SUPREME COURT OF KOSOVO
PKL-KZZ-30/10
Date: 01 February 2011

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, with EULEX Judges Lars Dahlstedt and Charles L Smith III and Kosovo Judges of the Supreme Court of Kosovo, Emine Mustafa and Salih Toplica as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk,

In the criminal matter P nr 628/04, of the District Court of Gjilan/Gnjilane against the defendants:

Burim Ramadani, father's name , mother's name in
in , of

Arsim Ramadani, father's name , mother's name in

Arben Kiqina, father's name , mother's name in

Blerim Kiqina, father's name , mother's name

Convicted by the Supreme Court Judgment Ap-Ka 293/06 of five criminal offence of Aggravated Murders and One Attempted Aggravated Murder pursuant to Article 30 par 1 and 2 (item 1) and 3 of the Criminal Law of Socialist Autonomous Province of Kosovo (CL SAPK) as read in conjunction to Article 19 and 22 of the Criminal Code of the Socialist Republic of Yugoslavia (CC SFRY),

Deciding upon the Requests for Protection of Legality filed by defence counsels Av Bejtush Isufi, (co-signed by Linn Slattengreen), Av Haxhi Millaku, Av Vahide Braha, Av Mahmut Halimi and Av. Ibrahim Dobruna on behalf of defendants Burim Ramadani, Arben Kiqina , Arsim Kiqina and Blerim Kiqina , against the Judgment of the District Court of Gjilan/Gnjilane P nr 162/03 dated 07.04.2005, against judgment of the Supreme Court of Kosovo, AP 393/06, dated 20.05.2008 and against the Judgment of the Supreme Court of Kosovo, API 04/09 dated 16.09.2009,

Pursuant to Article 454 para 1 of the Provisional Criminal Procedure Code of Kosovo (*hereafter* "PCPCK[1]"), after a session on deliberation and voting held on 01 February 2011, the Supreme Court of Kosovo issues the following:

JUDGMENT

To reject the Requests for Protection of Legality filed by defence counsels Av Bejtush Isufi (co-signed by Linn Slattengreen), Av Haxhi Millaku, Mahmut Halimi, Av Vahide Braha and Ibrahim Dobruna filed on behalf of defendants Burim Ramadani, Arsim Ramadani, Arben Kiqina and Blerim Kiqina, against the Judgment of the District Court of Gjilan/Gnjilane P nr 162/03 dated 07.04.2005, against the Judgment of the Supreme Court of Kosovo, AP 393/06, dated 20.05.2008 and against the Judgment of the Supreme Court of Kosovo, API 04/09 dated 16.09.2009 as UNFOUNDED and to confirm the Judgment of the Supreme Court of Kosovo rendered in second instance that was affirmed in the third instance, pursuant to Art 456 of the KCCP.

REASONING

I. Procedural Background

On 20 August 2001, at or about 23:17 hrs Hamez Hajra, his wife Miradije, his son Xhevdet and his daughters Mimoza and Adelina were murdered on a small narrow dirty road between the villages of Baica and Terstenik. They had earlier attended a wedding party of a family member in the village of Baica. Leaving the wedding celebration, the Hajra family travelled together in a car, driven by Xhevdet Hajra, with Hamez in the front passenger seat and his wife and daughters in the rear passenger seats heading towards their home in Glogovac. As the vehicle began to slowly cross an old wooden bridge the daughter Pranvera heard an Albanian voice shouting "stop" and then the sound of an automatic gunfire. Bullets began shattering the vehicle and Pranvera put her head down in her lap and stayed that way. All the vehicles windows but one were shot out and there were numerous bullet holes on the right side of the car. Hamez Hajra, his wife, son and two daughters died as a result of gunshot wounds; Pranvera survived.

On 07 February 2003 upon conclusion of the investigations the Public Prosecutor filed an Indictment against the accused Skender Halilaj, Burim Ramadani, Arben Kiqina, Arsim Ramadani, Zeqir Kiqina, Florim Kiqina and Blerim Kiqina charging them with the Murder of Hamez Hajra, Miradije Hajra, Xhevdet Hajra, Mimoza Hajra and Adelina Hajra acting in complicity and in aiding and abetting one another contrary to Article 30 paragraph 2 (1) (3) (4) (5) of the Kosovo Criminal Code, as read with Articles 22 and 24

[1] The Provisional Criminal Procedure Code of Kosovo entered into force on April 2004, as later on amended to KCCP.

of the Yugoslav Criminal Code; Attempted Murder of Pranvera Hajra acting in complicity and in aiding and abetting one another contrary to Article 30 paragraph 2 (1) (3) (4) (5) of the Kosovo Criminal Code read in conjunction with Article 19, 22 and 24 of the Yugoslav Criminal Code; Participation in a group that commits murder acting in complicity and in aiding and abetting one another contrary to Article 200 of the Kosovo Criminal Code read in conjunction with Article 22 and 24 of the Yugoslav Criminal Code; Agreement to commit a criminal act acting in complicity and in aiding and abetting one another contrary to Article 196 of the Kosovo Criminal Code read in conjunction with Articles 22 and 24 of the Yugoslav Criminal Code.

On 05 February 2003 the Public Prosecutor filed an Indictment against Agim Xhylani, Bekim Morina, Adem Kiqina and Muharrem Xhemajli charging them with complicity in aiding and abetting Skender Halilaj, Arsim Ramadani, Burim Ramadani, Arben Kiqina, Florim Kiqina and Blerim Kiqina, with the murder of Hamez Hajra, Miradije Hajra, Xhevdet Hajra, Mimoza Hajra and Adelina Hajra contrary to Article 30 (2) subparagraph (3) and (4) of the Kosovo Criminal Code read in conjunction with Article 22 and 24 of the Yugoslavia Criminal Code; Complicity in aiding and abetting Skender Halilaj, Arsim Ramadani, Burim Ramadani, Arben Kiqina, Zeqir Kiqina, Florim Kiqina and Blerim Kiqina, with the Attempted Murder of Pranvera Hajra contrary to Article 30 paragraph 2 (1) (3) (4) (5) of the Kosovo Criminal Code; Failure to Report the Preparation of a Criminal Act, acting in complicity contrary to Article 172 (2) of the Kosovo Criminal Code read in conjunction with Article 22 of the Criminal Code of Yugoslavia; Failure to Report a Criminal Act or a Perpetrator, acting in complicity contrary to Article 173 (2) of the Kosovo Criminal Code read in conjunction with Article 22 of the Criminal Code of Yugoslavia; Aiding a Perpetrator after the commission of the Criminal Act, acting in complicity contrary to Article 174 (3) of the Kosovo Criminal Code read in conjunction with Article 22 of the Criminal Code of Yugoslavia; Aiding a perpetrator after he or she has committed the Criminal Act contrary to Article 174 (3) of the Kosovo Criminal Code.

On 03 July 2002 the Public Prosecutor filed an indictment against Kimete Krasniqi charging her with Attempted Murder of Hamez Hajra motivated by personal gain, ruthless revenge, other basic motives or for vendetta, acting in complicity contrary to Article 30 (2) sub paragraph 3 and 4 of the Kosovo Criminal Code and Articles 19 and 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia and Unlawful Possession of Weapons contrary to Article 199 (1) of the Criminal Code of Kosovo and Sections 8.2 of UNMIK Regulation 2001/7;

On 11 September 2002 the Public Prosecutor filed a direct indictment against Skender Halilaj charging him with Attempted Murder of Hamez Hajra motivated by personal gain, ruthless revenge, other basic motives or for vendetta acting in complicity contrary to Article 30 (2) sub paragraph 3 and 4 of the Kosovo Criminal Code and Articles 19 and 22 of the Criminal Code of the Socialist Federal Republic of Yugoslavia.

On 16 September 2003 the indictment were consolidated by a decision of the trial panel and the venue of the trial was changed from Prishtine/a to Gjilane/Gnjilane by a decision of the SRSG[2] on 07 October 2003.

On 07 April 2005 the District Court of Gjilan/Gnjilane in the first instance announced the judgment. The defendants Burim Ramadani, Arben Kiqina, Arsim Ramadani and Blerim Kiqina were found guilty along with other defendants included in the judgment. However since other defendants are not subject to current proceedings regarding the request for protection of legality the Supreme Court finds no relevance for further reference.

The defendants Burim Ramadani, Arben Kiqina and Arsim Kiqina were imposed an aggregated sentence to a term of long imprisonment of 30 years. Defendant Blerim Kiqina was sentenced to a term of 10 years of imprisonment.

Deciding on the appeals, the Supreme Court of Kosovo with judgment Ap-Kaz-393/06 dated 20 May 2008 partially reformed the judgment P nr 162/2003 dated 07 April 2005 of the District Court of Gjilan/Gnjilane.

Defendants Burim Ramadani, Arben Kiqina, Arsim Kiqina and Blerim Ramadani were found guilty by the Supreme Court Judgment Ap-Ka 293/06 of five criminal offence of Aggravated Murders and One Attempted Aggravated Murder pursuant to Article 30 par 1 and 2 (item 1) and 3 of the Criminal Law of Socialist Autonomous Province of Kosovo (CL SAPK) as read in conjunction to Article 19 and 22 of the Criminal Code of the Socialist Republic of Yugoslavia (CC SFRY). For these criminal acts the accused Burim Ramadani, Arben Kiqina, Arsim Ramadani were each of them sentenced to an aggregated term of 30 years of imprisonment and the accused Blerim Kiqina was sentenced to 11 years of imprisonment.

On 16 September 2009 the Supreme Court of Kosovo deciding in the third instance rejected the appeals filed by the defence counsels on behalf of the defendants Burim Ramadani, Arben Kiqina and Arsim Kiqina as ungrounded whereas the appeal of the defence counsel on behalf of the defendant Blerim Kiqina was dismissed as inadmissible.

Against the Judgment of the District Court of Gjilan/Gnjilane P nr 162/03 dated 07.04.2005, against the Judgment of the Supreme Court of Kosovo, AP 393/06, dated 20.05.2008 and against judgment of the Supreme Court of Kosovo, API 4/09 dated 16.09.2009, defence counsels Av Bejtush Isufi,(co-signed by Linn Slattengreen), Av Haxhi Millaku, Av Vahide Braha, Mahmut Halimi and Ibrahim Dobruna on behalf of defendants Burim Ramadani, Arben Kiqina , Arsim Kiqina and Blerim Kiqina filed the Requests for Protection of Legality.

The Requests for Protection of Legality were forwarded to the Supreme Court of Kosovo on 22 February 2010. The case was sent to the OPPK for an opinion.

[2] The Special Representative of Secretary General of United Nations.

By submission KMLP II 28/2010 dated 23 June 2010 the Office of State Prosecutor filed a reply and proposed the following:

1) to **Dismiss** the Request filed by defence counsels Av Mahmut Halimi on behalf of the defendant Burim Ramadani and by Av Bejtush A. Isufi (co-signed by Linn Slattengren) on behalf of all defendants as **inadmissible** pursuant to Article 452 (1), 453 (2) item 2 and Article 454 92) of the KCCP; and/or as subsidiary proposal should the Supreme Court consider them admissible to Reject them as unfounded pursuant to Article 456 of the KCCP;
2) to **Reject** the Requests filed by defence counsels Av Ibrahim Dobruna, Av Haxhi Millaku and Av Vahide Braha on behalf of Arben Kiqina, Arsim Ramadani and Burim Ramadani as unfounded pursuant to Article 456 of the KCCP.

II. Requests for Protection of Legality;

The Request for Protection of Legality filed by defence counsels Av Bejtush Isufi,(co-signed by Linn Slattengreen), Av Haxhi Millaku, Mahmut Halimi, Av Vahide Braha and Ibrahim Dobruna allege Violations of Criminal Law, Essential Violations of the Law on Criminal Procedure, Other Violations of the Provisions of the Criminal Procedure Law (which influenced the legality of the court decision).

III. Supreme Court findings

In assessing the Requests for Protection of Legality, the Supreme Court of Kosovo established the following:

a. All the Requests for Protection of Legality filed by the defence counsels are admissible. The Supreme Court of Kosovo considers that the requests are filed with the competent court pursuant to Article 454 par 1 by persons authorized thereto and within the deadline pursuant to Article 452 par 3 of KCCP.

b. Evidently defence counsels Av Mahmut Halimi representing Burim Ramadani and Av Bejtush Isufi (co-signed by Linn Slattengreen), were authorized by relatives of defendants. After the defendants were asked by the court whether they agree of having these defence counsels to represent them, they all responded positively. Consequently is rejected the Opinion of the Office of State Prosecutor of Kosovo to dismiss Requests of Av Mahmut Halimi on behalf of the defendant Burim Ramadani and by Av Bejtush A. Isufi (co-signed by Linn Slattengren).

c. The Supreme Court of Kosovo decided in a session as prescribed by Article 454 paragraph 1 of the KCCP. The parties' notification of this session was not required.

d. All the Requests for Protection of Legality filed by defence counsels are however UNGROUNDED.

The panel respectfully notes that a very lengthy and ambiguity of some of requests containing numerous repetitions of issues addressed, some of them although qualified by the appellant as violations of the criminal law and of the criminal procedure law, in fact rather pertain to the question of factual situation (an erroneous or incomplete establishment of the facts).

This court however in its assessment is confined by Article 451 and Article 455 of KCCP in relation to the grounds of request and the arguments raised by the requesting party.

The Supreme Court of Kosovo considered at first the points that have been raised by all and/or most of defense counsels, and then to continue with specific points addressed by individual defense counsels in order to avoid mere duplications.

In the request for protection of legality defence counsels contended the following:

A. SUBSTANTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE AND OTHER VIOLATIONS OF THE PROVISIONS OF CRIMINAL PROCEDURE.

1. IMPROPER COMPOSITION OF THE FIRST INSTANCE PANEL

As in previous appeals in this case, defence counsels re-submit that the first instance court was not properly constituted since it was consisted of three instead of five judges (small panel). Defense counsels further argue that the replacement of trial member in the session dated 24 July 2004 onwards was in violation of the Article 364 par 1 item 1 of Law on Criminal Procedure (hereafter the "LCP[3]"), and Article 403 par 1 item 1 of KCCP.

This panel notes that improper composition of the panel constitutes a substantial violation of the provisions of criminal procedure. The violations of the provisions of the criminal procedure on composition of the panel are of "absolute" nature. As such the court is obliged *ex officio* to examine if the panel rendering the judgment was constituted in accordance to provisions of the criminal procedure even when the issue is not raised by the parties.

In this context it is worth noting that the court has repeatedly reviewed and examined this point in an exhaustive manner during the previous instances and has in continuity taken the view, with which this panel respectfully agrees that the trial panel was constituted in accordance with the law.

On this point, the Supreme Court of Kosovo finds it crucial to **reiterate** the fact that assignment of international judges in criminal matters is made pursuant to UNMIK Reg

[3] Law on Criminal Proceedings, year 1986 (Official Gazette No 26/86)

2000/64 dated 15 December 2000 On the Appointment and Removal from Office of International Judges and International Prosecutors[4].

In this context specifically Section 2.1 of above regulation reads:

" *Upon approval of the Special Representative of the Secretary-General in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate* "

(a) An international prosecutor;
(b) An international investigating judge; and/or
(c) A panel composed only of three (3) judges, including at least two international judges, of which one shall be the presiding judge.

While provisions of the cited regulation seem to overlap with the provisions of the criminal procedure namely Article 24 par 1 of PCPCK which provides for a large panel in cases punishable by imprisonment of at lest fifteen years, the prevalence of the first is of no doubt. This panel finds it useful to refer to the following observation of the Supreme Court of Kosovo with regard to the same topic in a related case:

" *the question of the apparent overlapping scope between provisions of PCPCK and UNMIK regulations cited above must be resolved according to the principle of specialty, i.e., Section 2.1 point (c) specifically addressing the assignment of International Judges in criminal cases, as a special enactment supersedes the provisions of PCPCK which broadly address composition of the trial panels*"[5].

As regards allegations about replacement of trial members, the Supreme Court of Kosovo refers to the minutes of the trial dated 24 June 2004 of the District Court of Gjilan/Gnjilane which reflect the change on the membership of the panel.

It is evident from the case file that the presiding judge announced replacement of a member of trial panel. As a result the presiding judge indicated in the minutes that all the previous records had been read. Further presiding judge indicated that " *the new trial member has been given all the trial records, the indictments, everything and that new judge has been through them and is quite familiar with the case now* "[6].

The parties to the proceedings had been expressly invited to comment whether they had any objections regarding the new composition of the trial panel. The presiding judge also invited all the parties to declare whether to consider the records as having been read since all the minutes were part of the record, or the parties would want to read the records all over again.

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[4] See United Nations Interim Administration Mission Regulation 2000/ 6 dated 12 February 2000, as amended by Regulation No 2000/64 dated 15 December 2000.
[5] Jeton Kiqina case, Judgment Pkl-Kzz 31/10, dated 01 November 2010, page 5. English version
[6] Minutes of the trial of the District Court of Gjilan/Gnjilane, dated 24 June 2004, page 6 and 7, English version.

No objection was made whatsoever on this point by the parties to the proceedings. All the defence counsels agreed as well the public prosecutor' stand was to consider the records as having been read in order to benefit the expedition of the procedure in this case. Having received no objection and after expressed consent of parties to the proceedings the court read out the statements given before the previous panel.

On this context, Article 345 paragraph 1 of the PCPCK reads:

"When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the main panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection".

The panel finds that the first instance court had fully complied with requirements of the cited provision.

Furthermore it worth mentioning that the change on composition of the panel and reading out of statements was not a contested matter up until conclusion of the trial proceedings. Only upon conclusion of the trial did defence counsels begin arguing about improper composition of the trial panel and put in question impartiality of the new panel members. Defence counsels however did not provide the court with any reasonable justification that would prove impartiality of the new panel member.

The Supreme Court of Kosovo found no new circumstances that would render the impartiality of the new members of the District Court panel doubtful in this case.

Accordingly the Supreme Court of Kosovo considers defence requests unfounded on this point.

2. INCOMPREHENSIBILITY OF THE ENACTING CLAUSE OF THE JUDGMENTS OF THE FIRST AND SECOND INSTANCE.

The appellants maintain that the enacting clause of the challenged judgments is incomprehensible, internally inconsistent or inconsistent with the grounds of the judgments. Defence counsels argue that judgment does not contain a precise determination of the criminal act since there exists no "*intentional aggravated murder*" according to the criminal law provisions and that the reasoning of the judgment is unclear, contradictory with statements of the accused, witnesses, other documentation in the case file and beyond the capacity of the administered evidences and those verdicts did not specify what form of culpability was attributed to the accused.

The Supreme Court of Kosovo notes that the content of a judgment is outlined in Article 396 of the PCPCK. This Article stipulates that there should be an introductory part, the enacting clause and the reasoning. Each of these parts must contain specific information

outlined in the rest of the provisions which also include the reasoning regarding the sentence.

The obligatory content of the enacting clause is specifically foreseen in the paragraphs (3), (4) and (5) of Article 396 of PCCK;

(3) *"the enacting clause of the judgment shall include the personal data of the accused (Article 233 paragraph 1 of the present Code) and the decision by which the accused is pronounced guilty of the act of which he or she is accused of by which he or she is acquitted of the charge for that act of by which the charge is rejected"*

(4) *"if the accused has been convicted, the enacting clause of the judgment shall contain the necessary data specified in Article 391 of the present Code, and if he or she was acquitted of the charge was rejected, the enacting clause shall contain a description of the act with which he or she was charged and the decision concerning the costs of criminal proceedings and the property claim if such claim was filed".*

In reviewing this point the Supreme Court of Kosovo could not establish any substantial deficiency as regards to the enacting clause of the appealed judgment.

On page 6 of the judgment rendered in the second instance which was confirmed in the third instance reads:

"Burim Ramadani, Arben Kiqina, Arsim Ramadani and Blerim Kiqina are declared guilty of the criminal offence of five intentional aggravated murders and one attempted intentional aggravated murder contrary to Article 30 par 1 and 2 (item 1) and 3 of the KLC in relation to Article 19 and 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia, as made applicable by UNMIK Reg 1999/24 (conducts still criminalized under Articles 146, 147 items 3 and 11 in relation to Articles 20 and 23 of PCCK), because they jointly took the lives of Hamez Hajra, Miradije Hajra, Xhevdet Hajra, Mimoza Hajra and Adelina Hajra, and attempted to take the life of Pranvera Hjara in an insidious manner by ambushing them while they were traveling with their car and by firing towards them with more than one weapon numerous rounds of 7.36 x 39 mm caliber rifle without succeeding in killing Pranvera Hajra due to intervening circumstances. On 20 August 2001 at or about 23:00 along a dirt road between the villages of Baica and Terstenik".

In light of above the Supreme Court of Kosovo finds that in this case the enacting clause of the challenged judgment is sufficiently clear. It makes an adequate reference to provisions of the criminal law, so clarifying what form of culpability was determined by court.

While the appellants argued wrongful qualification of the criminal offence referring to "*intentional* aggravated murder" as not being foreseen by the criminal law provisions, the court decisions remain unambiguous and thus free from error as per Article 396 of the PCPCK. For purpose of avoiding duplication, the issue of qualification of the criminal

acts is not addressed here but left when reviewing alleged violations of the criminal law provisions.

The enacting clause of challenged judgment clearly indicates the acts of which the defendants were found guilty and the legal qualification as well as the provisions on which the conviction was based upon. Furthermore enacting clause contains the citation of the facts and circumstances which constitute the statutory features of the criminal act and those on which depends the application of the particular provision of the criminal law.

As contemplated in various judgments and according to the legal practice, the description of facts and circumstances that draw the court to conclude as to the culpability or not of the accused as to the criminal act/s are not to be included in the enacting clause, but must be addressed in the reasoning of the verdict. In the case at hand in the reasoning component the court has exhaustingly compiled the reasons showing why it decided that the accused had acted deliberately and intentionally in order to kill victims.

Accordingly, the Supreme Court of Kosovo opines that the defense contention about a violation of procedural law is without merit.

3. INADMISSIBILITY OF EVIDENCES OF "MB" AND H

Defence counsels allege that parts of the evidences which were produced during the previous proceedings should have been rendered inadmissible. In particular the statements of witness MB as according to defence counsel the witness "MB" was exempted from duty to testify pursuant to Article 160 par 1 sub par 1 of the KCCP. Defence counsels argued substantial violation of Article 364 par 1 point 4 as the first instance court excluded public without issuing a decision that provides the reasons to exclude public when hearing witness "MB" and the witness H on 27 May 2004 respectively in special hearing December 2004.

In addressing appellants' allegation on inadmissibility of statements of "MB" and H , the Supreme Court of Kosovo finds it essential citing the relevant legal provisions which enumerate the persons who are exempted from the duty to testify.

Article 227 (1) of the LCP which was applicable during the investigative stage in the respective part reads:

(1) the following persons are exempted from the duty to testify:

1) The spouse of the accused;
2) Direct blood relatives of the accused, relatives in the lateral line to and including the third degree, and relatives by marriage up to and including the second degree.
3) The adopted child or adoptive parent of the accused

4) A religious confessor concerning matters that the accused has confessed to him.

During the course of trial proceedings the applicable procedure is the Provisional Criminal Procedure Code of Kosovo (*PCPCK, see footnote nr 1*). The relevant provision of KCCP on this point namely Article 160 par 1 sub par 1 reads:

"*(1) the following persons are exempted from the duty to testify;...*

2) A person who is related to the defendant by blood in a direct line or in a collateral line to the third degree or by marriage to the second degree, unless proceedings are conducted for a criminal offence punishable by imprisonment of at least ten years or he or she is a witness of a criminal offence against a child who is cohabiting with or is related to him or her or to the defendant;...".

In the case at hand witness "MB" and H do not fall under any legal provisions; be that of LCP and KCCP on exemption from their duty to testify. "MB" and H are not in relations to the defendants which would legally exempt them from the duty to testify. The KCCP provisions which defence counsels refer to exclude the possibility of exemption from the duty of testifying for "*a criminal offence which is punishable by imprisonment of at least ten years*".... As matter of fact the defendants in this case are found guilty for criminal offences which are punishable by imprisonment of at least ten years. Therefore the Supreme Court of Kosovo considers that the acceptance of these evidences does not raise doubts as to their formal admissibility.

As regards excluding of public in hearings while witness "MB" and H testified, it is worth stressing the fact that "MB" was granted a status of a protected witness in this case. For purposes of protection the trial court deemed it crucial, with which this panel fully agrees, to exclude public from whole part when these individuals testified. The persons attending including OSCE monitors that were allowed to be present had expressly been instructed not to reveal the names of the witnesses to anyone including to media. Otherwise the court noted that serious consequences may follow[7].

On this very topic Article 329 (6) of KCCP reads:

"*at any time from the beginning until the end of the main trial, the trial panel may exclude on the motion of the parties or ex officio but always after it has heard the parties, the public from the whole or part of the main trial if this is necessary for:*

1).....

.....

6) Protecting injured parties and witnesses as provided for in Chapter XXI of the present Code.

[7] Minutes of the trial of the District Court of Gjilan/Gnjilane, dated 27 May 2004, page 6 and 7 English version.

Further Article 333 (5) of KCCP reads

"The rulings of the trial panel shall always be announced and entered in the record of the main trial with a brief explanation".

There is no doubt that both "MB" and H fall under the categories of protected injured parties and witnesses as provided for in above mentioned provisions of KCCP.

As it is well reflected in the minutes of the trial of the District Court of Gjilan/Gnjilane, the presiding judge invited all parties to declare on the matter and afterwards had rendered a decision which is part of the minutes.

It is worth stressing also the fact that trial panel had no obligation of receiving a consent from all parties to the proceedings when rendering a decision to exclude the public from the session.

This panel is satisfied and considers that the first instance court has fully adhered and complied with the provisions of the KCCP.

4. INADMISSIBILITY OF BLERIM KIQINA'S STATEMENTS DATED 04 JULY 2002 AND 07 JULY 2002

The defence counsels in their requests challenged the evidentiary value of the statements of Blerim Kiqina 04 July 2002 and 07 July 2002 claiming that he was subjected to undue pressure by the police officers handling the case, claiming that the statements had not been corroborated by another evidences and therefore the statements should not form the basis of a conviction. Defence counsels further argue that the *ex-officio* appointed defence counsel who presented on 07 July 2002 did not defend his client in an efficient manner. Lastly some of defence counsels argue that although they represent other defendants they should have been invited to the hearing of 07 July 2002 before the investigating judge thus to enable them to cross examine Blerim Kiqina.

With regard to the statement given by Blerim Kiqina on 04 July 2002, Supreme Court of Kosovo in the second instance court deciding on the appeal had taken the view, with which this panel respectfully agrees that above mentioned statement is inadmissible due to formal requirements' deficiencies. That does not mean however that the statement was unlawfully obtained and/or that defendant Blerim Kiqina was subjected to undue pressure by the police officers handling the case as it is claimed by defence counsels. Such allegation is not supported by any evidence. The obtained statement from defendant Blerim Kiqina simply does not meet all the formal requirements which are required by the criminal procedure provisions. As found by the court of the second instance, no records from the case file could be found that demonstrate Blerim Kiqina being properly notified of the rights prior to giving his statement. Therefore this panel considers that the statement given on 04 July 2002 is inadmissible.

Concerning video-recording, the Supreme Court of Kosovo concedes with the claim of the defence counsels that the video-recording of the statement dated 04 July 2002 has not been made pursuant to criminal procedure provisions.

This panel shares the previous view with the Supreme Court of Kosovo in a related case which regarding the same topic held the following;

"*The only competent authority to allow recording of an interview relies with the investigating judge. Non-compliance with this provision constitutes a procedural violation*"....[8]

The police had apparently contacted a prosecutor prior to recording of the interview with Blerim Kiqina. Nevertheless no conclusion can be made that authorization was obtained by a competent authority since the competence for such authorization is reserved to the investigating judge and not to the public prosecutor.

Article 87 par 1 of the LCP reads;

(1) The investigating judge may order that the conduct of the proceedings in the examination be tape-recorded. The investigating judge shall so inform the person being examined or interrogated in advance.

It is evident that such authorization was not given by the investigating judge therefore the video-recording of statement is considered as inadmissible.

As regards the statement dated 07 July 2002 which defence counsels argue that should have been rendered inadmissible since *ex officio* defence counsel did not defend his client in an efficient manner in the view of the Supreme Court this argument is ungrounded.

The law foresees that the president of the court may dismiss an appointed defence counsel who does not perform his or her duties properly at the request of the defendant or with his or her consent.

On this point Article 72 (4) of the LCP reads;

"*The president of the court may dismiss an appointed defence counsel who is not performing his or her duties properly at the request of the defendant or with his of her consent. The president of the court shall appoint another defence counsel of experience and competence commensurate with the nature of the offence in place of the dismissed defence counsel. The bar association of Kosovo shall be informed of the dismissal of any defence counsel who is a member of the Bar*".

There is no evidence in the case file which indicates dissatisfaction of the defendant with performance of the *ex officio* appointed defence counsel and/or any circumstances that would render the previous defence counsel's attitude doubtful in this case.

[8] Jeton Kiqina case, Judgment Pkl-Kzz 31/10, dated 01 November 2010, page 9. English version

No infringement of the defense rights guaranteed to the defendant under the applicable law could be detected in this case. Therefore the Supreme Court considers this point as ungrounded

As regards allegation on the presence of defence counsels representing other defendants to the hearing 07 July 2002, this panel notes that the court has no obligation to invite other defence counsels to a hearing of a defendant different than the one they represent during the investigation stage. The allegation of the defence counsels that they had been prevented from the opportunity of cross examination is without a merit. The very fact that other defence counsels were not present when Blerim Kiqina gave his testimony before the investigating judge on 07 July 2002, does not raise any doubt about admissibility of that statement. Defence counsels have been given ample opportunities during the course of the trial to cross-examine Blerim Kiqina and put forward their contestations.

Therefore the Supreme Court considers this point as ungrounded.

5. LACK OF INTENT, MOTIVE, CAUSAL LINK AND LACK OF REASONING TO SUPPORT THE FACTUAL FINDINDS

The defence counsels claim that the judgments do not contain enough reasoning to support the factual findings as established by the courts. Defence counsels argue the lack of intent, motives, and lack of appropriate reasoning regarding causal link between actions and consequences.

It is worth noting that such arguments are related to a ground of incomplete or erroneous establishment of factual situation for which at this stage of procedure an appeal may not be permitted.

As it is indicated above, the Supreme Court of Kosovo in its assessment is confined by Article 451 and Article 455 of KCCP in relation to the grounds of request and the arguments raised by the requesting party.

Therefore the Supreme Court of Kosovo considers the appeals on this point as inadmissible.

6. EXEMPTION FROM THE DUTY TO TESTIFY OF THE MEMBERS OF THE KIQINA FAMILY.

The defence counsels raised the issue of the Kiqina family members (Jeton, Florim and Blerim) alleged exemption from the duty to testify in accordance with Article 227 of the LCP and Article 229 and 231 of the LCP since they were not informed of their duties as family relatives not to testify against each other.

Article 227 (1) of the LCP which defence counsels refer to enumerates the persons that are exempted from the duty to testify.

In the respective part, the LCP reads as follows:

(2) the following persons are exempted from the duty to testify:

1) The spouse of the accused;
2) Direct blood relatives of the accused, relatives in the lateral line to and including the third degree, and relatives by marriage up to and including the second degree.
3) The adopted child or adoptive parent of the accused
4) A religious confessor concerning matters that the accused has confessed to him.

It is notorious and not contested fact that the accused Florim Kiqina and Arben Kiqina are brothers. Same applies for Burim Ramadani and Arsim Ramadani. The accused Blerim Kiqina is uncle's son of Florim Kiqina, Arben Kiqina and Jeton Kiqina. Adem Kiqina is the uncle of Jeton Kiqina. Xhevdet Kiqina and Adem Kiqina are brothers. Blerim Kiqina and Jeton Kiqina are uncle's sons of Xhevdet Kiqina. Florim Kiqina and Blerim Kiqina are the uncle's sons of Jeton Kiqina.

Such factual situation indicates that Florim Kiqina and Blerim Kiqina are relatives in the lateral line of the 4th degree to the defendant Jeton Kiqina. Consequently they do not fall under the categories that are exempted from their duty to testify.

For these reasons, the Supreme Court of Kosovo considers that the courts in previous instances had correctly established the compliance of the authorities conducting the interviews with the then applicable law provisions of the procedure.

As regards the statement of Florim Kiqina dated 27 August 2001, the Supreme Court of Kosovo notes that he was interviewed in a capacity of a witness. Florim Kiqina was duly instructed of the rights of witnesses including the right not to answer questions. On 06 July 2002 Florim Kiqina was heard in the capacity of a suspect. Evidently Florim Kiqina was notified of the suspects' rights when being interviewed in that capacity which is also confirmed by a document that he himself signed at the end.

The Supreme Court of Kosovo considers that authorities conducting the interviews had fully complied with the applicable procedural provisions. The change of the status of the interviewee from that of a witness to that of a suspect does not render a statement which was obtained lawfully and in compliance with procedural provisions relevant to status of interviewee at the time of obtaining the interview inadmissible. It is up to the trial panel then to decide what kind of weight to attribute to that statement and/or to assess reliability of it. Therefore the acceptance of these evidences does not raise doubts as to their formal admissibility.

Accordingly the Supreme Court considers the defense request unfounded on this point.

8. INADMISSIBILITY OF THE STATEMENTS OF THE INTERNATIONAL POLICE OFFICERS RODNEY HILTON AND THE LIST OF MOBILE PHONE CALLS.

Defence counsel claims inadmissibility of the statement of the international police officer Rodney Hilton dated 06th and 7 August 2002. It is alleged that a motion for disqualification of the investigating judge was made during the course of the session and since it was not decided upon, according to the defence counsel the continuation of the session is contrary to the law in light of Article 43 of LCP.

In addition the defence counsels allege that the list of mobile phone calls was unlawfully obtained from PTK[9]. According to the defence counsel no request has been made by the investigating judge for such information from PTK.

With regard to inadmissibility of the Statement given by International Police Officer Rodney Hilton, the relevant provisions of LCP provide:

Article 40 (1) of LCP:

(1) *As soon as a judge or a lay judge learns that any of the grounds for disqualification exist as referred to in Article 39, Items 1 through 5 of this Law, he must interrupt all work on that case and accordingly inform the president of the court, who shall appoint his replacement from among the judges of that court, and if this is not possible, he shall ask the president of the immediately higher court to appoint a replacement.*

(2) *If a judge or lay judge feels that there are other circumstances that justify his disqualification (Article 39, Item 6) he shall inform the president of the court accordingly.*

Article 43 of LCP reads:

When a judge or a lay judge learns that a petition has been filed for his disqualification, he must immediately suspend all the work on the cases; but if it concerns the disqualification as referred to in Article 39, Item 6 of this Law, he may, until the decision is made on the petition , take only those actions whose performance is required to avert postponement.

Article 39 of LCP reads:

A judge or lay judge may not perform his judicial duties in the following cases:

.....
.....
.....
.....

[9] PTK- the Post and Telecommunications of Kosovo.

(6) if there are circumstances which cause doubt as to his impartiality.

In addressing this point the panel finds it essential to refer to the related criminal case handled by the Supreme Court of Kosovo where it held as follows[10]:

"*a motion for disqualification made on ground set forth in Article 39 paragraph 6 of LCP does not require termination of an ongoing legal activity which commenced before such motion was made. Article 40 Paragraph 2 of LCP specifically lays down an obligation to a judge or lay judge whose disqualification is sought only to inform the president of the court if he/she feels that there are circumstances that justify his disqualification from Article 39, item 6.*"

Based on the case file it is evident that the then investigating judge had duly informed the President of the District Court of the motion which was then rejected by the President on 11 August 2002 as ungrounded.

The Supreme Court of Kosovo considers that the continuation to hearing Mr Hilton after defence counsels had filed a motion for disqualification of the then investigating judge is not in violation of Article 39, Item 6 of LCP. As established in previous instances, Mr Hilton was about to finish his mission and obtaining a statement would be clearly difficult while delays would be unavoidable. Therefore the Supreme Court of Kosovo finds that the court complied with stipulated legal requirements to avert unnecessary postponement.

Concerning the mobile call lists, it is evident from the case file that a letter from investigating judge dated 23 November 2001 was sent to the Directorate of Infrastructure Affairs and Communications requiring outgoing and incoming call details related to the time period 19 through 21 August 2010 for enumerated therein VALA numbers.

As indicated on the reply from PTK which is part of the case file, the request of the investigating judge was complied with and results were made available to the court. Such investigative activities in the view of the Supreme Court of Kosovo were in full compliance with the provisions of the LCP which was in force at the time. No infringements of the human rights could be detected as result of such activity. Therefore the request is ungrounded on this point.

II. ALLEGED VIOLATIONS OF THE CRIMINAL LAW PROVISIONS

10. NON-COMPLIANCE WITH ARTICLE 3 (2) OF THE PCCK- PRINICPLE "*IN DUBIO PRO REO*".

The defence counsels claim that the criminal law was violated as the principle stated in Article 3 (2) of the PCCK that doubts regarding the facts relevant to the case or the

[10] Jeton Kiqina case, Judgment Pkl-Kzz 31/10, dated 01 November 2010, page 11 and 12 of English version

interpretation of the criminal law should be interpreted in favor of the defendant-the principle of "*in dubio pro reo*".

Concerning allegation about the existence of facts relevant to the case referred by the defence counsel, the Supreme Court of Kosovo finds it crucial to reiterate again that the contestation of the judgments on ground of factual situation is inadmissible pursuant to Article 451 (2) of KCCP. Consequently allegations related to establishment of the factual situation shall not be subject of review at this stage of procedure.

With regard to the application of "*most favorable law*", the Supreme Court of Kosovo concedes with defence counsel that in the event of a change in the law applicable to a given case prior to a final decision, the law more favorable to the perpetrator shall apply.

In the case at hand, undoubtedly the law in effect at the time of occurrence is far more favorable to the defendants than the law entering into force prior to a final decision.

The Supreme Court of Kosovo considers that the substantive law applied in the case is far more favorable than the law entering into force when the proceedings were conducted. Any further elaboration on this point would be superfluous and simply unnecessary.

Therefore the Supreme Court of Kosovo finds the request on this point unfounded.

11. WRONGFUL LEGAL QUALIFICATION OF THE CRIMINAL OFFENCES

Defence counsels argue that judgment does not contain a precise determination of the criminal act since there is no "*intentional* aggravated murder" according to the criminal law provisions and that the reasoning of the judgment is unclear, contradictory with statements of the accused, witnesses, accused witnesses, other documentation in the case file and beyond the capacity of the administered evidences and those verdicts did not specify what form of culpability was attributed to the accused.

The allegation on the precise determination of the criminal act since there is no "*intentional* aggravated murder" according to the criminal law provisions the Supreme Court of Kosovo considers this argument without merit. Evidently the challenged judgments make reference to relevant legal provisions of the criminal law leaving no dubious as to the applied criminal law previous.

Defendants Burim Ramadani, Arben Kiqina, Arsim Kiqina and Blerim Ramadani were found guilty by the Supreme Court Judgment Ap-Ka 293/06 of five criminal offence of Aggravated Murders and One Attempted Aggravated Murder pursuant to Article 30 par 1 and 2 (item 1) and 3 of the Criminal Law of Socialist Autonomous Province of Kosovo (CL SAPK) as read in conjunction to Article 19 and 22 of the Criminal Code of the Socialist Republic of Yugoslavia (CC SFRY). For these criminal acts the accused Burim Ramdani, Arben Kiqina, Arsim Ramadani were each sentenced to an aggregated term of 30 years of imprisonment and the accused Blerim Kiqina was sentenced to 11 years of imprisonment.

This court finds that the actions of the accused amount to the criminal offences for which accused are found guilty based on the evidences which were properly obtained, administered and evaluated by the trial court. The error on application of law was properly rectified by the court during the course of appellate procedure. The Supreme Court of Kosovo is satisfied with re-qualification of the second instance and finds therefore, that the second instance did not make an error of law.

Therefore the requests are ungrounded on this point.

12. FAILURE TO COMPLY WITH THE RULES FOR IMPOSING AN AGGRAGATED PUNISHMENT

Defence counsels claim the failure of the courts to comply with the rules for imposing an aggregated punishment as foreseen by Article 48 par 1 of the CC of the SFRY which corresponds in entirety with Article 71 par 1 of the KCCP. Defence counsels allege that the courts in previous instance did not convict the accused for each criminal act and then apply an aggregated sentence. Further more defence counsels claim that due to partial acquittal in the second instance, the Supreme Court should have reduced the punishment.

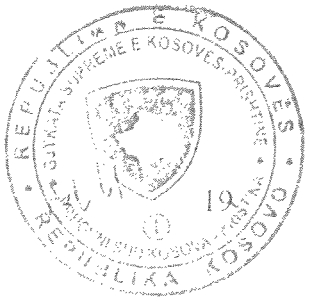
With regard to allegation in relation to aggregation of punishment, it is evident that the second instance court, after sentencing the accused separately for the five criminal offences of murder and one attempted murder sentenced the accused Burim Ramdani, Arben Kiqina, Arsim Ramadani to an aggregated term of 30 years of imprisonment and the accused Blerim Kiqina was sentenced to 11 years of imprisonment.

This panel finds that the court had fully complied with the applicable procedural provisions regarding aggregation of punishments. The panel is satisfied and considers that the courts in previous instance had adhered and complied with the provisions of the KCCP.

Therefore defence counsels claim on this point is without merit.

Concerning the reduce of sentence due to partial acquittal from one or more criminal offences, the Supreme Court maintains that there is no obligation for the court to reduce the sentence due to the partial acquittal. The court is only bound by the maximum penalty.

In light of the above, the Supreme Court of Kosovo has decided as in the enacting clause of this judgment.



SUPREME COURT OF KOSOVO
PKL-KZZ 30/10, dated 01 February 2011

Presiding judge:

Martti Harsia
EULEX Judge

Recording clerk:

Adnan Isufi
Legal Advisor

Members of the panel:

Charles L. Smith III,
EULEX Judge

Lars Dahlstedt
EULEX Judge

Emine Mustafa
Supreme Court Judge

Salih Toplica
Supreme Court Judge

Legal Remedy

No request for protection of legality may be filed against a decision of the Supreme Court of Kosovo in which a request for protection of legality was decided upon (Article 451 paragraph (2) of the KCCP).