

SUPREME COURT of KOSOVO

Supreme Court of Kosovo
PKL.-KZZ. No. 82/2010
Prishtinë/Priština
25 January 2011

Judgment

In the Name of the People

The Supreme Court of Kosovo in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Charles L. Smith III. and Kosovo National Judges Nesrin Lushta, Emine Mustafa and Salih Toplica as panel members,

And with Nexhmije Mezini as Court Recorder,

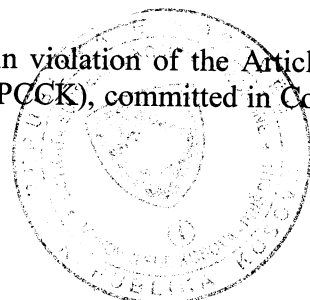
In the criminal case number API-KZI 09/2009 against the defendant:

Shyqeri Shala, the son of _____, born on 24 October 1968 in _____ Municipality, Kosovo Albanian, married, father of six children, resident in _____, merchant, average economic status, finished high school, in detention in Dubrava Detention Centre until his acquittal from all charges by the 2nd Instance Court, Supreme Court of Kosovo on 21 July 2009;

Convicted in the 1st Instance by Verdict of the District Court of Prizren in the case no. P. Nr. 155/2007 dated 17 April 2008 and registered with the Registry of the District Court of Prizren on the same day, **the defendant was found guilty of the following criminal offenses:**

[i] Because on 10 October 2005 at about 16:20 hrs in the market of Prizren municipality, **Osman Zyberaj** acting in concert as a co-perpetrator with **Shyqeri Shala** for the purpose of deliberately depriving another person of his life, namely H _____, intentionally shot at and killed H _____, while other persons were present and in a manner that demonstrated a ruthless disregard for life and in a violent manner;

of committing the criminal offence of **Aggravated Murder** in violation of the Article 147 paragraph 5 of the Provisional Criminal Code of Kosovo (PCCK), committed in Co-



Perpetration, under Article 23 of the PCCK, in that he, with another, killed H
on 10 October 2005 in , Prizren Municipality;

[ii] Because on 10 October 2005 at about 16:20 hrs in the market of
Prizren municipality, **Osman Zyberaj** acting in concert as a co-perpetrator with **Shyqeri Shala** for the purpose of deliberately attempting to deprive another person of his life, namely N , intentionally shot at and wounded N while other persons were present and in a manner that demonstrated a ruthless disregard for life and in a violent manner;

of committing the criminal offence of **Attempted Murder** in violation of the Article 147 paragraph 11 and Article 20 of the PCCK, committed in Co-Perpetration, under Article 23 of the PCCK, in that he, with another attempted to kill N on 10 October 2005, in

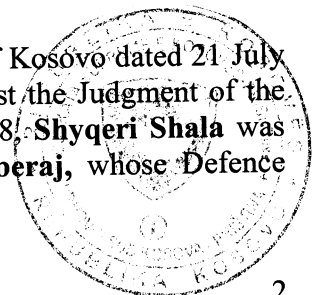
[iii] Because on 10 October 2005 at about 16:20 hrs in the market of village, Prizren municipality, **Osman Zyberaj** acting in concert as a co-perpetrator with **Shyqeri Shala** for the purpose of deliberately depriving another person of his life, namely H N ; and while deliberately attempting to deprive another person of his life, namely N intentionally shot at H and N , while in possession of and using a weapon for which he had no authorization to possess or use;

of committing the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of the Article 328 paragraph 1 of the PCCK, in that he was in possession of and used a weapon in the homicide and homicide attempt of the brothers on 10 October 2005, in village;

And was convicted as follows:

The accused was sentenced for the criminal act of **Aggravated Murder** committed in Co-Perpetration to a term of twenty-five (25) years [Article 147 paragraph 5 and Article 23 of the the PCCK]; for the criminal act of **Attempted Murder** committed in Co-Perpetration to a term of imprisonment of twenty-five (25) years [Article 147 paragraph 11; Articles 20 and 23 of the the PCCK]; for **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 1 of the PCCK] to a term of six (6) years and for **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 2 of the PCCK] to a term of three (3) years. An aggregate punishment of 25 years was built by the 1st Instance Court in accordance with Article 71 paragraph 1 of the PCCK with credit for the time served in detention on remand since 19 April 2007;

In the 2nd Instance by modifying verdict of the Supreme Court of Kosovo dated 21 July 2009 (Ap-Kz No. 481/2008) and on appeal of the Defence against the Judgment of the District Court of Prizren (P. no. 155/2007) dated 08 August 2008, **Shyqeri Shala** was **acquitted of all charges**, whilst his co-defendant **Osman Zyberaj**, whose Defence



Counsels had timely appealed as well, was found guilty alone and sentenced for **Aggravated Murder** in violation of Article 147 item 11 of the PCCK, committed in Co-Perpetration under Article 23 of the PCCK, in that he, with another, killed H on 10 October 2005 in village, Prizren Municipality; and 2) as to the legal qualification of count 3, being **Unauthorized Ownership, Control, Possession or Use of Weapons in violation of** Article 328 paragraph 2 of the PCCK, in that he was in possession of a weapon on 10 October 2005, in village, Prizren Municipality;

The Office of the State Prosecutor of Kosovo (OSPK) on 25 February 2010 timely filed a Request for Protection of Legality against the Verdict of the Supreme Court of Kosovo dated 21 July 2008 (Ap.-Kz.No.481/2009). The 2nd Instance Judgment particularly was challenged because the Supreme Court of Kosovo had not applied the provisions of Article 387 paragraph 2 of the KCCP properly in terms of the assessment of available evidence, when the Court acquitted the defendant Shyqeri Shala. Moreover, the Supreme Court of Kosovo had violated Article 424 paragraph 1 and 4 of the KCCP, that would require a new Main Trial anytime the testimony of some witnesses (in the case at hand the statements of witness N) gathered by the 1st Instance Court is subject matter of the dispute in relation to the determination of the factual state of affairs.

Therefore, the OSPK proposes that the 2nd Instance Judgment to be found to contain substantial violations of the provisions of criminal procedure as provided for by Article 403 paragraph 2 sub-paragraph 1 of the KCCP in relation with Article 387 paragraph 2 and Article 424 paragraph 1 and 4 of the KCCP.

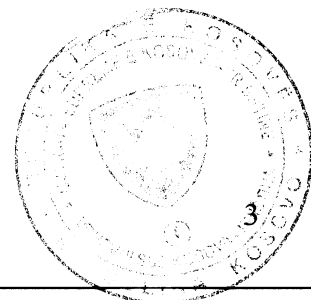
The Defence Counsel of the defendant Shyqeri Shala, with a reply to the Request for Protection of Legality 11 October 2010 proposed to either dismiss the Request for Protection of Legality of the OSPK as impermissible or reject it as ungrounded.

Based on the written Verdict of the District Court of Prizren in the case number P. Nr. 155/2007 dated 17 April 2008 (filed with the Registry of that Court on the same day), the Request for Protection of Legality of the OSPK, the written reply of the Defense Counsel and the relevant file records and documents as assessed during the session on 18 January 2011, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 18 January 2011, hereby issues the following:

JUDGMENT

The Request for Protection of Legality filed on 5 February 2010 by the Office of the State Prosecutor of Kosovo against the judgment of the Supreme Court of Kosovo Ap.-Kž. No. 481/2008, dated 21 July 2009, is hereby rejected as unfounded.

The costs of the proceedings will be borne by the Kosovo budget.



REASONING

Procedural History

1. In the afternoon of 10 October 2005 at about 16:20 hrs in the green market of village, Municipality of Prizren, two perpetrators acting in concert as co-perpetrators approached the K-Albanian citizens H and his brother N, who both of them were in the process to enter their car in order to leave the market, which they had attended for shopping purposes at that time Both perpetrators pointed their handguns at H, shot at and killed him. One of the two perpetrators, after having shot at H pointed his handgun towards N as well, who in the course of events eventually got wounded and was hospitalized afterwards.

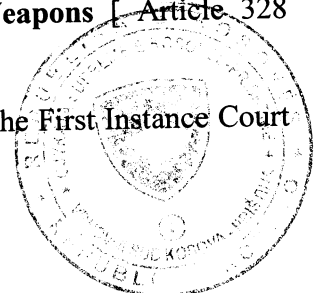
2. Witnesses identified the defendant **Osman Zyberaj** as one of the shooters, and who immediately after was observed entering a bordaux colored Opel Vectra at the drivers side, which was parked in a way that it blocked the vehicle of the victims, thus hindering them to leave the place. The respective Opel Vectra then left the village of towards Gjakova/Djakovica.

3. On 12 October 2005 the Public Prosecutor of the Prizren District filed a Ruling on Initiation of Investigation against **Osman Zyberaj** and the alleged second perpetrator Shyqeri Shala. An order for their arrest was issued by the Pre-Trial Judge of the District Court of Prizren on the same day. On 19 April 2007 **Osman Zyberaj** was apprehended by police and found in possession of a revolver of the type "Amadeo Rossi S.A. 0.38 Special", which he had no authorization for. He was detained from then on continuously.

4. As the second alleged perpetrator, **Shyqeri Shala** was arrested on 23 Mai 2007 without incident by UNMIK police and detained on motion of the District Public Prosecutor based on a ruling of the District Court of Prizren on the same day (Hep No 52/07).

5. Dated 16 July 2007 the District Public Prosecutor in Prizren drew up an indictment against the defendants **Osman Zyberaj** and **Shyqeri Shala** (PP 230/2005), which was filed with the District Court of Prizren on 17 July 2007. Both defendants were indicted for the criminal offenses of **Aggravated Murder** committed in Co-Perpetration [Article 147 paragraph 5 and Article 23 of the the PCCK]; **Attempted Murder** committed in Co-Perpetration [Article 147 paragraph 11; Articles 20 and 23 of the the PCCK]; **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 1 of the PCCK] and the defendant **Osman Zyberaj** alone as well for **Unauthorized Ownership, Control, Possession or Use of Weapons** [Article 328 paragraph 2 of the PCCK]

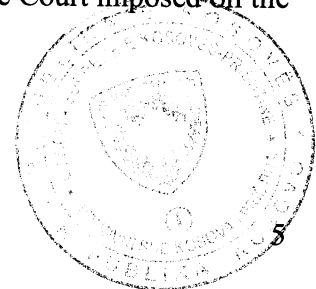
6. The indictment was consolidated by Confirmation decision of the **First Instance Court** (KA 112/2007) on 30 August 2007.



7. The public Main Trial hearing against **Osman Zyberaj** and **Shyqeri Shala**, which consisted in altogether nine (9) sessions between 31 January and 17 April 2008 was partly held in the premises of the District Court of Prizren and – considering the health conditions of the defendant Osman Zyberaj - in some other parts in the court room of the Dubrava Prison facility. The verdict of guilty for **Aggravated Murder** in violation of Article 147 paragraphs 4, 5 and 8 of the PCCK and **Attempted Murder** in violation of Article 147 paragraph 11 and Article 20 of the PCCK, both committed in Co-Perpetration according to Article 23 of the PCCK, and for **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 1 of the PCCK against both defendants as well against the defendant Osman Zyberaj alone for **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 2 of the PCCK was pronounced on 17 April 2008 imposing an aggregate 25 (twenty-five) years prison sentence against each of the defendants,

8. During the main trial, the First Instance Court examined the accused, **Osman Zyberaj** and **Shyqeri Shala**. Then, the following witnesses were questioned: V and S, who were attending the green market in , when the criminal acts in question were committed, KPS Officer L and former KPS Officer F, who investigated the crime scene and attended investigations and autopsy concerning the digging out and burning of the dead corps of the victim H in Rahovac/Orahovac a few days later, the victim N, International Police Officers R who was appointed to monitor and advise in the case of the killing of H and E, who was involved in the arrest of the defendant **Osman Zyberaj** on 19 April 2007, KPS Officer I, who was involved as ballistic expert into the investigations concerning the weapon found on **Osman Zyberaj** and the shell casings and bullet heads found in the crime scene, Lajm journalist Q, who attended the crime scene immediately after the shooting and who – based on information given to him through a telephone call – published a newspaper article on 14 October 2005, thus telling the names of both victims and that the defendants **Osman Zyberaj** and **Shyqeri Shala** would be the perpetrators, Autopsy Pathologist Dr. A, who conducted the autopsy of H, Orthopedic Surgeon and Traumatologist Dr. D, who treated N, KPS Officers H, G, X, B and Ru. Be, who all have been involved in the investigation of the crime; Sh, who as a worker in a car wash in and Xh, who works as a sales person close to the market in and who both had seen **Shyqeri Shala** near to the market at the day of the shooting, as well as Bu, the wife of defendant **Osman Zyberaj**.

09. Based on this evidence, the 1st Instance Court established the factual situation, which led to the convictions as outlined before. Based on its findings, on 17 April 2008, the District Court announced the Verdict and found the accused guilty of the criminal offences listed above from items [i] through [iv]. Consequently, the Court imposed on the accused the punishments as also specified above.



10. The Judgment was timely appealed both, the Defence Counsels of the defendant **Osman Zyberaj** as well as the Defence Counsel of **Shyqeri Shala**, the latter on 11 August 2008.

11. On 29 October 2008, Defence Counsel Av Ethem Rogova forwarded to the Court a letter of the defendant **Osman Zyberaj** and asked to have it attached to the appeal. Amongst others, the defendant Osman Zyberaj in this letter stated that he himself had killed the victim H _____ and wounded his brother N _____ and that he had acted alone.

12. Dated 01 December 2008 the OPSK gave an opinion according to Article 409 paragraph 2 of the PCPCK, thus proposing to reject all appeals as being ungrounded and without merits. The Public Prosecutor did not appeal.

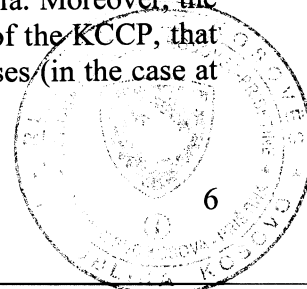
13. On 21 July 2009, after the handover of the case files to EULEX in January 2009, the Supreme Court of Kosovo held an appeal session pursuant to Article 410 of the KCCP, within which the submissions of the co-defendant **Shyqeri Shala** and his Defence Counsels Av Rxhep Hasani and Hazer Susuri were heard.

Moreover, also the request of the defendant **Osman Zyberaj** dated 25 October 2008 as attached to the appeal of his Defence Counsels was read and the submissions of the Defence Counsels of the defendant **Osman Zyberaj**, Av Ruzhdi Gashi, Av Ethem Rogova and Av Fatmir Celina were heard as well as the submissions of the defendant **Osman Zyberaj** and the opinion of the OSPK.

14. Dated 21 July 2009 the appeals panel of the Supreme Court of Kosovo pronounced its Judgment (Az.-Kz. 481/2008), by which the defendant **Shyqeri Shala** was acquitted of all charges due to lack of evidence.

15. The defendant **Osman Zyberaj** was found guilty, but his appeals were partially granted as to the legal qualification under counts 1 and 2 of the 1st Instance Judgment, which was qualified as one Aggravated Murder in violation of Article 147 paragraph 11 of the PCCK, and as to the legal qualification under count 3 of the 1st Instance Judgment, thus stating that the defendant **Osman Zyberaj** had committed the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 2 of the PCCK** only. For the remaining parts the appeals were rejected and the 1st Instance Judgment was confirmed.

16. **The Office of the State Prosecutor of Kosovo (OSPK)** on 25 February 2010 timely filed a Request for Protection of Legality against the Verdict of the Supreme Court of Kosovo dated 21 July 2008 (Ap.-Kz.No.481/2009). The 2nd Instance Judgment particularly was challenged because the Supreme Court of Kosovo had not applied the provisions of Article 387 paragraph 2 of the KCCP properly in terms of the assessment of available evidence, when the Court acquitted the defendant Shyqeri Shala. Moreover, the Supreme Court of Kosovo had violated Article 424 paragraph 1 and 4 of the KCCP, that would require a new Main Trial anytime the testimony of some witnesses (in the case at



hand the statements of witness N) gathered by the 1st Instance Court is subject matter of the dispute in relation to the determination of the factual state of affairs.

Therefore, the OSPK proposes that the 2nd Instance Judgment be found to contain substantial violations of the provisions of criminal procedure as provided for by Article 403 paragraph 2 sub-paragraph 1 of the KCCP in relation with Article 387 paragraph 2 and Article 424 paragraph 1 and 4 of the KCCP.

17. **The Defence Counsel of the defendant Shyqeri Shala**, with a reply to the Request for Protection of Legality 11 October 2010 proposed to either dismiss the Request for Protection of Legality of the OSPK as impermissible or reject it as ungrounded.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

18. The OSPK has challenged the 2nd Instance Judgment because the Supreme Court of Kosovo had violated Article 403 paragraph 2, sub-paragraph 1 of the KCCP.

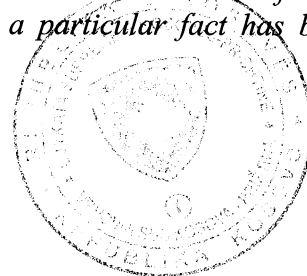
I. THE ASSESSMENT OF AVAILABLE EVIDENCE ACCORDING TO ARTICLE 387 OF THE KCCP

19. In particular, it is argued that the Supreme Court of Kosovo had not applied the provisions of Article 387 paragraph 2 of the KCCP properly in terms of the assessment of available evidence, when the Court acquitted the defendant **Shyqeri Shala**.

20. After careful analysis of the relevant provisions of the law as well as of the adjudication of the Supreme Court of Kosovo, this panel finds that the particular case at hand the 2nd Instance Court has not disregarded the provision of Article 387 paragraph 2 of the KCCP to the detriment of proper criminal procedures and therefore no violation of Article 403 paragraph 2, sub-paragraph 1 of the KCCP could be established that would justify having the respective 2nd Instance Judgment considered as essentially violating criminal procedure law.

21. Article 387 stipulates as follows:

- (1) *The court shall base its judgment solely on the facts and evidence considered at the main trial.*
- (2) *The court shall be bound to assess conscientiously each item of evidence separately and in relation to other items of evidence and on the basis of such assessment to reach a conclusion whether or not a particular fact has been established.*



22. Since it is not clear from the wording of Article 387 of the KCCP alone, whether the applicability of the provision is restricted to the courts of 1st instance only or it applies to all instances, the law needs to be interpreted.

(1) A **grammatical interpretation** of the law could allow for either interpretation, since the law does not specifically mention any limitation to stages of the proceedings, but talks about “*the court*” only.

(2) Under **systematical aspects** it needs to be mentioned that the respective provisions on rendering of the judgment are given under Chapter XXXV of the KCCP and thus belong to Part Four of the KCCP, which rules on “*Main Trial and Judgment*”. This could drive to the opinion that all these provisions apply to the proceedings at 1st instance level only. In particular, Article 319 paragraph 2 of the KCCP insofar clearly stipulates that “*the presiding judge schedules the main trial as soon as the indictment becomes final*”, which naturally refers to the 1st instance.

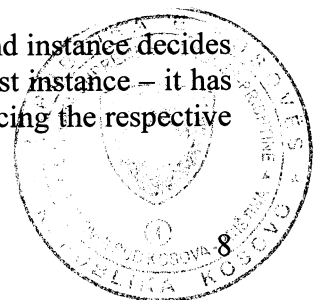
At the other side, also other instances may decide by judgment. This particularly can be read from Article 423 of the KCCP, according to which “*the court of second instance shall reject by a judgment an appeal as unfounded ...*”. Also, the Supreme Court of Kosovo decides by judgment on any request for protection of legality, as stipulated by Article Article 456 of the KCCP for decision to reject the request for protection of legality as well as by Article 458 of the KCCP for decisions on annulment of the challenged verdict.

Since only Part Four of the KCCP rules on the judgment, it would be surprising to conclude that these provisions are related to the 1st instance only but that all other instances which also can decide by judgment are left without any applicable provisions on how to proceed in these cases. Therefore, the position of Article 387 of the KCCP in the context of Part Four of the said law indicates that the rules on rendering a judgment apply also at the appeal stage.

(3/4) Since no documentation on the **motives of the law** is accessible, the question for the **purpose of the law** can be used as an additional interpretation tool. It is quite clear that the purpose of Article 387 paragraph 2 of the KCCP targets to make sure that each item of evidence is properly evaluated by the respective court both individually and in the context of all other admissible pieces of evidence. That this is relevant also for the court of second instance particularly illuminates from Article 412 paragraph 1 of the KCCP, according to which “*a hearing before the court of second instance shall be conducted only when it is nessecary to take new evidence or to repeat evidence already taken due an erroneous or incomplete determination of the factual situation, and when there are valid grounds for not returning the case to the court of first instance for re-trial*”.

Upon this background it becomes quite clear that the court of second instance can also take evidence, but if it does so, is bound to follow the same rules as the court of first instance, which in these cases is the one to be replaced by the appellate court.

Therefore, it can be established as a rule that – when the court of second instance decides to replace the assessment on evidence as carried out by the court of first instance – it has to take the evidence directly in the course of a hearing instead of replacing the respective



assessment just based on the case file, particularly when the evidence in question is a witness's statement.

23. Moreover, in compliance to the latter interpretation the Supreme Court of Kosovo has issued several verdicts in cases where the appellate panel had chosen not to take any new evidence. In all these cases the Supreme Court has established that the findings and assessments of the trial panel must be considered as binding for the next instance. In particular in the case of **Vladimir Ukaj, Robert Sylaj and Sabri Islami** (Ap-Kz 428/2007, dated 28 May 2007) the Supreme Court has clarified that

“The Supreme Court of Kosovo must defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so [...]” (p.24 of the English version).

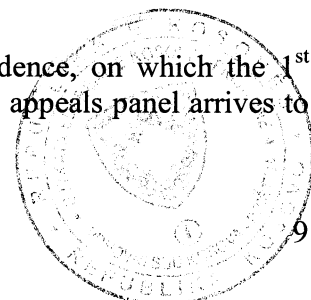
This adjudication was repeated in the case of **Jeton Kiqina** (Ap-Kz 84/2009, dated 03 December 2009), in which the Supreme Court of Kosovo found that

“[...] it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again” (p. 19 of the English version).

24. However, in the case at hand the situation is different. The 2nd Instance Court has arrived to the opinion that the assessment of the statements of witness N as carried out by the 1st Instance Court would be questionable. Moreover, some circumstantial evidence, in particular the telephone call received by the journalist Q two days after the crimes as well as the statements of several witnesses that the defendant **Shyqeri Shala** was seen in in the afternoon of the day when the crimes were committed, would not be sufficient evidence for a conviction each one alone, despite the fact that the presence of the defendant **Shyqeri Shala** exactly at the time of the murder was not established beyond all doubts.

The relevant assessment of the 2nd Instance Court can be found in the respective Judgment dated 21 July 2009 (Ap-Kz 481/2008) on p. 22-25 of the English version. The 2nd Instance Court has arrived to the opinion that despite from the fact that the identification of the defendant **Shyqeri Shala** by the witness N was made two years after the crime had happened and the police report dated 13 October 2005 would not mention the defendant's name at all, there was no evidence that **Shyqeri Shala** ever had possessed a fire weapon. Moreover, the first judge had omitted to consider that the defendant **Shyqeri Shala** had no motive and the judge had disregarded the alibi of **Shyqeri Shala** as provided by the witnesses J, Sh and Xh:

Then the 2nd Instance Court in its Judgment analyzes the evidence, on which the 1st Instance Court had based the conviction of **Shyqeri Shala**. The appeals panel arrives to



the opinion that there are reasonable doubts on the identification of the second shooter as **Shyqeri Shala** as carried out by the witness N . During his first interrogation on 11 October 2005, the witness had described the second shooter in detail but declared that he could not identify him, whilst during the second interview on 27 October 2005 he had described him and stated that he was told by his family that the person would be **Shyqeri Shala**. On a third occasion on 08 July 2008 the witness had identified **Shala** in a photo line-up but underlined that he was not sure just by the pictures. Only during the main trial he had clearly identified **Shala**, who was present in the court room, together with only very few other participants in the trial.

Although **Shyqeri Shala** at the critical time had possessed a burgundy colored Opel Vectra as assessed by the first judge and similar to the one observed in connection with the respective crimes, the car of **Shala** was never found by the police.

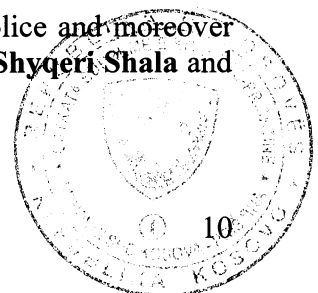
Although telephone calls between the mobile phones of **Shyqeri Shala** and **Osman Zyberaj** have been recorded immediately before the crimes were carried out, neither the contents of the telephone conversations nor the whereabouts of the two telephones at the critical time would be known.

The telephone call received two days after the shooting by the journalist Q alone – although the narration of the witness would be credible - would be unable to ground the responsibility of **Shyqeri Shala**.

Finally, several witnesses have stated that **Shyqeri Shala** was present in in the afternoon, when the respective crimes were committed. However, witness Xh had stated that **Shyqeri Shala** had left towards Gjakova/Djakovica and it could not be established, whether or not **Shala** was present just at the moment of the murder.

25. This panel finds that the 2nd Instance Court in the case at hand has evaluated each piece of evidence individually in a correct manner, even under the aspect that the statements of all relevant witnesses have been considered without having these witnesses interrogated again in person, although the latter would have been the better and clearer way to re-assess the questionable evidence. In particular, there was no need to hear the witness N again, since despite the contradictions between his several statements on indentification or non-identification of **Shyqeri Shala** as one of the perpetrators, also some of the circumstantial evidence collected to the detriment of **Shyqeri Shala** was either not found back at all by the police and thus was not verified to an amount justifying **Shala** to be found guilty, or was not strong enough to have the chain of evidence closed to the detriment of the accused. Therefore, the 2nd Instance Court has properly applied the principle of *in dubio pro reo* as stipulated by Article 3 paragraph 2 of the KCCP and acquitted **Shyqeri Shala** of all charges.

26. Particularly, the car of **Shyqeri Shala** never was found by the police and moreover the contents of the telephone conversation between the cell phones of **Shyqeri Shala** and **Osman Zyberaj** short time before the murder are unknown.



II. MISINTERPRETATION OF ARTICLE 424 PARAGRAPH 1 AND 4 OF THE KCCP

27. Moreover, according to the OSPK, the Supreme Court of Kosovo had violated Article 424 paragraph 1 and 4 of the KCCP, that would require a new Main Trial anytime the testimony of some witnesses (in the case at hand the statements of witness N.) gathered by the 1st Instance Court is subject matter of the dispute in relation to the determination of the factual state of affairs.

28. This panel finds that Article 424 paragraph 1 and 4 of the KCCP has not been misinterpreted by the 2nd Instance Court and thus Article 403 paragraph 2 item 1 of the KCCP was not concerned.

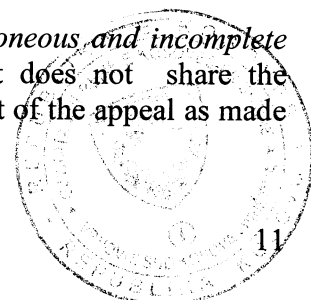
Article 424 of the KCCP in its relevant parts reads a follows:

- (1) *The court of second instance shall, in accepting an appeal ..., annul by a ruling the judgment of the court of first instance and return the case for re-trial if it finds that there exists a substantial violation of provisions of criminal procedure, except for cases provided for in ... Article 426 paragraph 1 of the present Code, or if it considers that a new main trial before the court of first instance is nessecary because of an erroneous or incomplete determination of the factual situation.*
- (2)
- (3)
- (4) *Where the only reason for annulling the judgment of the court of first instance is an erroneous determination of the factual state of affairs and where all that is required for a correct determination is a different assessment of already determined facts and not the collection of new evidence or the repetition of previously produced evidence, the court of second instance shall not annul the judgment of the court of first instance, but shall act according to Article 426 of the present Code.*

Article 426 of the KCCP as relevant in the case at hand stipulates as follows:

- (1) *The court of second instance shall, in accepting an appeal ..., modify by a judgment the judgment of the court of first instance if it determines that the material facts have been properly determined in the judgment of the court of first instance but that having regard to the determination of the factual situation a different judgment should have been passed according to the correct application of the law.[...]*
- (2) ...

29. The 2nd Instance Court in its reasoning under the point “*erroneous and incomplete determination of the factual situation*” has pointed out that it does not share the assessment of the first judge and that therefore the respective point of the appeal as made



by the Defence of **Shyqeri Shala** was deemed to be grounded. In particular, the assessment of the statements of witness N as carried out by the 1st Instance Court would be questionable. Moreover, some circumstantial evidence as there are in particular the telephone call received by the journalist Q two days after the crimes as well as the statements of several witnesses that the defendant **Shyqeri Shala** was seen in in the afternoon of the day when the crimes were committed, would not be sufficient evidence for a conviction each one alone, despite from the fact that the presence of the defendant **Shyqeri Shala** exactly at the time of the murder was not established beyond all doubts.

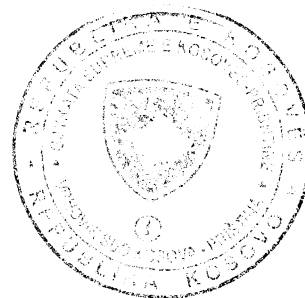
30. Insofar, reference is made to what was said before in relation to the 2nd Instance Court's decision under item A.I., p. 9 and 10, item 24. of this Judgment

31. From all this it can be understood that the 2nd Instance Court has applied Article 424 paragraph 2 as read with Article 426 paragraph 1 of the KCCP, thus considering that the 1st Instance Court has determined the material facts properly, but that a correct determination of the factual situation would require a different assessment of the already determined facts. After what was said before in relation to the principle of *in dubio pro reo* in the case at hand, the Supreme Court of Kosovo finds that the 2nd Instance Court has correctly applied the respective provisions of the KCCP, since the case at hand indeed was to be subsumed under Article 424 paragraph 4 as read with Article 426 paragraph 1 of the KCCP.

B. Conclusion of the Supreme Court of Kosovo

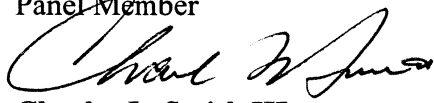
32. For the abovementioned reasons, the Supreme Court concludes that the Request for Protection of Legality of the OSPK is unfounded.

33. For the foregoing reasons the Supreme Court decided as in the enacting clause, pursuant to Article 457 paragraph 2 of the KCCP.

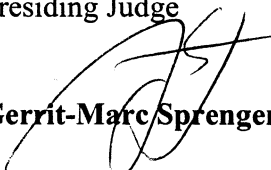


SUPREME COURT OF KOSOVO IN PRISHTINE/PRISTINA
PKL.-KZZ. No. 82/2010, 25 January 2011

Panel Member


Charles L. Smith III.


Presiding Judge


Gerrit-Marc Sprenger

Panel Member

Emine Mustafa

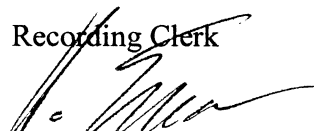

Panel Member


Nesrin Lushta

Panel Member


Salih Toplica

Recording Clerk


Holger Engelmann

