

Supreme Court of Kosovo

Ap. – Kž. – 364/2010

12 April 2011

Prishtinë/Priština

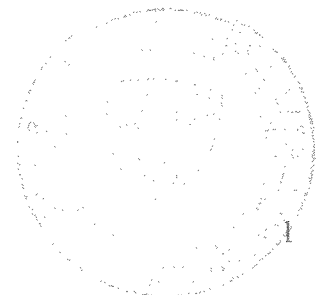
IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Lars Dahlstedt as Presiding Judge and with EULEX Judge Martti Harsia, EULEX Judge Charles L. Smith III, Supreme Court Judge Nesrin Lushta and Supreme Court Judge Emine Mustafa as members of the panel, assisted by EULEX Legal Officer Sampsa Hakala as the recording officer,

In the criminal proceedings against:

Avni Osmani, , date of birth , place of birth village
in the Municipality of , residing in the same
place, name of father , maiden name of mother ,
accomplished , average economic conditions, with ,
held in detention on remand since 29 October 2004, Convicted by the District Court of
Prishtinë/Priština for the criminal offence of **Aggravated Murder** pursuant to Article
147 paragraph 1 items 3 and 8 of the Criminal Code of Kosovo (CCK);

Deciding on the appeals of the defendant Avni Osmani, his Defence Counsel and the District Public Prosecutor, all filed against the Judgment of the District Court of Prishtinë/Priština in case P.nr. 64/2005, dated 30 November 2009.



After having received the opinion and motion from the Office of the State Prosecutor of Kosovo (OSPK) dated 14 October 2010.

After a session of the Panel held on 12 April 2011 open to public, in the presence of the State Prosecutor Laura Pula, defendant Avni Osmani and his Defence Counsel Feti Limani.

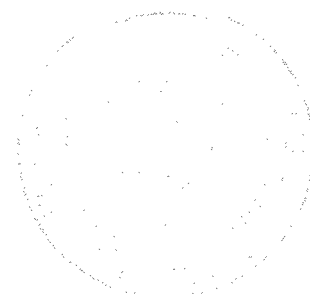
On 12 April 2011, pursuant to Articles 392 and 420 of the Kosovo Code of Criminal Procedure (KCCP), in a public pronounces the following:

JUDGMENT

The appeals of the defendant Avni Osmani and his Defence Counsel against the judgment of the District Court of Prishtinë/Priština in case P.nr. 64/2005, dated 30 November 2009, are hereby REJECTED.

The appeal of the District Prosecutor against the judgment of the District Court of Prishtinë/Priština in case P.nr. 64/2005, dated 30 November 2009, is hereby REJECTED.

The judgment of the District Court of Prishtinë/Priština in case P.nr. 64/2005, dated 30 November 2009 is AFFIRMED.



REASONING

I Procedural history

The indictment against the defendant was filed by the local Public Prosecutor in Prishtina on 26 October 2005 charging Avni Osmani for the criminal offence of Aggravated murder pursuant to Article 147 paragraph 1 items 3 and 8 of the Criminal Code of Kosovo. The indictment was confirmed and the main trial against the defendant commenced on 20 March 2006 in the District Court of Pristina before a panel composed of local judges and lay judges. The trial panel held numerous sessions but was not able to complete the trial until 24 April 2009, when the President of the Assembly of EULEX Judges decided to assign the case to a panel composed of a majority of EULEX Judges. A panel of international judges was requested by the defendant and the request was formally endorsed by the President of the District court.

The criminal charge against Avni Osmani is related to the killing of Kastriot Zogiani on 28 October 2004. According to the charge the crime took place in the Village Bardhe I Madh, Municipality of Fushë Kosovë/Kosovo Polje, where the defendant allegedly shot the victim to death with a 9x19 mm caliber handgun. After the killing the body of the victim was placed in a hole in the ground and covered with some plastic and soil, which was done by the defendant with the assistance of one Fitim Breznica who was consequently convicted in these same proceedings for the criminal offence of providing assistance to perpetrator after the commission of the criminal offence.

The first instance trial then re-commenced on 4 June 2009 before a panel of two EULEX Judges and one local Judge. The prosecution has been represented by a local Public Prosecutor throughout the proceedings.

The main trial against the defendant was then completed in the District Court of Pristina by the end of November 2009. All parties were present at the trial. On 30 November 2009

the district court announced its verdict finding the defendant guilty of the criminal offence charged and sentencing him to 30 years of imprisonment.

The judgment of the district court was served to the District Prosecutor on 23 September 2010 and to defendant Avni Osmani personally on 29 September 2010. Appeals against this verdict were filed by the following persons: the District Prosecutor of Pristina, Defence Counsel Fadil Hoxha and the defendant on 27 September 2010, 6 October 2010 and 12 October 2010 respectively.

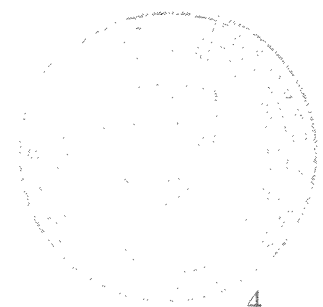
The OSPK has submitted an opinion and motion to the appeal. The State Prosecutor in his opinion and motion argues that the appeals filed on behalf of the of defendant are ungrounded, thus moving the Supreme Court to reject it whereas the State Prosecutor proposes to grant the appeal of the District Prosecutor and moves the Supreme Court to amend the appealed judgment and to impose a more severe punishment on defendant.

During the scheduling of this session Avni Osmani's former Defence Counsel, Mr. Fadil I. Hoxha, notified the Supreme Court that he has withdrawn from the task of Defence Counsel for Avni Osmani. According to the law of criminal procedure in this case the defendant must have a defence counsel due to the gravity of the criminal offence charged. Therefore, on 14 March 2011 the presiding Judge appointed ex officio a new Defence Counsel for the defendant. Lawyer Feti Limani from Pristina was appointed as Defence Counsel pursuant to his consent.

II Findings of the Supreme Court

All appeals are timely filed and admissible.

The Supreme Court finds, however, that the appeals are ungrounded.



The appeals in favor of the defence were launched on four grounds: 1) Violation of the rules of criminal procedure; 2) Violation of criminal law; 3) Wrongful determination of the factual situation; and 4) On account of the decision on penal sanctions.

The District Prosecutor, with his appeal has challenged district court's decision on the punishment and proposes to increase the punishment of defendant Avni Osmani.

1) The defence argues that the district court judgment contains several violations of the criminal procedure namely Article 403 paragraph 1 item 12 of the KCCP. As the first point it was alleged that the district court did not offer reasoning about the conclusive facts of the case. The Supreme Court, however, found that the district court has reasoned quite extensively on its factual findings. In doing so, the district court also thoroughly analyzed all evidence presented to it. Although one of the parties may very well disagree with the conclusions of the first instance court, this does not render the reasoning in the judgment inexistent.

As second point, the defence alleges violation of the criminal procedure because the district court, rejecting the motion filed by the defence during main trial, did not conduct a site inspection or a reconstruction of the events. On this point the Supreme Court notes that according to Article 254 of the KCCP a court may decide to conduct a reconstruction but it is not obliged to do so even if the defence has filed such a motion. This action is not mandatory. In the case at hand, the long time that had elapsed between the crime and the main trial may indeed have made it very difficult to achieve any clarification to the events by conducting a site inspection or reconstruction. In any case there is no indication that the district court had exceeded its margin of discretion by refusing the reconstruction.

As third point, the defence challenges the content of the enacting clause of district court's judgment. The defence in particular finds that the enacting clause is in contradiction with the factual findings in relation to the murder weapon. The Supreme Court considers that this ground for appeal is completely without merit. The panel found that both the English version as well as the Albanian version of the appealed judgment is quite clear in stating

in the enacting clause that the crime was committed by using one weapon. In this regard the enacting clause is fully consistent with the latter part of the judgment. Therefore no violation of criminal procedure was found in the appealed judgment on this point.

As the fourth point, the defence has raised doubts about the admissibility of the statements given by Avni Osmani to the police on 29 October 2004, 30 October 2004 and 3 November 2004 during which time he was not represented by a defence counsel. From the records of these examinations it is apparent that the defendant was duly informed of his position as suspect to the crime of murder and that he was informed of his rights as a suspect, including the right to have a legal counsel present during the examination. The first instance court has referred to these examinations only to illustrate the different versions of the events provided by Avni Osmani. These examinations as such have not been taken into account in the reasoning part neither to the benefit nor to the disadvantage of Avni Osmani. Therefore also this ground for appeal is found ungrounded.

As the fifth and final point it was alleged that no proper evaluation of the credibility of contradicting pieces of evidence was made by the court of first instance. The defence emphasized that the record of the forensic report on possible gun powder traces taken from the defendant after his arrest was never presented during the trial. This point is ungrounded as well. It is obvious that such a forensic report is not included in the case file. It is moreover uncontested that this report was never presented to the court during the main trial. For this reason it was not possible for the court of first instance to assess this evidence neither to the advantage nor to the detriment of the defendant. Therefore no violation of criminal procedure was found in the appealed judgment on this point.

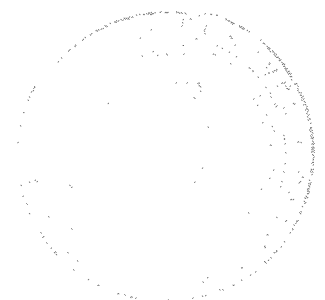
2) Violation of criminal law. The defence argues that the first instance judgment lacks any reasoning as to the defendant's intention to kill the victim and to his motive to commit the criminal act. As to the subjective element (*mens rea*) of the criminal offence, the Supreme Court finds that – on the contrary to what the defence alleges – intention was properly established by the district court as well as the causal link between the actions of the defendant and the death of the victim. In the enacting clause it is clearly

stated that Avni Osmani willingly deprived Kastriot Zogiani of his life by shooting him 12 times on the body thus explicitly indicating criminal intent. In relation to the motive, the Supreme Court notes that generally it is not even necessary to establish a specific motive for the criminal offence. In this case such a motive was nevertheless established by the district court because the motive was even relevant as one of the two aggravating circumstances to the criminal offence, as was concluded by the district court.

3) Wrongful determination of the factual situation. The appeals maintain that Avni Osmani is not guilty of the murder of Kastriot Zogiani. The defence argues that the Court of first instance erred in the way it evaluated and asserted the contents of the statements of the witnesses and those of the defendants. As to this ground for appeal the Supreme Court did not agree with the assessment made by the defence. After carefully assessing the evidence in the case file and comparing it to the factual findings of the appealed judgment, the Supreme Court has come to the conclusion that the district court had performed a fully reasonable assessment of evidence. In establishing the guilt of Avni Osmani beyond reasonable doubt the district court has taken into account the cumulative effect of different pieces of evidence and the Supreme Court finds no erroneous or incomplete determination of the factual situation in the appealed judgment.

4) Finally, the defence as well as the prosecution has challenged the district court's decision on the punishment. As to sentencing, the Supreme Court asserts that the term of imprisonment imposed by the Court of first instance is appropriate in comparison with sentences imposed for criminal offences similar to this one by the courts of Kosovo.

For all the above mentioned reasons it is decided as in the enacting clause.



Ap.-Kž. No. 364/2010
Dated this 12 April 2011.

Prepared in English, an authorized language.

Presiding Judge


Lars Dahlstedt

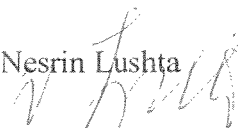
Member of the Panel


Charles L. Smith III

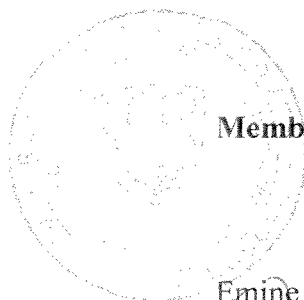
Member of the Panel


Martti Harsia

Member of the Panel

Nesrin Lushta


Member of the Panel



Emine Mustafa


Legal remedy: The authorized persons may file an appeal against this Judgment with the Supreme Court of Kosovo through the District Court of Prishtinë/Priština within fifteen (15) days following the receipt of the judgment (Articles 398, 407 and 430 of the KCCP).