

SUPREME COURT OF KOSOVO

7th February 2012

Ap – Kz 373/10

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Horst Proetel as Presiding Judge, Supreme Court judges Marije Ademi and Nesrin Lushta and EULEX judges Francesco Florit and Gerrit-Marc Sprenger as panel members, assisted by Legal Officer Chiara Rojek as recording clerk,

In the criminal case against

Hajriz GASHI, no nickname, son of S [redacted], born on [redacted] and residing in [redacted] Village, Municipality of [redacted] Kosovo, of Albanian ethnicity, [redacted] highest education secondary school, unemployed, of poor economic status, in detention on remand from 20th September 2008 until 11th January 2010,

Charged as per in the Indictment PP. no. 104/08 dated 10th March 2009 and lately amended during the main trial session on 29th April 2010, with the criminal offences of Murder contrary to Article 146 of the Criminal Code of Kosovo (CCK), Attempted Murder contrary to Article 146 as read with Article 20 of the CCK, and Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 Paragraph 1 of the CCK,

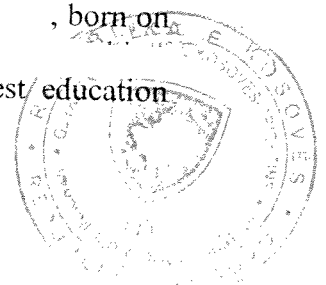
Convicted in 1st instance by Judgement P no. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010 for the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 Paragraph 2 of the Provisional Criminal Code of Kosovo (PCCK) and sentenced to four (4) years of imprisonment; and acquitted of the charges of Murder contrary to Article 146 of the PCCK and Attempted Murder contrary to Article 146 as read with Article 20 of the PCCK,

Kasum GASHI, no nickname, son of J [redacted] born on [redacted] and residing in [redacted] Village, Municipality of [redacted] Kosovo, of Albanian ethnicity, [redacted] highest education secondary school, income of 400 euros/month,

Charged as per in the Indictment PP. no. 104/08 dated 10th March 2009 and lately amended during the main trial session on 29th April 2010, with the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 1 of the CCK,

Convicted in 1st instance by the same judgment, for the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 2 of the PCCK and sentenced to three (3) years of imprisonment,

And **Shaqir GASHI**, nickname Shaqe, son of I [redacted], born on [redacted] and residing in [redacted] Village, Municipality of [redacted] Kosovo, of Albanian ethnicity, [redacted] highest education



primary school, unemployed, of poor economic status, no known previous conviction, in detention on remand from 20th September 2008 until 11th January 2010, Charged as per in the Indictment PP. no. 104/08 dated 10th March 2009 and lately amended during the main trial session on 29th April 2010, with the following criminal offences of Incitement to commit Murder contrary to Article 146 as read with Article 24 of the CCK, Incitement to commit Attempted Murder contrary to Articles 146 as read with Articles 20 and 24 of the CCK, and Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 Paragraph 1 of the CCK, Acquitted in 1st instance of all the charges by the same judgment,

Acting upon the Appeal filed by the District Public Prosecutor Neeta Amin on 10th August 2010, the Appeal filed by Defense Counsel Adem Vokshki on the behalf of Defendant Hajriz Gashi on 25th August 2010, the Appeal filed by Defense Counsel Arif Hasi on the behalf of Defendant Kasum Gashi on 18th August 2010, and the Appeal filed by Lawyer Fadil I. Hoxha on the behalf of the Injured Party Jonuz Gashi on 18th August 2010 against the Judgement P no. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010, and taking into consideration the Reply to the Appeals filed by Defense Counsel Zekir Maxhuni on the behalf of Defendant Shaqir Gashi on 20th September 2010 and the Opinion of the Office of the State Prosecutor of Kosovo (OSPK) filed on 26th August 2011,

After having held a public session on 7th February 2012 in the presence of Defendant Kasum Gashi, his Defense Counsel Arif Hasi and Lawyer Hamdi Jashanica, Representative of the Injured Party Jonuz Gashi, having deliberated and voted on the same day,

Pursuant to Articles 420, 423 and 426 of the Kosovo Code of Criminal Procedure (KCCP), issues the following

JUDGMENT

The Appeal filed by the District Public Prosecutor on 10th August 2010 against the Judgement P no. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010 is hereby GRANTED.

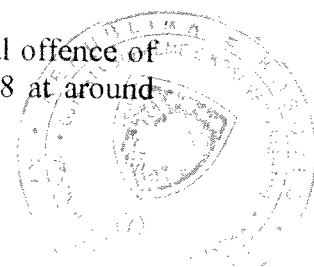
The Appeal filed by Defense Counsel Adem Vokshki on the behalf of Defendant Hajriz Gashi on 25th August 2010 against the Judgement P no. 24/09 is partially GRANTED.

The Appeal filed by Defense Counsel Arif Hasi on the behalf of the Defendant Kasum Gashi on 18th August 2010 against the Judgement P no. 24/09 is partially GRANTED.

The Appeal filed by Lawyer Fadil I. Hoxha on the behalf of the Injured Party Jonuz Gashi on 18th August 2010 against the Judgement P no. 24/09 is REJECTED as inadmissible.

The Judgement P no. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010 is MODIFIED as follows:

Defendant **Hajriz Gashi**, personal data above, is found guilty of the criminal offence of Murder contrary to Article 146 of the CCK because on 20 September 2008 at around



13:00, in the neighbourhood "Gashi", Kryshevc village, Municipality of Skenderaj with the automatic rifle AK 47 of calibre 7,62x39mm with serial number C-43367 fired 10 shots in the direction of Abedin Gashi and Kasum Gashi, hitting and thereby causing the immediate death of Abedin Gashi.

Defendant Hajriz Gashi is found guilty of the criminal offence of Attempted Murder contrary to Article 146 read in conjunction with Article 20 of the CCK because on 20 September 2008 at around 13:00, in the neighbourhood "Gashi", Kryshevc village, municipality of Skenderaj with the automatic rifle AK 47 of calibre 7,62x39mm with serial number C-43367 fired 10 shots in the direction of Abedin Gashi and Kasum Gashi, hitting Kasum Gashi and thereby causing serious bodily injury to Kasum Gashi on his right arm.

Defendant Hajriz Gashi is found guilty for the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 Paragraph 2 of the CCK because on 20 September 2008 at around 13:00, in the neighbourhood "Gashi", Kryshevc village, Municipality of Skenderaj with the automatic rifle AK 47 of calibre 7,62x39mm with serial number C-43367 fired 10 shots in the direction of Abedin Gashi and Kasum Gashi., hitting each with one bullet and thereby causing the immediate death of Abedin Gashi and causing serious bodily injury to Kasum Gashi on his right arm.

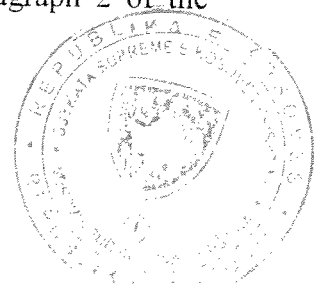
The Defendant Hajriz Gashi is therefore sentenced to fifteen (15) years of imprisonment pursuant to Article 147 Item 11 of the CCK for the criminal offences of Murder contrary to Article 146 and Attempted Murder contrary to Article 146 read in conjunction with Article 20 of the CCK.

The punishment of four (4) years of imprisonment imposed onto the Defendant Hajriz Gashi in 1st instance by Judgement P no. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010 for the criminal act of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 2 of the PCKK is modified to one year and an half (1,5) of imprisonment.

The Defendant Hajriz Gashi is convicted to an aggregate sentence of sixteen (16) years of imprisonment pursuant to Article 71 of the CCK.

The time spent in detention on remand from 20th September 2008 until 11th January 2010 is to be credited pursuant to Article 73 Paragraph 1 of the CCK. A ruling on detention on remand will be issued separately.

The punishment of three (3) years of imprisonment imposed onto the Defendant **Kasum Gashi**, personal data above, in 1st instance by Judgement P no. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010 for the criminal act of Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 Paragraph 2 of the PCKK is modified to one year and an half (1,5) of imprisonment.



The costs of the criminal proceeding in second instance shall be paid by the Defendants Hajriz Gashi and Kasum Gashi pursuant to Articles 99, 100 and 103 of the KCCP.

REASONING

I. Procedural background

The case relates to the event that occurred on 20th September 2008 at around 13.00 in Kryshevc village, Municipality of Skenderaj/Srbica. Following disagreements between two neighboring families, Kasum Gashi and his brother, Abedin Gashi, went to the house of Shaqir and Hajriz Gashi. Kasum Gashi pulled out a handgun and Hajriz looked for an automatic weapon. Both shot with their weapons at the direction of the other. Abedin Gashi was shot dead. Kasum was injured on his right arm.

On 10th March 2009, the EULEX Prosecutor filed an Indictment of the Prosecutor PP. no. 104/08, by which:

Defendant **Hajriz Gashi** was charged with Aggravated Murder contrary to Article 147, Paragraph 1 item 3 of the CCK (count 1); and Attempted Aggravated Murder contrary to Article 147 Paragraph 1 item 3 read in conjunction with Article 20 of the CCK (in relation to the first count - count 2);

Defendant **Shaqir Gashi** was charged with Incitement to commit Aggravated Murder, contrary to Article 147 Paragraph 1, item 3 of the CCK as read with Article 24 of the CCK (count 1); and Incitement to commit a criminal offence of Attempted Aggravated Murder contrary to Article 147 Paragraph 1, item 3 of the CCK as read with Articles 20 and 24 of the CCK (count 2).

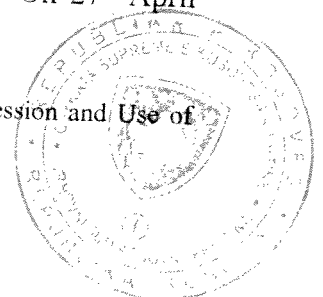
Defendant **Kasum Gashi** charged with Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 1 of the CCK.

On 11th January 2010, the Indictment was confirmed by Ruling KA no. 24/09 with the following amendments. **Hajriz Gashi** was charged with the criminal acts of Murder contrary to Article 146 of the CCK and Attempted Murder contrary to Article 146 of the CCK read in conjunction with Article 20 of the CCK. **Shaqir Gashi** was charged with Incitement to commit Murder contrary to Article 146 as read with Article 24 of the CCK, and Incitement to commit Attempted Murder contrary to Articles 146 as read with Articles 20 and 24 of the CCK. The confirmation judge found that none of the facts or evidence supported the legal designation of Aggravated Murder and Attempted Aggravated Murder. As for **Kasum Gashi**, the Indictment with the original charge was confirmed in its entirety.

The First Instance Court held the trial sessions on 30th, 31st March, 27th, 29th April, 31st May and 10th June 2010.

During the course of the main trial, on 31st March 2010, the Public Prosecutor filed an amended indictment pursuant to Article 376 Paragraph 1 of the KCCP.¹ On 27th April

¹ The Prosecutor submitted to add a count of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 2 of the CCK against Shaqir Gashi.



2010², the discussion related to the amendment to the indictment was postponed to the next session. Finally, on 29th April 2010,³ Hajriz and Shaqir Gashi were further charged with the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 2 of the CCK.

On 10th June 2010, the District Court of Mitrovica/ë s issued a Judgment P. nr. 24/09⁴ by which:

Defendant **Hajriz Gashi** was found guilty of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328 Paragraph 2 of the PCKK and sentenced to four (4) years of imprisonment, “because on 20 September 2008 at around 13:00, in the neighbourhood “Gashi”, Kryshevc village, municipality of Skenderaj with the automatic rifle AK 47 of calibre 7,62x39mm with serial number C-43367 fired 10 shots in the direction of Abedin Gashi and Kasum Gashi, hitting each with one bullet and thereby causing the immediate death of Abedin Gashi and causing serious bodily injury to Kasum Gashi on his right arm.” The time spent in detention on remand from 20th September 2008 until 11th January 2010 is to be credited pursuant to Article 73 Paragraph (1) of the PCKK.

Hajriz Gashi was acquitted for the remaining charges of Murder contrary to Article 146 of the CCK, and Attempted Murder contrary to Article 146 as read with Article 20 of the CCK, pursuant to Article 390 Item 3 of the PCKK, “because it could not be excluded that he acted in necessary defence pursuant to Article 8 Paragraph (2) of the PCKK when on 20 September 2008 at around 13:00, in the neighbourhood “Gashi”, Kryshevc village, municipality of Skenderaj with the automatic rifle AK 47 of calibre 7,62x39mm with serial number C-43367 fired 10 shots in the direction of Abedin Gashi and Kasum Gashi, hitting each with one bullet and thereby causing the immediate death of Abedin Gashi and causing serious bodily injury to Kasum Gashi on his right arm.”

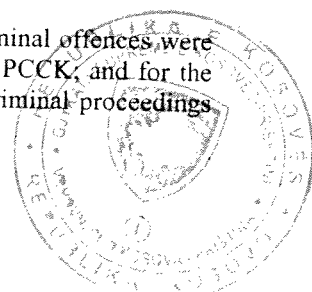
Defendant **Kasum Gashi** was found guilty for the criminal offence of Unauthorized Ownership, Control, Possession and Use of Weapons, contrary to Article 328, Paragraph 2 of the PCKK and sentenced to three (3) years of imprisonment, “because on 20 September 2008 at around 13:00, in the neighbourhood “Gashi”, Kryshevc village, municipality of Skenderaj with the pistol Crvena Zastava M-57 of calibre 7,62x25 mm with serial number C-139535 he fired three shots at the direction of the window of Shaqir Gashi’s house.”

The third defendant **Shaqir Gashi** was acquitted of all the charges.

² District Court of Mitrovica/ë, case P. nr. 24/09, minutes of main trial, 27th April 2010, page 23

³ District Court of Mitrovica/ë, case P. nr. 24/09, minutes of main trial, 29th April 2010, pages 2-5: The Prosecutor filed a second amendment as follows: count 4 against Shaqir Gashi for Aggravated Murder contrary to Article 147 Paragraphs 5 and 9 of the CPCK; count 3 against Hajriz Gashi for Aggravated Murder contrary to Article 147 Paragraphs 5 and 9 of the CPCK

⁴ The District Court also ordered that the weapons used for the perpetration of the criminal offences were confiscated pursuant to Article 60 Paragraph (1) and Article 328 Paragraph (5) of the PCKK, and for the Defendants Hajriz Gashi and Kasum Gashi to reimburse their parts of the costs of criminal proceedings pursuant to Article 102 Paragraph (1) of the CPCK.



II. Submissions of the parties

A. Appeal of the Public Prosecutor

The EULEX Prosecutor filed an appeal because of substantial violations of the provisions of the criminal procedure under Article 403 of the KCCP; violation of the criminal law under Article 404 of the KCCP; and erroneous or incomplete determination of the factual situation under Article 405 of the KCCP, read with Articles 387 and 396 Paragraph 7 of the KCCP. She moves the Supreme Court to approve the appeal, and either to modify the First Instance's Judgment, or to send the case back for retrial.

The Prosecutor alleges a violation of Article 403 Paragraph 1 Item 12 of the KCCP, as there are discrepancies between the statement of grounds relating to the content of documents or records of testimony given in the proceedings on the one hand and these documents or records themselves on the other hand.

In respect to the erroneous determination of the factual situation, the Public Prosecutor claims that the First Instance Court based its findings solely on the direct testimony of witnesses heard in Court and failed to peruse the evidence gathered during the investigation. Consequently, the First Instance Court's findings on the evidence and the credibility of the witnesses are incomplete and erroneous.⁵

Hence, there was a violation of the criminal law, namely the law on self-defence. The First Instance Court omitted to consider whether the act committed by **Hajriz Gashi** was disproportionate to the degree of danger posed by an attack and it exceeded the limits of the necessary defence. Therefore, the Court erroneously determined the legal requirements of necessary defence.⁶ Moreover, the defendant was acquitted pursuant to Article 390 Item 3 of the CPCK, and not under Article 8 Paragraph 1 of the PCCK.

Finally, the Prosecutor alleges that the District Court made an erroneous determination of the forensics evidence as to the cartridges found on the crime scene.

B. Appeal filed on the behalf of defendant Hajriz Gashi

The Defence alleges essential violations of the provisions of the criminal procedure under Article 403 Paragraph 1 Item 10 and Paragraph 2 Item 1 of the KCCP; violations of the criminal code under Article 404 Paragraph 1 Items 1-5 of the KCCP; and on the decision on criminal sanctions under Article 406 Paragraph 1 of KCCP.

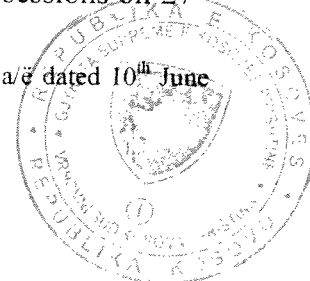
Therefore, he submits to the Supreme Court of Kosovo to approve the appeal and:

- to return the case to the First Instance for re-trial; or
- to modify the Judgment against **Hajriz Gashi** as to reject the indictment under Article 384 Paragraph 1 Item 3 read with Article 386 Paragraph 1, and Article 390 Paragraph 1 Item 3 of KCCP.

As to the substantial violation of the provisions of the criminal procedure, the Defence opposes that the First Instance Court did not act pursuant to Articles 386 and 376 of KCCP when it confirmed the indictment amended orally during the trial sessions on 27th

⁵ The Prosecutor refers to the judgement P. nr. 24/09 of the District Court of Mitrovica/ë dated 10th June 2010, Paragraph C, page 7

⁶ The Prosecutor refers to the judgement P. nr. 24/09, Paragraph E.2, page 22



and 29th April 2010. By doing so, the District Court violated Article 403 Paragraph 1 Item 10 of KCCP. The Defense Counsel also contends the punishment of four (4) years of imprisonment for the weapon charge.

The Defense Counsel submits that the First Instance Court committed a violation of the criminal law, namely Article 384 Paragraph 1 Item 3 of the KCCP.⁷ In the case, the charge of the prosecution became final and the factual description of the acts has not changed during the main trial.

The Defense Counsel puts forward that the only explanation for such sentencing is the general aim of sentencing and the deterrence of the perpetrator to reoffend. The First Instance Court did not take into account that **Hajriz Gashi** was attacked and placed in the position of defending himself and his family, as mitigating circumstance.

C. Appeal filed on the behalf of defendant Kasum Gashi

The Defence challenges the Judgment because of essential violations of the criminal procedural provisions under Article 403 of the KCCP; violation of the criminal law under Article 404 of the KCCP; and on the decision on criminal sanctions under Article 406 of the KCCP. He, therefore, proposes to the Supreme Court of Kosovo to approve the appeal and annul the First Instance verdict and:

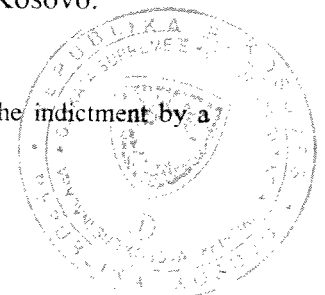
- to return the case for retrial; or
- to modify the verdict in such a way that the defendant is acquitted.

The Defence alleges a violation of Article 403 Paragraph 1 Item 12 given the Judgment is not based on the evidence presented. There is no statement of grounds relating to material facts and there was a contradiction between the statements of grounds relating to the content of material evidence heard during the trial, and the one collected during the investigation. The District Court also failed to proceed to a re-enactment of the crime scene. The Defence avers several contradictions and violations in the Judgment, especially because an attempted murder was committed against **Kasum Gashi**. The First Instance Court did not properly apply the provisions relating to the criminal acts of Attempted Murder and Grievous bodily harm despite the circumstances, e.g. a shooting from 10 meter distance from behind with an automatic weapon aiming at vital upper body parts.

The Defence also contends the First Instance Court's conclusions on several elements: that **Kasum Gashi** remained silent; that the three bullets shot in self-defence by **Kasum Gashi** were fired opposite to the balcony from where **Hajriz Gashi** had shot. There is no evidence that Hajriz Gashi acted in necessary self-defence. In the Defense's view, the District Court should have not found **Kasum Gashi** guilty for the charge under Article 328 of the CCK as he acted in necessary defence.

The Defence alleges a violation of the criminal law, assuming that the District Court did not act in accordance with Articles 14 and 15 of CCK. The Defence submits that the District Court should have acquitted **Kasum Gashi** or imposed a more lenient sentence. The punishment imposed is in contradiction with the law and practice in Kosovo.

⁷ Article 384 Paragraph 1 Item 3 of the KCCP: "(1) The trial panel shall dismiss the indictment by a ruling:[...] 3) If there are other circumstances which temporarily bar prosecution."



D. Appeal filed on the behalf of the Injured Party Jonuz Gashi

As a preliminary remark, Lawyer Hoxha waives his right to be served with the challenged judgement, and therefore accepts that the Judgment is considered to have been delivered at the time of submission of the appeal, in order to avoid delaying the proceeding. However, neither he nor the injured party received it.

The Representative of the injured party proposes to the Supreme Court of Kosovo to approve the appeal and:

- to return the case for retrial; or
- to modify the Judgment, as **Hajriz Gashi** is found guilty and punished for two counts of Aggravated Murder pursuant to Article 147 Paragraphs 5 and 9 against Abedin and **Kasum Gashi**; and **Shaqir Gashi** is found guilty for two counts of Incitement to Aggravated Murder pursuant to Article 147 Paragraphs 5 and 9 of the CCK against Abedin and **Kasum Gashi**; and to release **Kasum Gashi** from his punishment.

Lawyer Hoxha fully supports the appeal of the Public Prosecutor and the appeal filed on the behalf of defendant **Kasum Gashi**. In addition, he mentions several elements corroborated by witness statements and forensic evidence that the District Court omitted or erroneously interpreted. He alleges that the defendants' actions were premeditated, and the First Instance Court wrongly applies the provisions of necessary defence.

Besides, the District Court wrongly relied on the statements given by the defendants while the Court bypassed the statement of **Kasum Gashi** and did not take into account his admission of guilt for the weapon charge. Finally, Lawyer Hoxha claims that the District Court did not analyse correctly the elements of liability under Article 15 of the CCK.

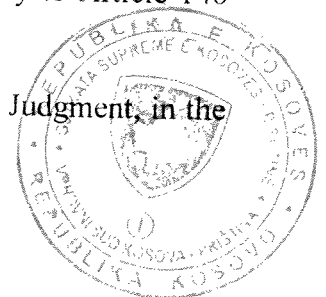
E. Response filed by Defense Counsel for defendant Shaqir Gashi to the Appeals

In its Reply, Defense Counsel Zeqir Maxhuni proposes the Supreme Court to reject, as ungrounded, the appeals filed by Injured party Jonuz Gashi and defendant **Kasum Gashi**. He mentions that, at the main trial, Lawyer Fadil Hoxha waived his right to file a property claim, and consequently, the appeal should be dismissed pursuant to Articles 46 through 52 and Article 108 of the KCCP. The Appeal filed on the behalf of **Kasum Gashi** does not contain any assertions to invalidate the First Instance Court's findings.

F. Opinion of the OSPK

The State Prosecutor of Kosovo, pursuant to Article 420 Paragraph 1, subpar. 2, and Article 423 of KCCP, moves the Supreme Court of Kosovo to approve the appeal and:

- to modify the Judgment by convicting **Hajriz Gashi** for the charges of Murder contrary to Article 146 of the CCK and Attempted Murder contrary to Article 146 read with Article 20 of the CCK; or
- to return the case for re-trial to the First Instance; and
- to reject all other appeals as unfounded and to affirm the contested Judgment, in the remaining parts.



In the OSPK's view, the challenged Judgment contains substantial violations of the provisions of the criminal procedure; erroneous and incomplete determination of the factual situation as well as violation of the criminal law.

Appeal by the Public Prosecutor

The State Prosecutor fully endorses the appeal of the Public Prosecutor in respect to the violation of the provisions of the criminal procedure. The District Court did not give reasons as to why these contradictions and inconsistencies could not be clarified. The Court did neither oppose them to the witnesses and suspects' statements given at an earlier stage, nor justify this decision *in dubio pro reo*. Moreover, a legally grounded reasoning is missing as to the elements of the necessary defence.

The State Prosecutor of Kosovo supports the Public Prosecutor's view on the violation of the criminal law as the District Court wrongfully did not exclude that Hajriz Gashi acted in necessary defence under Article 8 of the CCK. The objective elements of a real and imminent attack were not fulfilled in the instance. As a consequence, the Court incorrectly qualified the criminal offence of **Hajriz Gashi** under Article 328 Paragraph 2 CCK, instead as Murder and Attempted Murder contrary to Article 146 and Article 146 read with Article 20 of the CCK.

The State Prosecutor of Kosovo claims that the District Court proceeded to an erroneous and incomplete determination of the factual situation. Moreover, it deems the State Prosecutor that the trial panel also wrongly determined the forensic evidence presented as to the part of **Hajriz Gashi**. At last, a reconstruction of the crime scene would have allowed having a better understanding on the circumstances of the events.

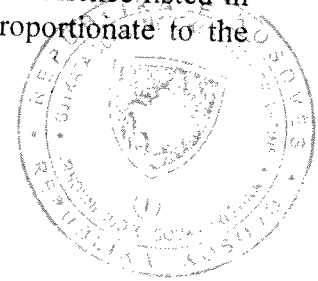
Appeal by defendant Hajriz Gashi

The State Prosecutor finds essential violations of the provisions of criminal procedure and of the criminal law in the Judgment as to **Hajriz Gashi**, because he should be sentenced, not only because of the criminal offence as to Article 328 Paragraph 2 of the CCK, but also because of Murder and Attempted Murder. The OSPK only reiterates the opinion that the First Instance Court did not properly apply the law on self-defence. The decision on criminal sanctions is not in accordance with the law as **Hajriz Gashi** should also be convicted for Murder and Attempted Murder.

Appeal by defendant Kasum Gashi

The State Prosecutor alleges that **Kasum Gashi** as a defendant in this case, cannot be considered as injured party. He is therefore not entitled to appeal against the verdict in respect to **Hajriz** and **Shaqir Gashi**, pursuant to Articles 398 and 399 Paragraph 2 of the KCCP.

In the OSPK's opinion, the challenged Judgment does not contain any essential violations of the provisions of criminal procedure or violation of the criminal law. It is undisputable that **Kasum Gashi** committed the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons. The State Prosecutor finds that the District Court considered all mitigating and aggravating circumstances of the criminal offence listed in Article 64 of the CCK, and thus the imposed sentence is not disproportionate to the criminal offence committed.



Appeal by the Injured Party Jonuz Gashi

The State Prosecutor of Kosovo moves the Supreme Court to dismiss the appeal on the ground of criminal sanction for the criminal offence under Article 328 of the KCCP as inadmissible because it was filed by an unauthorized person pursuant to Article 420 Paragraph 1 Item 1 of the KCCP. Jonuz Gashi is not an injured party in regard to the weapon charge and a violation of Article 328 CCK does not fall under Article 399 Paragraph 3 of the KCCP.

As regard to the acquittal of **Shaqir Gashi**, the State Prosecutor shares the opinion of the First Instance Court and the appeal does not elaborate on any evidence which could change the consideration of evidence made by the First Instance Court.

III. Findings of the Supreme Court of Kosovo

A. Competence and proceeding before the Supreme Court of Kosovo

The Supreme Court of Kosovo is competent to decide on the Appeals pursuant to Article 26 Paragraph 1 and Articles 398 and following of the KCCP. The Supreme Court panel has been constituted in accordance with Article 3 Paragraph 7 of the Law No. 03/L-53 on Jurisdiction. The Supreme Court panel held a public session on 7th February 2012. The parties were notified of the session. Defense Counsel Adem Vokshi by letter dated 30th January informed the Supreme Court that he will not attend the session and stands by his appeal.

B. Admissibility of the Appeals filed by the Injured party

The verdict in the case P no. 24/09 was announced by the District Court of Mitrovica/ë on 10th June 2010.

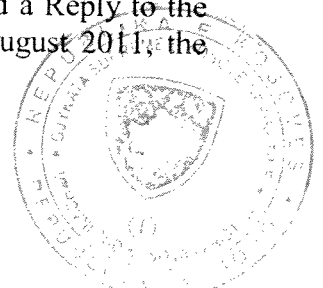
The Public Prosecutor received the challenged Judgment on 26th July 2010 and filed an Appeal on 10th August 2010.

Defense Counsel Adem Vokshki received the Judgment on 13th August 2010. A receipt acknowledges the delivery to the defendant **Hajriz Gashi** on 30th July 2010. It is impossible to ascertain at which date the Defense Counsel sent the appeal. It was registered with the Court on 25th August 2010.

Defense Counsel Arif Hasi received the Judgment on 29th July 2010 as attested by the delivery receipt. **Kasum Gashi** received the Judgment on 30th July 2010. The Defense Counsel Arif Hasi sent by post the appeal on 11th August 2010. The appeal was received by the District Court registry on 18th August 2010.

There is no receipt to determine when the Injured party and his legal representative received the Judgment. Lawyer Fadil I. Hoxha sent the Appeal by mail on 11th August 2010. It was received with the Court Registry on 18th August 2010. In his appeal, he mentioned that the judgment was delivered neither to him nor Jonuz Gashi. He nonetheless, waives his right to be served.

The four appeals were delivered to the other parties in September. On 20th September 2010, Defense Counsel Zekir Maxhuni for defendant **Shaqir Gashi** filed a Reply to the Appeals of the Injured party and defendant **Kasum Gashi**. On 26th August 2011, the OPSK filed an Opinion on the Appeals.



The Appeal filed by the Representative of the Injured Party Jonuz Gashi is not permissible, even if it was filed on time by an authorized person. As far as it is related to the punishment of **Kasum** and **Hajriz Gashi** for the criminal offence of Unauthorized use and possession of weapons under Article 328 Paragraph 2 of the CCK, the injured party is not entitled to contest the decision. Article 399 Paragraph 3 CCK expressly restricts the right of the injured party to appeal to “the court’s decision on the **punitive sanctions** for criminal offences committed against life and body”. The criminal offence of Article 328 is not securing the individual rights of a person, but the community *in toto*. This has to be controlled by the Public prosecutor.

The same applies for the appeal against the **acquittal** of the defendants Hajriz and **Shaqir Gashi** for the charges of Murder and Attempted Murder though these criminal offences have been committed against life and body. The acquittal of the defendants **Gashi** by the First Instance Court is not a “punitive sanction”. It is the role of the Prosecutor to appeal when deemed appropriate.

The appeal filed on the behalf of the defendant **Kasum Gashi** is admissible as to the conviction for the criminal offence of Unauthorized possession and use of weapons. However, the remainder of the Appeal in regard to the acquittal of the defendants **Hajriz** and **Shaqir Gashi** for Murder and Attempted Murder is not permissible pursuant to Article 399 Paragraph 3 of the KCCP, as explained above.

The other Appeals are considered as timely filed by an authorized person, and thus admissible pursuant to Article 398 Paragraph 1 of the KCCP.

C. Merits of the Appeals

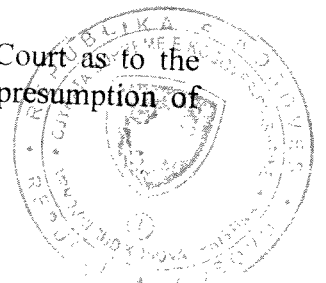
In respect to defendant Hajriz Gashi

The Appeal filed by the District Public Prosecutor is granted as to modify the First Instance Judgment in respect to the **acquittal of Hajriz Gashi** for the charges of Murder and Attempted Murder contrary to Article 146 and Article 146 as read with Article 20 of the CCK. The Supreme Court in this regard also shares the opinion of the State Prosecutor. The appeal is **grounded** and leads to the conviction of the defendant as described in the enacting clause.

The Supreme Court can render a judgment to the detriment of the defendant **Hajriz Gashi** because the prosecution filed an appeal against the First Instance Judgment. The absence of the defendant during the appeal session did not stand in the way of further proceedings, because he duly has been notified of the session, as his Defense Counsel, as foreseen under Article 410 Paragraph 4. Both were aware of the content of the Prosecution’s appeal.

The Supreme Court modifies **the appealed Judgment** according to Article 424 Paragraph 4 in conjunction with Article 426 Paragraph of the KCCP because all the relevant facts have been determined by the District Court, and partly only **differently assessed**. This applies mainly for the First instance’s finding that **necessary defense** in the sense of Article 8 Paragraphs 1 and 2 CCK cannot be **excluded**.

The Supreme Court does not share the concerns of the First Instance Court as to the uncertainty of necessary defense. It is true that, in case of doubt, the presumption of



innocence requires the application of the principle *in dubio pro reo*. Nevertheless, the assessment of the facts and evidence, which always has to be thoroughly **carried out in advance**, results that the action of the defendant was **not necessary** to avert from him or the other members of the family **“an unlawful, real and imminent attack”**.

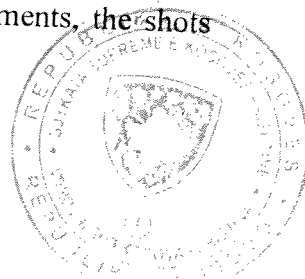
There is no indication relating to the harm caused by Abedin Gashi. Even if the fact that he came along with his armed brother could have been considered as an increased threat, this did not justify shooting at him. In addition, **Kasum Gashi** has used his weapon and several bullets pierced the windows. However, **Hajriz Gashi** was in safe surroundings and not really endangered by the shots and the approach of **Kasum** and **Abedin Gashi**. Even when the statement of **Hajriz Gashi**⁸ would be true, that additionally Rasim Gashi showed up “with something in his hands” saying: “Let’s us bomb them...”, it was not plausible to intervene by shots with an automatic weapon directed at persons on the ground. The tensions between the neighbored families on that day surely had increased. However, the situation could have been quietened without such massive and violent means. The aggression of the members of Jonuz Gashi’s family has been concluded. The alleged threatening to bomb the house was not real but, at best, the expression of helpless fury.

The Prosecutor rightly claims that, even in case of an assumed unlawful aggression, the shooting by **Hajriz Gashi** would not be justified. It was **not necessary** in the sense of Article 8 Paragraph 2 of the CCK. The requirements are: a) an unlawful, **real and imminent** attack; b) the **will** of the attacked to **defend** himself or another person; c) the measures of defense are applied **towards the aggressor**; d) the **objective** situation, not only assumed by the defendant, **must require** the means of defense, and e) the defense has to correspond to the **kind and riskiness** of the aggression (**principle of proportionality**).

As discussed, it is doubtful that the aggression of Abedin Gashi justifies the measure of defense. The possible attack has been concluded when the defendant used his weapon. Also, the applied means were **disproportional** to the attack. The defendant had a relative secure shelter and only indirectly was exposed to shots from outside. As he took the automatic weapon (remarkably already loaded) jumping on the balcony of the house he was in an obvious position of superiority. The brothers Abedin and **Kasum Gashi** were put at his mercy. The defendant was aware of this situation and knew the riskiness of shooting from such short distance (5-7 meters) with an automatic rifle directed at persons on the ground. As the medical and autopsy report demonstrate, Abedin Gashi was killed by one shot entering his upper arm and piercing the chest and the lungs. **Kasum Gashi** was hit by another bullet entering in his body under his right elbow and entering into the stomach. The restricted number of shots and the caused violation show that the shots were addressed to both brothers, and were not only fired to “scare” them.

The whole action looks like an intended execution of adversaries, and not a scene only to frighten them and made them flee. The use of an automatic weapon against aggressors discernibly not equally armed at best could **exceptionally** be justified as a measure of necessary defense when other circumstances might cause a life-threatening situation for the person attacked. Even in such cases, the defendant would have to **warn** the aggressor before he uses the weapon. Having in mind all the mentioned requirements, **the shots** fired by **Hajriz Gashi** were no means necessary defense.

⁸ Statement of Hajriz Gashi given before the Prosecutor, 10th January 2008, page 235



The Supreme Court finds that the defendant Hajriz Gashi has **committed** the criminal offence of **Murder** contrary to Article 146 of the CCK by depriving Abedin Gashi of his life. The killing was unlawful and not justified by necessary defense, as discussed above. There is no doubt that the shot **caused** the death of Abedin Gashi. The link between the acts of the defendant and the regrettable outcome of this shooting is proved by the medical reports. Such shots are generally suited to kill a person as the experience teaches and it is known to each user of such an automatic weapon meaning that the course of the events was not atypical.

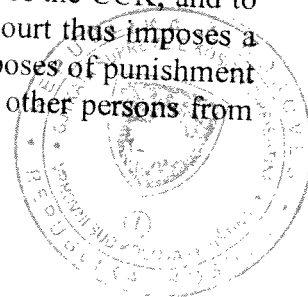
The defendant **Hajriz Gashi** acted as well with **intent**: He directed the weapon against the defenseless Abedin Gashi, staying in front of the house. The medical report refutes the statement of the defendant he only has shot not well aimed. It was his will to hit him. The Supreme Court is of the opinion that at least he acted with **eventual intent**. He was aware of the riskiness of the used weapon and the probability that a shot fired from a short distance in direction of Abedin Gashi could hit him, causing deadly wounds. The described scene tells clearly that the defendant knew all the circumstances and risks and, nevertheless, shot.

The criminal liability of **Hajriz Gashi** is not excluded according to Article 8 of the CCK, because the defendant might have mistakenly assumed that he was in a life-threatening situation and his chosen defense was necessary. As argued, he was aware of the lacking imminent and persisting threatening and the disproportion of his means of defense, as well as the extent of the aggression.

The defendant **Hajriz Gashi** also committed **an Attempted Murder** contrary to Article 146 read in conjunction with Article 20 of the CCK, as to the shots hurting **Kasum Gashi**. His action met the requirements of the criminal offence of Murder under Article 146 of the CCK. He shot in the direction of the victim and was aware of the consequences of his act. However, he did not deprive **Kasum Gashi** of his life. The offence only was attempted. Hajriz Gashi acted intentionally taking into consideration the possible death of the shot person and, nevertheless, did aim at him.

Article 146 of the CCK prescribes that "Whoever deprives another person of his or her life shall be punished by imprisonment of at least five years." Article 20 Paragraph 3 foresees that a person who attempts a criminal offence shall be punished more leniently than the perpetrator; it shall remain below the punishment prescribed for the criminal offence. Under Article 147 Paragraph 11 of the CCK, a punishment of imprisonment of at least ten years or of long-term imprisonment shall be imposed on any person who intentionally commits two or more murders [...].

Due to the fact that the murder and the attempted murder have been committed within the same event, in similar conditions with the same intent of the perpetrator, it deems appropriate to measure the penalty according to Article 147 Point 11 of the CCK, and to impose one penalty for the two criminal acts. The Second Instance Court thus imposes a sentence of fifteen (15) years of **imprisonment**. This reflects the purposes of punishment of Article 34 of the CCK, as to prevent the re-offending and to deter other persons from



committing of similar crimes. The award of punishment shall be as well a satisfaction for the injured party and a mean for reconciliation of the involved families.

The Supreme Court takes into consideration the individual responsibility of the perpetrator and the special circumstances during which the crimes occurred. The facts that the victims have contributed to the conflict and its inappropriate resolution, and that **Hajriz Gashi**, as the eldest son, felt obviously called to defend the family house are mitigating factors.

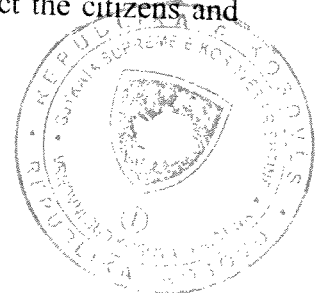
As explained above, the defendant cannot benefit from Article 8 Paragraph 4 of the CCK permitting the reduction of punishment in case of excess of necessary defense.

The Supreme Court partially grants the Appeal filed on the behalf of **Hajriz Gashi** concerning the punishment imposed for the criminal offense of Unauthorized Ownership, Control, Possession and Use of Weapons contrary to Article 328 Paragraph 2 CCK. The appeal is **partially justified** because the punishment of four (4) years of imprisonment is too harsh. It obviously has been imposed because of the assumed acquittal of the defendant for the charges of Murder and Attempted Murder. These are the current relevant offenses demanding for a serious punishment as this is ordered now by the Second Instance Court. A reduction of the punishment for the commission of the offence under Article 328 Paragraph 2 of the CCK to one year and an half (1 ½) years is just as the defendant has not been the first to shoot, and the use of weapon was also provoked by others. The usage of the weapon was not justified by necessary defense. Finally, the Supreme Court takes into consideration the realized riskiness of this possession and use of weapons.

Considering Article 71 Paragraph 2 of the CCK, it deems appropriate to pronounce an aggregate sentence of **sixteen (16) years** of imprisonment. Pursuant Article 73 Paragraph 1 of the CCK, the time **Hajriz Gashi** spent in detention on remand had to be credited.

In respect to defendant Kasum Gashi

The Supreme Court finds the Appeal filed of the defendant **Kasum Gashi** to be partly well founded. The punitive sanction had to be decreased considering the special circumstances of the case, mainly the own serious violation of his body caused by Hajriz Gashi and **Kasum Gashi's** early admission of guilt. A reduction of the penalty to one year and an half (1.5) year instead of the imposed three (3) years deems appropriate, having in mind the purposes of punishment foreseen under Article 34 of the CCK. Contrary to his legal opinion of the Defense Counsel the reaction of the state to this infringement of Article 328 Paragraph 2 must be perceptible. There is a need for a clear message to the defendant and the public that the possession of weapons and the thoughtless use cannot any longer considered a trivial offense. A modern society cannot accept that each citizen takes the alleged right into his own hands as it put in practice in archaic structures. All have to learn that there are other means of resolving conflicts and the use of force has to be preserved to state-organs qualified to protect the citizens and care for their rights.

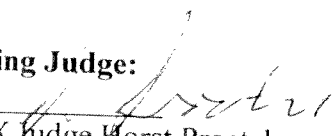


In the concrete case, it is reprehensible that the defendant has approached the house of **Shaqir Gashi** with his handgun, and that he has been the first to shoot at it and their expected inhabitants.


The decision on the costs of the appellate proceedings is based on Articles 99, 100, 103 of the CCK.

The Supreme Court decided as per in the enacting clause.

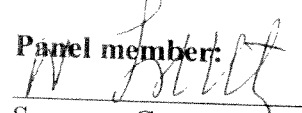
Presiding Judge:


EULEX Judge Horst Proetel

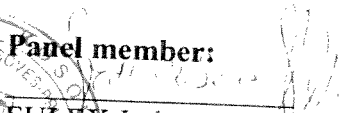
Panel member:


Supreme Court Judge Marije Ademi

Panel member:


Supreme Court Judge Nesrin Lushta

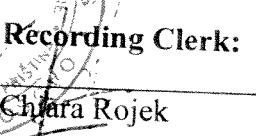
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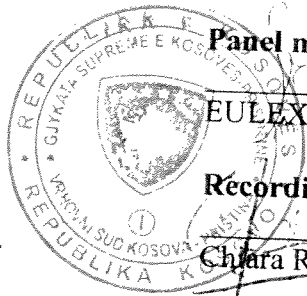

EULEX Judge Francesco Florit

Panel member:


EULEX Judge Gerrit-Marc Sprenger

Recording Clerk:


Chiara Rojek



SUPREME COURT OF KOSOVO

7th February 2012

Ap – Kz 373/10

Prishtinë/Priština

LEGAL REMEDY: Pursuant to Article 430 and Article 398 and following of the KCCP, the parties may file an appeal against this Judgment within fifteen (15) days of the day the copy of the Judgment has been served.