

SUPREME COURT of KOSOVO

Ap – Kž – 351/2010

25 May 2011

Prishtinë/Priština

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Martti Harsia as Presiding and Reporting Judge, with Supreme Court Judges Emine Mustafa and Marije Ademi as panel members, assisted by EULEX Legal Officer Noora Aarnio as the recording clerk,

In the criminal case against defendants **Shefqet Musliu**, convicted by the District Court of Gjilan/Gnjilane for two kidnappings contrary to Article 64 paragraphs 1, 2 and 4 of the Criminal Law of Serbia [CLS] as read with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia [CLSFYR], attempted extortion of a witness contrary to Article 180 of the CLS as read with Articles 19 and 22 of the CLSFYR and kidnapping contrary to Article 64 paragraphs 1 and 2 of the CLS as read with Article 22 of the CLSFYR,

and defendant **Besim Tahiri**, convicted by the District Court of Gjilan/Gnjilane for two kidnappings contrary to Article 64 paragraphs 1, 2 and 4 of the CLS as read with Article 22 of the CLSFYR,

After having held a session on 24 May 2011 open to public, in the presence of the State Prosecutor represented by Prosecutor Laura Pula, Defence Counsels Masar Morina and Nikë Shala, on 25 May 2011 pronounces in public the following

RULING

Shefqet Musliu, name of father _____, name of mother _____, place of birth _____, residing in _____, date of birth _____, Kosovo Albanian, mechanic, _____, completed 8 years in school, currently in detention in Dubrava Prison,

The appeals filed on behalf of the defendant Shefqet Musliu against the Judgment of the District Court of Gjilan/Gnjilane in case P.nr. 181/2007, dated 5 October 2010, are hereby granted. The Judgment is annulled and the case is returned to the District Court of Gjilan/Gnjilane for retrial.

The detention against Musliu is terminated.

ALL

Besim Tahiri, nickname Cecen, name of father _____, name of mother _____, place of birth _____, residing in _____, date of birth _____, Kosovo Albanian, farmer, _____, completed high school, _____, no other ongoing criminal proceedings,

The appeal filed on behalf of the defendant Besim Tahiri against the Judgment of the District Court of Gjilan/Gnjilane in case P.nr. 181/2007, dated 5 October 2010, is hereby granted. The Judgment is annulled and the case is returned to the District Court of Gjilan/Gnjilane for retrial.

REASONING

I PROCEDURAL HISTORY

A criminal investigation against **Besim Tahiri** was initiated on 20 June 2003 with a decision to conduct an investigation against him, and against **Shefqet Musliu** on 9 July 2003

On 9 December 2003 the International Public Prosecutor filed an indictment against **Shefqet Musliu** and **Besim Tahiri**.

The indictment was amended on 21 January 2004. In the amended indictment defendant **Shefqet Musliu** was accused of two kidnappings contrary to Article 64 paragraphs 1, 2 and 4 of the CLS as read with Article 22 of the CLFRY, attempted extortion of a witness contrary to Article 180 of the CLS as read with Articles 19 and 22 of the CLFRY, unauthorized possession of a weapon contrary to Article 8.2 and 8.3 of UNMIK Regulation No. 2001/7, kidnapping contrary to Article 64 paragraphs 1 and 2 of the CLS as read with Article 22 of the CLFRY, unauthorized possession of a weapon contrary to Article 8.2 and 8.3 of UNMIK Regulation No. 2001/7, kidnapping contrary to Article 64 paragraphs 1 and 2 of the CLS as read with Article 22 of the CLFRY and criminal association contrary to Article 227 of the CLS. Defendant **Besim Tahiri** was accused of two kidnappings contrary to Article 64 paragraphs 1, 2 and 4 of the CLS as read with Article 22 of the CLFRY, kidnapping contrary to Article 64 paragraphs 1 and 2 of the CLS as read with Article 22 of the CLFRY, unauthorized possession of a weapon contrary to Article 8.2 and 8.3 of UNMIK Regulation No. 2001/7 and criminal association contrary to Article 227 of the CLS.

The first main trial was held during February to June of 2004 at the District Court of Gjilan/Gnjilane. With a judgment announced on 25 June 2004 the District Court of Gjilan/Gnjilane found the defendant **Shefqet Musliu** guilty to four counts of kidnapping and one count of attempted extortion of a witness. He was acquitted from two counts of unauthorized possession of a weapon and one count of criminal association. He was

sentenced to an aggregate sentence of 12 years of imprisonment. Defendant **Besim Tahiri** was found guilty to three counts of kidnapping. He was acquitted from unauthorized possession of a weapon and criminal association.

The verdict was appealed by the defendants. Upon deciding on the appeal on 27 March 2007 the Supreme Court of Kosovo partially upheld the Verdict. The verdict of District Court of Gjilan/Gnjilane was partially annulled and the case was returned to the District Court for retrial in relation to the kidnapping of witness FY and to the aggregate sentence. On 10 March 2010 the Supreme Court corrected an obvious material mistake in its previous verdict.

On 1 October 2010 the Chief EULEX Prosecutor of the District Prosecution Office of the Republic of Kosovo decided to withdraw charges against Shefqet Musliu and Besim Tahiri in regards to the count of the kidnapping of witness FY.

The District Court of Gjilan/Gnjilane held a session on 1 September and 5 October 2010 in the presence of the defendants, their Defence Counsels and the Prosecutor. On 5 October 2010 the District Court of Gjilan/Gnjilane announced its verdict rejecting the charge of Kidnapping of witness FY. The Court sentenced Shefqet Musliu to an aggregate sentence of ten years and six months of imprisonment for the offences of kidnapping witnesses 3, 4 and AK and attempted extortion of witness 1, and the defendant Besim Tahiri to an aggregate sentence of six years and nine months of imprisonment for the offences of kidnapping witnesses 3 and 4.

The judgment was served to the defendant Shefqet Musliu on 20 October 2010.

The judgment was served to the defendant Besim Tahiri on 15 October 2010 and again on 29 October 2010.

On 15 October 2010 the Defence Counsel Masar Morina filed an appeal on behalf of both of the defendants against the verdict of the District Court of Gjilan/Gnjilane. NAH

On 2 November 2010 the Defence Counsel Nikë Shala filed an appeal on behalf of the defendant Shefqet Musliu against the verdict of the District Court of Gjilan/Gnjilane.

On 4 November 2010 the District Public Prosecutor filed a response to the defendants' appeals and the opinion and motion of the Office of the State Prosecutor of the Republic of Kosovo (OSPK), was received by the Supreme Court on 8 December 2010.

II THE APPEAL OF THE DEFENCE AND THE RESPONSE OF THE PROSECUTION

The appeal of Lawyer Masar Morina challenges the first instance judgment on several grounds. He claims that the Verdict of the first instance contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state,

violation of the criminal code and that request that the punishment imposed upon the accused be modified. The Defence Counsel proposes that the sentence is mitigated.

The presented grounds for the appeal are summarized as follows:

- Firstly, the provisions of the applicable law are violated because in the indictment as per kidnapping witnesses 3 and 4 the charge is for one criminal offence of kidnapping two people but the defendants have been found guilty and are sentenced for two offences of kidnapping one person.
- Secondly, the aggregate sentence for Musliu exceeds the sentence foreseen by law. The aggregate sentence cannot be higher than maximal punishment for the criminal offence which is 10 years in this case.
- As the third and final ground for appeal the defence alleges that Musliu has been in detention from March 2003.

The appeal of Lawyer Nikë Shala for Musliu challenges the first instance judgment as per decision on punishment. The Defence Counsel proposes that the punishment be under the minimum foreseen by the law.

The presented grounds for the appeal are summarized as follows:

- Firstly, the first instance Court did not evaluate and analyze appropriately all the circumstances which could influence the amount of punishment.
- Secondly, Musliu has no previous convictions not are other criminal proceeding conducted against him. He is a former commander of UCPMB, married, no one in his family is employed, enjoys respect in the surroundings where he lives and works.
- Thirdly, he has been detained since 7 July 2003 – over 7 years or 2/3 of the punishment ordered by the District Court but due to the ongoing proceedings has not been released for parole as foreseen by the law. Therefore his rights have been violated. He has behaved well in prison.
- As the fourth and final ground for appeal the defence alleges that the purpose of punishment has been achieved due to the years spent in detention.

The District Public EULEX Prosecutor in her response states that the appeals are unfounded and should be rejected. The prosecution argues that the verdict of the first instance court is fair and in accordance with the applicable legal provisions. The defence council does not justify any of the grounds with relevant evidence.

The State Prosecutor in his opinion argues that the appeals of the defendants are ungrounded, thus moving the Supreme Court to reject it and to affirm the judgment of the first instance court. The State Prosecutor states that the issue of detention has been confirmed by the Supreme Court of Kosovo. The ascertainment of the first instance Court

is proper and based on the law. The Court has properly and completely established the factual situation. The Court has described in details the incriminating actions. Also, the criminal law was applied properly when qualifying the actions of the defendants. Furthermore the decision of the first instance Court regarding the sentencing is based on law and is proper. The defence council does not state any mitigating circumstances.

III COURT FINDINGS

A. Admissibility of the appeal

The Supreme Court finds that the appeals filed on behalf of the defendant Musliu are timely filed and admissible as far as it concerns the rejection of the charge of kidnapping Witness FY and the determination of the aggregate punishment. The appealed verdict was served to the defendant Musliu on 20 October 2010. The appeal of the Defence Counsel Morina was filed with the District Court of Gjilan/Gnjilane on 15 October 2010 and the Defence Counsel Shala on 2 November 2010, thus within the limit of 15 days as prescribed in Article 359 of the LPC. The appeals were filed by the Defence Counsels, authorized persons.

The appealed verdict was served to the defendant Tahiri on 15 October 2010 and again on 29 October 2010 and the appeal of the defence was filed with the District Court of Gjilan/Gnjilane on 15 October 2010, thus within the limit of 15 days as prescribed in Article 359 of the LPC. The appeal was filed by the Defence Counsel, an authorized person.

The Supreme Court finds that the appeals are founded. The Panel will now assess each of the arguments raised in the appeals.

B. Scope of the appellate review

In the amended indictment dated 9 December 2003 both Shefqet Musliu and Besim Tahiri with other individuals have been charged with abducting two persons on an unspecified date in September 2000 in Dobercane, Gjilan/Gnjilane for the purpose of extorting money from them. Accordingly, defendants committed two (2) counts of kidnapping.

From the structure of the Verdict of the District Court of Gjilan/Gnjilane on 25 June 2004 it is unclear whether the Court has altered the qualification of the Prosecutor of the kidnapping of witnesses 3 and 4 as two criminal acts. The sentencing part of the said Judgment is written in a slightly ambiguous way so as to enable the interpretation that the kidnapping of witness 3 and witness 4 are considered separate criminal acts. The Supreme Court states that it has upheld the "*...verdict concerning the conviction and sentencing of eight (8) years in respect of each of the offences of kidnapping of Witnesses*

MAH

3 and 4.”¹ From this it is clear that the Supreme Court has interpreted kidnapping of the Witnesses 3 and 4 as two separate criminal acts. The Supreme Court has also approved the District Court’s assessment of the sentencing and confirmed eight years of imprisonment to be the correct sentence for each of the kidnappings.

As a response to the appeals the Supreme Court therefore states that the question of attributing the guilt of the defendants to the kidnapping of the witnesses 3 and 4 has already been determined by the Supreme Court of Kosovo and therefore cannot be redefined. The same applies to the punishment for each criminal act. Therefore, the scope of the appellate review is the determination of the aggregate punishment.

C. The applicable law

The Supreme Court agrees with the District Court’s assessment of the applicable law in determining the aggregate sentence.

According to the Article 48 paragraph 2 subparagraphs 3 of the CLFRY the court shall impose the integrated punishment by the following rule: if the court has decided upon punishments of imprisonment for the combined criminal acts, the integrated punishment shall consist of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, and may not exceed a period of 15 years’ imprisonment. The Supreme Court notes that for the criminal offence of kidnapping under the Article 64 paragraph 4 the law provides for a punishment of imprisonment of one to ten years of imprisonment. Thus the maximum aggregate sentence is 15 years.

D. Appropriate determination of the factual situation

The Panel recalls that the guilt of the defendant Musliu to the two counts of kidnapping the witnesses 3 and 4, the attempted extortion of a witness 1 as well as the kidnapping of AK as well as the guilt of the defendant Tahiri to the two counts of kidnapping the witnesses 3 and 4 has been decided upon in the Supreme Court of Kosovo judgment of 27 March 2007 and it’s correction dated 10 March 2010. On 27 March 2007 the Supreme Court states that *“This court is making it perfectly clear that as far as counts 1, 2 and 4 are concerned, after a careful and thorough evaluation of the case files, including both documentary and testimonial evidence presented by both parties, it is satisfied, that the first instant court has established the decisive facts of the case, completely and correctly.”*² Count 1 refers to the act of kidnapping of witnesses 3 and 4 , count 2 to the attempt extortion and count 4 to the kidnapping of AK. Accordingly, the elements, including the role of the defendant, his material conduct and his subjective intention,

¹ Supreme Court Judgment 27 March 2007, page 3 of the English version

² Supreme Court Judgment 27 March 2007, page 9 of the English version

have been expressed in a very clear way and without ambiguity so that the defendant and all interested persons can understand the charge of which the defendant is found guilty.

Also, the individual sentences of each of the criminal acts have been determined in the above-mentioned Supreme Court judgment.

Furthermore, according to the Article 348 paragraph 2 of the LCP if the charge covers several criminal acts, the verdict shall declare for each of them whether the charge is rejected, whether the defendant is acquitted of the charge, or declared guilty. Article 351 further specifies the content of the pronouncement of a verdict declaring the defendant guilty.

The Supreme Court is therefore of the opinion that mere reference to the above-mentioned Supreme Court judgment in the District Court's judgment on the aggregate sentence is not sufficient because the enacting clause of the appealed sentence is incomprehensible when read separately from the above-mentioned Supreme Court's judgment.

Moreover, the District Court's judgment does not contain a detailed description of the rejected criminal charge of kidnapping of witness FY. Without this description it is impossible to know the elements of the criminal act, including the time and place of the offence, the role of the defendant, his material conduct and his subjective intention, and therefore understand the charge of which is rejected. The Supreme Court deems that as a result of this omission the enacting clause is incomprehensible. The omission, therefore, constitutes an essential violation of the provisions of criminal procedure as stipulated in the Article 364 paragraph 1 item 11.

E. Sentencing

Finally, as to sentencing, the Supreme Court asserts that the court of first instance has clearly explained the provisions of the applicable law concerning the imposing of aggregate sentence. However, the court of first instance has not clearly explained how it combined the individual sentences and finally decided to impose the appealed aggregate sentence.

F. Conclusion

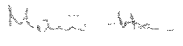
Since the Supreme Court assesses that the appealed judgment contains an essential violation of the provisions of criminal procedure it is decided as in the enacting clause.

AAA

Dated this 25 May 2011.
Ap.-KZ. No. 351/2010

Prepared in English, an authorized language.

Presiding Judge

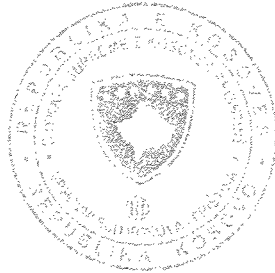

Martti Harsia

Recording clerk


Noora Aarnio

Member of the Panel

Emine Mustafa

Member of the Panel

Marije Ademi
