Vukmir CVETKOVIC was extradited to Kosovo and arrested. A detention hearing was held at the District Court of Pejë/Peć on 14 July 2010. A one-month detention was decided, which the latter was extended by a three-judge panel on 12 August 2010 until 13 October 2010.

The Office of the Special Prosecutor of Kosovo (SPRK) filed an Indictment on 08 September 2010, charging Vukmir CVETKOVIC for War Crimes against Civilian Population in violation of Articles 22 and 142 of the CC SFRY and requested detention to be extended. Therefore, pursuant to Article 360 paragraph 5 of the Kosovo Criminal Code of Procedure (KCCP) a three-judge panel extended by decision dated 10 September 2010 detention on remand until 10 November 2010.

On 21 September 2010, a confirmation hearing was held in the presence of the defendant, his Defense Counsel and the Public Prosecutor. The Confirmation Judge ruled that the Indictment was in compliance with the requirements of the law and therefore was confirmed.

On 26 October 2010, the Main Trial was opened and commenced through four sessions on 26, 27, and 28 October and 09 November 2010, when the Judgment was announced. Except from a site inspection on 28 October 2010, regarding to which h had waived his right to be present, the defendant was continuously present. The defense Counsel of the

defendant, the EULEX Public Prosecutor, the injured parties M S , Z and K as well as the Legal Representative of the injured party Z have been present in all sessions.

The 1st Instance Court in the course of the Main Trial has heard the witnesses M (on 26 October 2010 and during the site inspection on 28 October 2010), S (on 26 October 2010), E (on 27 October 2010 and during the site inspection on 28 October 2010) and P on 27 October 2010 and during the site inspection on 28 October 2010). Moreover, police reports as well as pictures of the respective burnt houses and of the mills door taken by the Public Prosecutor and those provided by the injured party Z and K during the site inspection on 28 October 2010 and the statement of the defendant given to the SPRK on 17 August 2010 have been read out during the trial sessions or considered to be read out.

11. Based on its findings, on 08 March 2007, the District Court announced the verdict and found the accused guilty of the criminal offences listed above from items [i] through [ii]. Consequently, the Court imposed on the accused the punishments as also specified above.

12. **The Defense Counsel** of the accused timely filed an appeal dated 25 February 2011 against the Verdict as specified before.

Also **the Legal Representative of the injured party Z** , replied to the appeal of the Defense Counsel on 15 March 2011 as pointed out before.

The OSPK submitted an opinion dated 03 June 2011 and registered with the Registry of the Supreme Court of Kosovo the same day, also as specified before.

13. On 09 August 2011, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The Defense Counsel confirmed his submissions and request.

The OSPK concluded to partially grant the appeal and to modify the contested judgment as pointed out in the written opinion dated 03 June 2011.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

I. Alleged Inconsistency of the Enacting Clause

14. The Defense Counsel in his appeal as well as the OSPK in their legal opinion both **allege violations of Article 403 paragraph 1 item 12 of the KCCP** due to the enacting clause of the challenged Judgment not prescribing the complete and correct legal

designation of the criminal offence of Article 142 of the CC SFRY as "War Crimes against the Civilian Population", but as "War Crimes" only and also not referring to a specific paragraph of Article 142 of the CC SFRY.

15. The Supreme Court of Kosovo finds that the enacting clause of the challenged Judgment is not in compliance with the law and thus violates Article 403 paragraph 1 item 12 of the KCCP.

Although it is beyond all reasonable doubts that the 1st Instance Court talks about a criminal offence under Article 142 of the CC SFRY and in particular considering the correct legal designation of the respective criminal offence under Article 142 of the CC SFRY, which is named by the referred Indictment dated 08 September 2010 (PPS 18/09) as "War Crimes against the Civilian Population", the Supreme Court of Kosovo finds that indeed the District Court has failed to use the full legal designation of Article 142 of the CC SFRY as "War Crimes against the Civilian Population" and talks about "War Crimes" only.

Moreover, the Supreme Court of Kosovo finds that the 1st Instance Court has failed referring to a specific paragraph of Article 142 of the CC SFRY, thus creating confusion on which of the three different types of criminal offences described by the respective legal provision is given in the case at hand.

Article 142 of the CC SFRY in its 5th edition 1995 stipulates as follows:

(1) The person who, violating the regulations of international law during war, armed conflict or occupation, orders that attack be performed against civilian population, settlement, individual civilian persons incapable of fight, which had a consequence of death, heavy physical injury or heavy disturbance of the health of the people; attack without selection of the objective hitting civilian population; that murder, torture, inhumane treatment, biological, medical or other scientific experiments, taking tissue or organs for transplantation, causing great suffering or violation of physical integrity or health; displacement or re-settling or forced de-patriation or conversion to another religion; forcing prostitution or rape; application of measures of intimidation or terror, taking hostages, collective punishment, forced taking to concentration camps and other illegal imprisonment, deprivation of the right to correct and impartial trial; forced service in armed forces of the enemy force or its intelligence service or administration; forcing forced labor, starvation of the population, confiscation of the property, looting of the property of the population, illegal and self-willing destroying or taking possession of the property in great scales, which is not justified by military needs, taking illegal and disproportionally large contribution or requisition, devaluation of the value of domestic money, be performed against the civilian population, or the person who performs some of the stated acts, shall be punishment by at least five years of imprisonment or twenty years of imprisonment.

(2) The person who, violating the regulations of international law during war, armed conflict or occupation, orders: that attack be conducted against facilities specially protected by international law and facilities and structures with dangerous force, such as

dams, embankments, and nuclear power plants; that, without selection of the objective, civilian facilities under special protection of international law be hit, undefended places and demilitarized zones; long-term and large-scale damage of natural environment which may harm the health or survival of the population, or the person who performs some of the stated acts, shall be punished by the penalty from Paragraph 1 of this Article.

(3) the person who, violating the regulations of international law during war, armed conflict or occupation, as occupier, orders or performs the re-settling of parts of his/her civilian population to the occupied territory, shall be punished by at least five years of imprisonment.

It needs to be left open, whether or not the 1st Instance Court was aware of the last version of Article 142 of the CC SFRY, as quoted before, and just by negligence has missed to properly refer to a specific paragraph of the law, or if the Court erroneously has applied the older version of Article 142 of the CC SFRY dated 01 July 1977, which the latter indeed provides only one paragraph.

The Supreme Court of Kosovo finds that the charges against the defendant can be subsumed only under Article 142 paragraph 1 of the CC SFRY in its 5th edition 1995, as performing *"displacement or re-settling or forced de-patriation"* and *"looting of the property of the population"* directed against the civilian population.

Since Article 142 of the CC SFRY in its older version dated 01 July 1977 is almost identical to Article 142 paragraph of the CC SFRY dated 1995, it does not deem necessary to decide upon the quality of the mistake conducted by the District Court as outlined before.

II. Alleged Inconsistency of the Reasoning of the challenged Judgment regarding decisive facts:

The Defense Counsel moreover has challenged that the complete 1st Instance Verdict would be based on statements of witnesses who were summoned by the Public Prosecutor and without taking into consideration the fact that there have been differences in the statements of the witnesses S , M , E and P in comparison to their earlier statements as well as in the cross-comparison with the statements of the other witnesses. In particular, the 1st Instance Court had not pointed out the differences in detail and thus not properly assessed the evidence given. Therefore, the reasoning of the challenged Judgment would be completely unclear and inconsistent regarding the decisive facts.

The Supreme Court of Kosovo finds that no inconsistency of the reasoning can be established with regards to the challenged Judgment.

Having checked through all the referred witness statements contained in the case files, indeed a number of incongruities between the statements of the same witness given on different occasions can be established. This amongst others refers to the uniform

allegedly worn by the defendant Vukmir CVETKOVIC on the 27/28 March 1999 during the questionable actions.

However, it illuminates from p. 5 through 7 and p. 7 through 12 of the challenged judgment that the 1st Instance Court has thoroughly assessed and analyzed all witness statements and in particular has paid utmost attention to the question of reliability of the witnesses S , M , P and E as well to the credibility of their statements. Regarding the witness S , the 1st Instance Court has underlined the awareness of the panel that regarding discrepancies between the statements of the witness in front of the Court and his earlier statements. Nevertheless the Court has found that "[i]t is a matter of common knowledge that the capacity for remembering in general diminishes by and by and elements of interviews in particular those of minor importance use to vary the more often the witness is questioned on the same subject" ...[and that]... *"it should be understandable for everyone that normally a witness will be less aware of details after a period of ten years, a period which has elapsed since the time of the offence"*. Moreover the 1st Instance Court has found that it is *"also common knowledge that in general those statements which were produced at the earliest after the commitment of a crime might be considered as the most credible ones, because then the memory of the witness was freshest"* and that on this background it would speak *"in favor of the witness's credibility that he now* [had*] incriminated the accused in a less severe way"* than in the course of his previous statement *(p.8 of the English version).*

Regarding the witnesses M , P and E the 1st Instance Court has made clear reference to its findings and assessment on the witness S and his statements *(p.10 through 12 of the English version).*

The challenged Judgment has also made reference to the fact that and why the witnesses have notified police only in 2005, thus years after the crimes have happened *(p. 9 of the English version).*

Therefore, the Supreme Court of Kosovo finds that the challenged judgment does not contain inconsistent reasoning based upon weak or wrongful assessment of evidence.

The Supreme Court of Kosovo in the context given moreover refers to its adjudication particularly in the case *Runjeva, Axgami and Dema (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, were it was pointed out that *"appellate proceedings in the PCPCK rest on principles that it is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous' "*. This adjudication was repeated amongst others in the case against Jeton Kiqina (Ap.-Kž. No. 84/2009) dated 03 December 2009 *(p.19 of the English version, item 35).*It is neither under the competence of the appeal

panel nor possible in fact to replace the findings of the 1st Instance Court by its own, especially not without taking all the evidence again.

B. Erroneous and Incomplete Determination of the Factual Situation

33. The Defense Counsel in his appeal has moreover stressed erroneous and incomplete establishment of the factual state of the crime, thus claiming that the witnesses M , S , E and P , upon whose statements solely the defendant was found guilty, would be utterly unconvincing and contradictory in their statements. Therefore, the 1st Instance Court had violated Article 3 paragraph 2 of the KCCP, according to which the guilt of a defendant must be proven beyond all reasonable doubts.

The Supreme Court of Kosovo finds that no erroneous and incomplete determination of the factual situation can be established in the case at hand, at least not up to a degree that would lead to the annulment of the challenged Judgment.

It needs to be stressed in the case at hand that indeed some incongruities between some of the several statements of the witnesses mentioned must be established as pointed out before. Nevertheless, the Supreme Court of Kosovo has found that according to all statements of the witnesses as contained in the case files the defendant Vukmir CVETKOVIC was clearly identified as one of the perpetrators expelling the families of the witnesses from their houses and setting the houses of N and Z and K on fire by the use of a flame thrower.

The witness M has stated on 24 September 2005 in front of UNMIK Police that he saw the defendant Vukmir CVETKOVIC setting the house of N on fire and that he was accompanied by his brother Mi and by B as well as by V and the family X. The witness basically has repeated the contents of this statement in the course of his police interrogation on 16 December 2006 and specified it on occasion of another police interrogation on 16 February 2007, when he pointed out that he saw the defendant burning the house of N by a flame thrower and being accompanied by Mi and B and that also the house of the witness was totally burned down, but that he, the witness, did not see the perpetrators. Although the witness on 09 May 2008 has stated that it was not the defendant to expel him and his family from their house, he again has repeated that he saw the defendant burning the houses of N and Z by a flame thrower, and that he, the witness, at that time was already seated at a tractor and in the process of forcefully leaving Klinë/Klina. The witness has repeated his respective statement on 09 August 2010 in front of the Prosecutor and finally also in front of the District Court on 26 and 28 October 2010.

The witness S has stated on 24 September 2005 in front of UNMIK Police that the defendant was one of those who burnt the whole of the witness's neighborhood in Klinë/Klina and that in addition he was one of those who expelled

Albanians from their houses, on that occasion having a Kalashnikov machine gun (AK 47) with him. He has repeated his statement on 27 November 2006 in front of police and in parts on 08 September 2010 in front of the Prosecutor, stating at that time that the defendant, wearing a Kalashnikov, was amongst those to expel Albanians from their houses, but that it was another person who asked the witness to leave his house. The latter again was repeated in front of the District Court on 26 October 2010.

The witness P has stated on 07 March 2008 in front of police as well as on 27 and 28 October 2010 in front of the District Court that he saw the defendant together with two others, who the latter he on 27 October 2010 named as Mi and B , burning the house of N by the use of a flame thrower.

The witness E has stated on 24 September 2005 that it was the defendant together wit Mi and B who came to the witnesse's house and asked them to leave to Albania. On 16 December 2006 the witness has stated that the defendant and his respective two companions have burned the house of Z , using a flame thrower. The witness has confirmed this statement on 16 February 2007, on 12 May 2008 and in front of the District Court on 27 October 2010.

Main differences/incongruities regarding the respective witnesses and their statements can be established with respect to the uniform the defendant was allegedly wearing on 27/28 March 1999 and concerning the question, whether or not it was the defendant to expel the witness S and his family from their house.

It in this respect indeed may be criticized that the 1st Instance Court did not list and analyze all discrepancies between the different statements. However, two points clearly need to be stressed, as at first there is a "red line" in all statements verifying that the defendant had a leading role when it came to the burning of the houses of N and of Z and K , and that at least there is strong indication for the allegation that the defendant took part as well in the witnesses being expelled from their houses as well.

In particular, reference is made to what already was pointed out under item A. II., p. 12 of this Judgment regarding the assessment of evidence as carried out by the 1st Instance Court and regarding the necessity for the Supreme Court to rely upon this assessment as long as evaluation of the 1st Instance Court is not *"wholly erroneous"*.

C. Decision on the punishment

52. The Defense Counsel moreover claims that as a result of an alleged substantial violation of the provisions of the criminal procedure and the erroneous establishment of the factual situation by the 1st Instance Court also the decision on punishment needs to be reviewed.

The decision on the punishment is fair. The 1st Instance Court in accordance with the framework of possible punishments given by the relevant law (article 142 paragraph 1 of the CC SFRY), has imposed a punishment of seven (7) years for both counts of the Indictment the defendant was found guilty for. It has weighed in favor of the defendant in particular the fact that he was not convicted before, that he is well educated and socialized, married, father of a minor child, the long period of time elapsed since the crimes have been committed and that the crimes compared with other committed in the respective period is of average character. To the disfavor of the defendant it was considered that the defendant has not only committed one but two different cases of war crimes, that he has set on fire not one but two houses and that in this way he has seriously endangered neighboring houses as well the lives of the population living around.

The Supreme Court of Kosovo considers that the 1st Instance Court correctly and completely has taken into consideration all the circumstances that influence in severity of punishment and has fairly evaluated those circumstances. Therefore, no reason can be seen to lower the punishment. In particular considering the fact that contrary to the opinion of the Defence no inconsistency of the reasoning of the challenged Judgment and no erroneous or incomplete establishment of the facts was established, there is no reason to re-consider the punishment imposed under these circumstances.

D. Decision on costs of the proceedings

53. The Defense Counsel in his appeal also has proposed to re-assess the decision of the 1st Instance Court regarding the costs of the proceedings, which the defendant has been burdened with.

Reference is made to what was said before *(item C. p.11 of this Judgment)*. The decision upon costs of the proceedings follows the guilt of the defendant as was properly imposed according to Article 102 paragraph 1 of the KCCP.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Supreme Court of Kosovo
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Members of the panel:

[*signed*]

Francesco Florit
EULEX Judge

[*signed*]

Martti Harsia
EULEX Judge

[*signed*]

Marije Ademi
Supreme Court Judge

[*signed*]

Emine Mustafa
Supreme Court Judge

Presiding Judge:

[*signed*]

Gerrit-Marc Sprenger
EULEX Judge