

Supreme Court of Kosovo
AP – Kž. No. 192/2010
5 October 2010

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judge Martti Harsia and Supreme Court Judges Marije Ademi, Nesrin Lushta and Salih Toplica as members of the panel, assisted by Holger Engelmann as recording clerk,

in the criminal case against the accused Enver **Hasani**, son of _____ and _____, Kosovo Albanian, born on 1 January 1948, in _____ Village, Municipality of _____, assistant caretaker at a school, widower with seven children, average economic status, no previous conviction, charged with the criminal offences of Aggravated Murder contrary to Article 147 Paragraph 9 of the Provisional Criminal Code of Kosovo (hereinafter PCCK) and Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph 2 of the PCCK, in detention on remand since 31 May 2007,

deciding upon the appeal, dated 28 April 2010 and filed by Defence Counsel Rexhep Kaçaniku on behalf of the defendant, against the judgment P. No. 215/2007, rendered by the District Court of Mitrovicë/Mitrovica on 16 February 2010,

in a session, held on 5 October 2010, after a deliberation and voting renders this

JUDGMENT

The Appeal filed by Defence Counsel Rexhep Kaçaniku on behalf of the accused Enver Hasani is **rejected** as ungrounded and the first instance judgment of the District Court of Mitrovicë/Mitrovica, P. No. 215/2007, dated 16 February 2010, is **affirmed**.



Reasoning:

I. Procedural History

On 31 May 2007 at around 11:30 hours the victim R was shot dead in her house in the village of

With indictment PP No. 169/2007, dated 10 September 2007, the District Public Prosecutor in Mitrovicë/Mitrovica charged the accused, who is the husband of the late victim, with the criminal offences of Aggravated Murder contrary to Article 147 Paragraph 9 of the PCCK and Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph 2 of the PCCK. The indictment was confirmed with Ruling of the District Court Mitrovicë/Mitrovica, dated 20 November 2007. The main trial commenced on 12 February 2008.

Due to the forced displacement of the staff of the District Court Mitrovicë/Mitrovica from the courthouse in March 2008 the main trial was interrupted before it could be concluded. On 17 August 2009 the EULEX Chief Prosecutor assigned the case to the District EULEX Prosecutor of Mitrovicë/Mitrovica. Upon request of the District EULEX Prosecutor, on 14 October 2009 the President of the Assembly of the EULEX Judges decided that EULEX Judges would take over the case.

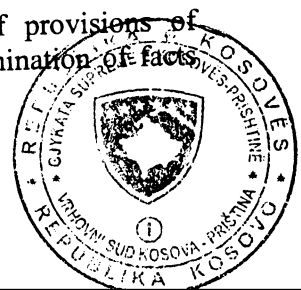
The main trial before a panel of three (3) EULEX Judges of the District Court Mitrovicë/Mitrovica was held between 21 January and 16 February 2010. On 16 February, with judgment P. No. 215/2007, the court found the accused guilty of the criminal acts of (A) Aggravated Murder contrary to Article 147 Paragraph 9 of the PCCK and (B) Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 Paragraph 2 of the PCCK, and sentenced the accused to fourteen (14) years imprisonment for count (A) and two (2) years imprisonment for count (B), resulting in an aggregate sentence of fifteen (15) years imprisonment.

The verdict was served on the parties between 20 April and 28 April 2010. Defense counsel Rexhep Kaçaniku received it on 27 April 2010 and the accused on 28 April 2010.

On 29 April 2010 defense counsel Rexhep Kaçaniku on behalf of the accused filed an appeal against the verdict P No. 215/2007.

II. Issues raised in the appeal:

Defence Counsel Rexhep Kaçaniku claims essential violation of provisions of criminal procedures, violation of criminal law and erroneous determination of facts and punishment.



In particular defence counsel Rexhep Kačaniku contends:

- the court of first instance exceeded the scope of the indictment by adding the words "... to prevent his wife from leaving ..." and in doing so violated Article 386 Paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP);
- the court of first instance erroneously established that the accused had been jealous for a long time and wrongly concluded that this jealousy had been the motive for the crime;
- the accused, when shooting his wife, reacted on a serious insult. The late victim, who had never offended or insulted the accused before, on the critical day all of a sudden offended him with the words: "I don't have to ask for permission You are an old man, tired. No one asks you for anything, because you are tired and you are dead although you are still alive". At this point the accused lost his temper and killed his wife. Such an insult after 30 years of living together is serious, in particular against the background of the rural community they lived in. Hence the accused acted in a state of shock or mental distress pursuant to Article 148 of the Criminal Code of Kosovo (CCK).

Based upon these reasons, defence counsel Rexhep Kačaniku proposes to approve the appeal, to alter the first instance judgment and to find the accused guilty of murder committed in a state of mental distress pursuant to Article 148 of the CCK, or to quash the first instance judgment and return the case for retrial.

The Office of the State Prosecutor (OSPK) with opinion, dated 16 August 2010, proposes to reject the appeal as ungrounded and to affirm the first instance judgment. The OSPK opines that the court of first instance stayed within the "act" which is subject of the charge contained in the indictment and hence did not exceed the scope of the indictment. As to the alleged mental distress the OSPK refers to the thorough assessment in the first instance judgment. In addition the OSPK opines that the accused was not able to submit any evidence regarding the alleged insult and that even if the accused had been able to prove the provocation it would not have changed the qualification of his deed as he had triggered the alleged insult through his own behaviour. The OSPK furthermore submits that the facts were properly and accurately established by the court of first instance and that the decision on the criminal sanction is fully in accordance with Article 64 of the CCK.



III. Findings of the Supreme Court

The appeal is timely filed and admissible.

The appeal, however, is not grounded.

Concerning the matters addressed in the appeal the Supreme Court of Kosovo finds that a violation of the law cannot be found in the first instance judgment.

1.

The court of first instance did not exceed the scope of the indictment by putting the words “to prevent her from leaving” in the enacting clause. According to Article 386 Paragraph 1 of the KCCP the judgment may relate only to the accused and only

to an act which is the subject of a charge contained in the indictment

The word “act” in this context refers to the event in a broader sense, i.e. to a general description of the deed of the defendant. It cannot be interpreted as an obligation to mention every single detail in the indictment. Such interpretation does not find any support in the wording of the law and would in addition confine the trial panel to a far too narrow approach when trying the case which would conflict with the obligation of the court “to truthfully and completely establish the facts which are important to rendering a lawful decision”, a strong inquisitorial element stipulated in various provisions such as Article 7 and Article 360 Paragraph 5 of the KCCP.

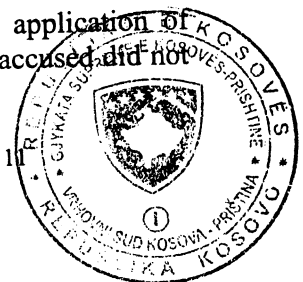
Thus in the case in question the term “act” in Article 386 Paragraph 1 of the KCCP has to be understood as reference to the outline of the event that the accused shot his wife under circumstances which might allow qualifying the killing as aggravated murder pursuant to Article 147 item 9 of the CCK. The first instance court stayed within this description of the act and consequently did not exceed the scope of the indictment.

2.

As to the application of the provisions of criminal law the court of first instance correctly qualified the crime committed by the accused as aggravated murder rather than murder committed in a state of mental distress (Article 148 of the CCK).

As the Supreme Court of Kosovo held in previous decisions¹, the application of Article 148 of the CCK cannot be denied for the mere reason that the accused did not

¹ judgment, dated 3 August 2010 (AP – Kž. No. 128/2010); see also judgment, dated 11 December 2009 (AP – Kž. No. 23/2009)



provide any evidence for the alleged insult by the late victim prior to the killing. Such requirement to present evidence would conflict with the principles *in dubio pro reo* and *presumption of innocence* and would therefore constitute a violation of most basic individual rights enshrined in the European Convention of Human Rights.

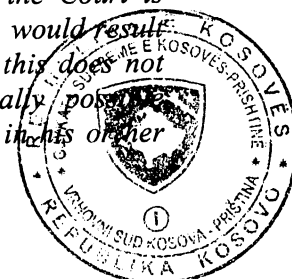
To this regard the Supreme Court of Kosovo in the judgment, dated 3 August 2010 (AP – Kž. No. 128/2010), pointed out the following:

Since the accused gave a clear, detailed and plausible explanation for the crime, the Court of first instance was obliged by the principles of presumption of innocence and in dubio pro reo as the most fundamental rights of the defendant enshrined in Article 6 of the European Convention on Human Rights to determine whether the respective facts have to be established or should be dismissed based upon evidence which proves the narration of the accused untrue. These principles, which ensure that the rights of the defendant are fully respected in criminal trials, require that the Court is convinced beyond reasonable doubt that the defendant committed the crime. Any doubts to that regard have to be respected and taken into account in favor of the defendant.

Based upon these reasons in a case like the one in question, where the accused claims necessary self-defence or other reasons which might diminish his or her criminal liability, it falls too short to concentrate only on the fact that the accused without any doubt deprived the victim of his life. This in itself is not sufficient to establish the individual personal guilt of the accused. The law provides numerous legal provisions which allow different levels of classification of the act of killing another person. The range varies from aggravated murder as the most serious alternative to not even being a criminal act as the most favorable alternative, and consequently the law foresees different explicitly specified levels of personal guilt – aggravated murder, murder, homicide, murder committed in a state of mental distress - and even options which exclude guilt of the perpetrator and prohibit imposing a punishment – necessary self-defence or extreme necessity. The principles of presumption of innocence and in dubio pro reo require to establish beyond reasonable doubt the precise level of personal guilt of the defendant.

Hence a scope of review by a Criminal Court which referred only to the act of killing would not satisfy the requirements of a correct and complete determination of facts as it would not allow establishing the appropriate legal qualification of the act which is the necessary precondition for the correct determination of the personal guilt and consequently of the appropriate sentencing of the defendant.

The principle of presumption of innocence requires that the Court is convinced beyond reasonable doubt that alternatives which would result in an acquittal of the defendant can be excluded. Clearly this does not require the Court to ex officio consider all theoretically possible alternatives. In a situation, however, where the defendant in this order



defence gives a narration of the events, the Court is obliged to assess this narration with due diligence and full respect for the principle of presumption of innocence. Consequently the Court has to evaluate whether the description of the events by the defendant is plausible and reasonable and, if yes, whether there is evidence which allows the conclusion beyond reasonable doubt that the version submitted by the defendant is not true. Otherwise the burden of proof would be shifted on to the defendant who would have to proof his or her innocence².

Likewise, in accordance with the principle in dubio pro reo the Court is obliged to carefully evaluate whether the narration given by the defendant allows the application of a provision of the criminal law which would result in a less severe punishment. Consequently the Court has again to evaluate whether the description of the events by the defendant is plausible and reasonable and, if yes, whether there is evidence which allows the conclusion beyond reasonable doubt that the version submitted by the defendant is not true. Only this approach guarantees full respect for the principle in dubio pro reo.

To sum it up, an overall assessment of the presented facts, which might be legally relevant, in their entirety is required in order to correctly and precisely establish possible guilt and the appropriate sentencing of the defendant.

The panel of the Supreme Court fully agrees with and adheres to these principles. Hence the narration given by the accused cannot be dismissed for the only reason that he failed to submit any evidence. His description of the event is plausible and no evidence can be found by which this part of his statement could be disproved.

This, however, does not change the legal qualification. Not even the narration provided by the accused himself allows the application of Article 148 of the CCK.

It is not necessary to establish whether the words of the victim constituted a “grave insult” and whether the accused was brought in a state of mental distress by these words, because the application of Article 148 of the CCK requires that all this happened “through no fault of his or her own”, i.e. of the accused. To this regard the correctly established facts in the first instance judgment leave no space for doubts that the victim reacted on wrong accusations, personal offenses and even physical maltreatment inflicted on her by the accused prior to the event itself. It was the accused who for a long time before the event had burdened and offended her with his strong, albeit baseless, suspicions regarding an extramarital affair, it was him who had forced her to undergo the - humiliating – swearing ceremony, it was him who had not allowed her to leave the house unaccompanied by him or one of their children, and it was him

² Supreme Court of Kosovo, judgment dated 11 December 2009, PKL.-Kzz. No. 23/2009, the same in other European Countries - for the United Kingdom, for instance, http://www.cps.gov.uk/legal/s_to_u/self_defence/; to the prohibition in general to shift the burden of proof onto the accused see judgments of the European Court of Human Rights in cases of *Telfner v. Austria* and *Murray v. the United Kingdom*



who had physically maltreated and sexually violated her as mentioned in the first instance judgment.

As a consequence there is no doubt that it were in any case his own faults which made the victim on the critical day react in the way described by the accused. In doing so she just reacted on his offensive insistence that she had to ask him for permission before she was allowed to leave the house. This excludes the application of Article 148 of the CCK.

3.

The Court of first instance correctly applied item 9 of Article 147 of the KCCP. The accused deprived his wife of her life for base motives.

Base motives are all those motives which are not worthy of a human being and which do not coincide with the adopted moral views of the society; they are at the lowest point of the scale of values according to moral judgment³.

It might be arguable whether jealousy in itself can be seen as a base motive⁴. In the case in question, however, the accused did not only act out of jealousy. He also killed his wife because she "dared" attempting to leave the house without his permission. Regardless whether she wanted to leave the house temporarily or forever, i.e. splitting up from him, his reaction on this attempt – shooting her – demonstrates his belief that he was entitled to decide about her right to exist. This ruthlessly selfish concept of being the sovereign over her existence shows utmost disrespect for the natural right of another human being to live and is as such a base motive.

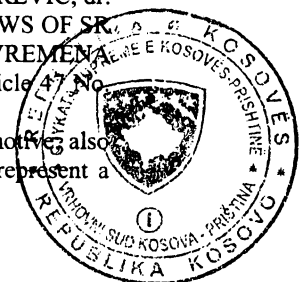
Since Article 147 of the CCK provides a punishment of at least ten (10) years or long-term imprisonment, the sentence imposed by the first instance court onto the accused for this criminal offence is just slightly higher than the minimum punishment and in any case not too high.

As a result the matters addressed in the appeal – referring only to the conviction for Murder and not to the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons - do not allow granting the appeal.

In addition the panel of the Supreme Court thoroughly assessed the matters which have to be examined *ex officio* (see Article 415 of the KCCP). Violations of the respective

³ See SRZENTIC, Nikola – STAJIC, dr. Aleksandar – KRAUS dr. Bozidar – LAZAREVIC, dr. Ljubisa – DJORDJEVIC, dr. Miroslav, COMMENTARY ON THE CRIMINAL LAWS OF SERBIA, OF SERBIA, SAP KOSOVO AND SAP VOJVODINA, 1981, "SAVREMENA ADMINISTRACIJA" BELGRADE, Commentary on Criminal Code of Serbia, Article 147 item d;

⁴ Supreme Court of Serbia in its ruling Kz-2105/57 qualified jealousy not as base motive, also Supreme Court of Croatia in its ruling Kz-2333/56 stated that jealousy does not represent a base motive.

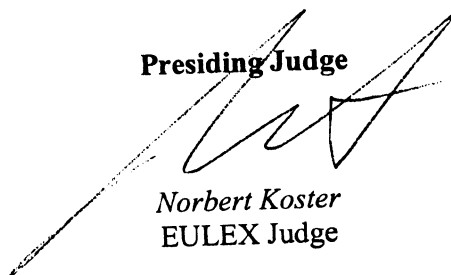


rules and issues were not found.

Hence the appeal was rejected as ungrounded and the first instance judgment affirmed.

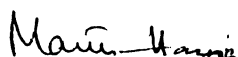
SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
AP – Kž. No. 192/2010

Presiding Judge



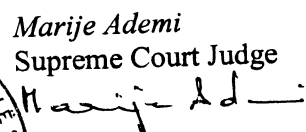
Norbert Koster
EULEX Judge

Panel Member



Martti Harsia
EULEX Judge


Panel Member



Marije Ademi
Supreme Court Judge

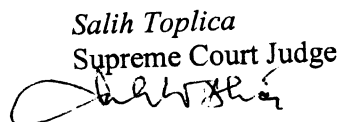


Panel Member



Nesrine Lushta
Supreme Court Judge

Panel Member



Salih Toplica
Supreme Court Judge