Supreme Court of Kosovo
Ap.-Kž. No. 409/2008
12 March 2009
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted in compliance with Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure ("KCCP"), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo ("Law on Jurisdiction"), composed of

- Guy Van Craen, EULEX Judge, as presiding and reporting judge,
- Maria Giuliana Civinini, EULEX Judge,
- Emilio Gatti, EULEX Judge,
- Avdi Dinaj, Supreme Court Judge and
- Fejzullah Hasani, Supreme Court Judge, as panel members,

assisted by Judit Eva Tatrai, EULEX Legal Officer, as recording officer, Valentina Gashi and Robert Abercrombie, EULEX court recorders, Arlinda Gjebrea, Anila Shehu, Mentor Abdullahu and Naser Syla EULEX Interpreters, also in the presence of the Public Prosecutors, Anette Milk, EULEX Prosecutor, and Ismet Kabashi, Defence Counsel Mahmut Halimi and defendant Florim Ejupi, in a session held on 10 March 2009, following the deliberation of the panel concluded on 12 March 2009;

In the criminal case against:

Florim EJUPI, nickname Luli, son of Mursel Ejupi and Fatime Berisha, born on 15 June 1978, in Gllamnik/Glavnik, Podujevë/Podujevo municipality, Kosovan Albanian, last permanent residence Sekiraca village, Podujevë/Podujevo municipality, Kosovo, married, father of two children, finished 8 years of elementary school, farmer, of average economic status, no known previous conviction, in detention between 19 March and 14 May 2001, and continuously since 08 June 2004;

Found guilty by the verdict of the District Court of Prishtinë/Priština, dated 6 June 2008, P. No. 202/2005 for the criminal offences of:
Murder, contrary to Article 30 paragraphs (1), (2) items 1, 2 and paragraph (3) of the Criminal Law of Kosovo (CLK), in conjunction with Article 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), both made applicable by the UNMIK Regulation No. 1999/24; **Attempted Murder,** contrary to Article 30 paragraphs (1), (2) items 1, 2 and paragraph (3) of the CLK, in conjunction with Articles 19 and 22 of the CC SFRY; **Terrorism,** contrary to Articles 22 and 125 of the CC SFRY; **Causing General Danger,** contrary to Article 157 paragraphs (1), (3) of the CLK in conjunction with Article 22 of the CC SFRY; **Racial and Other Discrimination**, contrary to Articles

22 and 154 of the CC SFRY; and **Unlawful Possession of Explosive Substances,** contrary to Article 199 paragraphs (1), (3) of the CLK;

Sentenced to a unified term of forty (40) years of imprisonment, with credit for the time served in detention on remand between 19 March and 14 May 2001, and continuously since 08 June 2004, pending the date when the verdict becomes final;

Deciding on the appeal of the Defence Counsel Mahmut Halimi filed in favour of the defendant Florim Ejupi on 4 September 2008, supplemented on 10 October 2008, against the verdict of the District Court of Prishtinë/Priština, dated 6 June 2008, P. No. 202/2005;

Having reviewed the court records, heard the arguments of the Defence Counsel and that of the Public Prosecutor, and having analysed the relevant laws, the Supreme Court of Kosovo renders the following

JUDGMENT

The appeal of the Defence Counsel Mahmut Halimi filed in favour of the defendant Florim Ejupi on 4 September 2008, supplemented on 10 October 2008, is **GRANTED** and the verdict of the District Court of Prishtinë/Priština, dated 6 June 2008, P. No. 202/2005, is **MODIFIED;**

Florim Ejupi is found **NOT GUILTY**, and is **ACQUITTED of all charges.**

Reasoning

1. On the Procedure :

1.1 The Appeal of the defendant Florim Ejupi is admissible, filed regular and in due time.

1.2 The Supreme Court is competent to decide upon the admissible appeal of the defendant Florim Ejupi, in a panel of five Supreme Court Judges. The legal composition of the panel, three Eulex Supreme Court Judges and two Kosovar Supreme Court Judges, established by the President of the Assembly of the Eulex Judges and confirmed, in *limine litis*, by the decision of the President of the Assembly of the Eulex Judges dd. 10 March 2009 in accordance with the Law on Jurisdiction Case Selection and Case Allocation, heard the parties present in the session of the Supreme Court held on the 10March 2009.

1.3 Although duly summoned the injured party failed to appear during the session.

1.4. The Appeal procedure and the session of the Supreme Court were help following the Criminal procedure Code of Kosovo with regard in particular to Chapter XXXVI, 4 / inter alia art. 409, art. 410 (1, 2, 3, 4), art. 411, art. 412.

1.5 The decision (see the acting clause) is reached pursuant to art 426 (1)CPCK.

2. On the Grounds of the Appeal:

2.1 In essence, the defence does not challenge the material facts as such as they were established by the first instance judgement BUT challenges the reasoning build upon these material facts and the consequences coupled on these established facts resulting in the conviction of the accused. The defence stressed in his appeal that the two most important pieces of evidence (DNA findings with regard to the cigarette butt and the witness statement(s) of witness Alpha) are not only questionable but also defect so the First Instance Court could not rely upon this "evidence" to conclude in the conviction of the accused. The defence underlines the adagium "*in dubio pro reo*" meaning that the elements of doubt should benefit the accused and/or be interpreted in favour of the accused.

2.2 In essence, the Prosecutor underlined the establishment of the material facts and the admissibility of the evidence on which the appealed judgement is based, in particular the credibility of the witness Alpha and the regularity of the accurate scientific examination of the fresh cigarette butt found on the crime scene. The Prosecutor stressed that also other evidence was found at the crime scene establishing indeed the unchallenged material facts as they were described by the District Court of Pristina. The Prosecutor concluded that the decision of the First Instance Court has to be confirmed by the Supreme Court and the appeal has to be rejected as unfounded.

3. On the Evidence:

3.1. The Panel, in examining the presented evidence during the criminal procedure until now, taking into account that the judgement can solely be based on the evidence considered at the main trial (art. 387.1 CPCK), notes that there is NO direct evidence of the presence of the accused at the crime scene while he was preparing or executing the crimes he has been convicted for. The (questionable) evidence which links the accused to the crime and to the day of the facts are the

above mentioned DNA findings on a butt of cigarette and the statements of Witness Alpha.

3.2. In examining the DNA evidence the Panel founds that this evidence is defect for different reasons.

The panel concluded that there is no conclusive objective and scientific expertise which proves with a reasonable certainty that the cigarette but was smoked before or after the explosion. The mere declaration , even with regard to the weather conditions that day and the day before and with regard to the relative sealed crime scene, of the investigating officer(s) do not suffice to conclude that the cigarette was smoked during the preparation or execution of the bombing the bus. Being "fresh" is no indication of a precise time; it is at the most an indication that the cigarette butt was not laying there since the day before. Except the questionable conclusion that the ripped electrical wires "proof" the place of the commando-point and thus that the place of the commando-point is near the place were the cigarette butt was found, there is no other evidence or concurring indications proving the exact place of the commando-point, watch-out place and the kind of electrical device which caused the detonation.

Furthermore, there is not a sufficient proof that indeed the cigarette butt found at the crime scene is the same cigarette butt (no investigation report on the finding, sealing and /or marking of the evidence)which was subject to the comparative test with the DNA sample which was kept in Germany (previous DNA test taken in another criminal case from the accused). Finally it is to be noted that the complete report of the previous to the criminal acts German DNA analyses (the taking of the sample, the scientific expertise , the DNA mapping) was not requested nor joint to the file. The Panel has no insight in full report concerning the German DNA analysis as such and is not able to evaluate materially or legally this analysis.

Therefore, considering the above mentioned reasons, the Panel does not accept the comparative test which concluded that the DNA on the cigarette butt matches with the DNA of the defendant, as convincing evidence which proofs the presence of the defendant at the crime scene while preparing or executing the criminal acts where he is accused from.

3.3. In examining the evidence collected from the statements of witness Alpha the Panel founds that this evidence is defect for different reasons and the Panel concluded that the statements of this witness are not reliable and can not be a proof for the participation of the accused in the bus bombing. In any case a judgement can not be grounded , solely, on the statements of an anonymous witness(art 157 CPCK).

The Panel notes that the witness Alpha was prepared and instructed by the investigating officers to infiltrate in the group of the accused at the Dubrava Prison,

and doing so to collect information about the participation of the defendant (and eventually others) in the bus bombing. It has to be observed that this kind of " infiltration technique" was not ordered or controlled by a pre-trial judge. Further more it can not be questioned that the witness got in return for his (dangerous) cooperation, promises and advantages. The latter is not only deducted from the statements of the witness himself ,from the investigators, and from the mere fact of his successful attempt to obtain the status of "protected witness ". It is clear that the witness Alpha will not risk his live (as he indicates) because he feels sorry for the victims or finds the facts to cruel. Finally the Panel notes that different statements of this witness Alpha concerning the time of his meetings with the accused and the wordings used about the (vague) information gathered at that moment , the way and the circumstances in which the "confession" of the accused was made, the lack of correct and precise information on essentials(e.g. the electrical power device used by the accused, the way it was transported, connected and used, the fabrication, the precisions on the collection and emplacement of the bomb - explosives and the needed expertise), and/or other not mere details, differs from each other and are not sufficient consistent (also noted in the First Instance Judgement) and in many aspects in contradiction with other witness statements (e.g. explosive expert on the electric energy source need to activate the explosion). Finally and additionally the witness personality (e.g. prior implications in criminal matters, escape attempt, disciplinary problems in prison) does not invite the Court to believe this witness without further consistent supporting evidence, which is lacking.

3.4 All the above mentioned elements leads the Panel to conclude that the witness Alpha is not credible and the Court of First Instance should not have relied upon witness Alpha, not even as supporting evidence and should not have declared his statements (partial) credible. The panel underlines in this, contrary to the first instance judgement, that the witness Alpha statements and the witness personality should be taken as a whole in its entire context in order to evaluate its credibility, and not partially.

3.5 In examining the above and the other presented indications and pieces of evidence, the Panel in its surge for the truth, can not adhere to the theory of conspiracy and the arbitrary arrest of the defendant - as presented by the defence lawyer - because any indications or any evidence to proof this allegation is lacking.

4. On Other Legal Arguments Raised in the Appeal

The Panel in deciding the absence of sufficient proof of the presence of the accused at the crime scene during the preparation or execution of the criminal acts does not answer (eventual) other legal arguments with the same finality, raised by the defendant. In this sense the Appeal is granted.

5. On the Decision of the Panel

5.1 The Panel, as mentioned above (point 2), finds that the first instance judgement determined properly the material facts but that having regard to the determination of the factual situation, *in casu* the absence of convincing evidence regarding the accused, a judgement of acquittal (not guilty) should have been passed according to the application of the law. Therefore in application of art 406 (1) – 426 (1) CPCK the Panel does not send back for retrial.
In addition, the Panel is convinced that, with regard to the criminal facts dating from 9 years ago, new convincing evidence is not likely to be collected, so that sending back the case to the First Instance Court would not have any legal or real objective and contrary to the administration of justice.

5.2 The panel decided, according to art. 426(3) CPCK, to immediately cancel the detention against the defendant by means of a separate ruling issued the 12 March 2009.

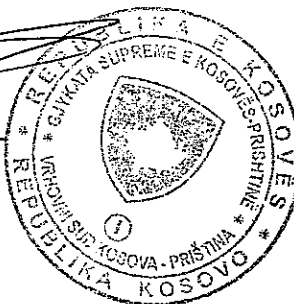
6. On the Costs of the Criminal Proceedings

The costs of the criminal procedure are to be paid from budgetary resources due to the acquittal of the defendant from all charges, based on the lack of evidence against this accused.

Therefore the Panel decided as written in the above enacting clause.

Presiding Judge:

Guy Van Craen
EULEX Judge



Recording officer:

Judit Eva Tatrai
EULEX Legal Officer