Supreme Court of Kosovo
Pkl-Kzz 119/09
20 January 2010
Prishtinë/Priština

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 EULEX Judge Maria Giuliana Civinini as Presiding, EULEX Judge Gerrit-Marc Sprenger and SC Judges Zait Gjemajli, Avdi Dinaj and Gjuran Demaj as panel members assisted by Edita Kusari, EULEX Legal Advisor, as court recorder and Mentor Osmani, EULEX Interpreter
;

In the case against the accused:

Mehmet Morina, nickname Meha, Kosovo-Albanian, father's name: Seidi Morina mother's maiden name: Nazime Shabani, a car wash employee, residing at Street 21, Bese, Fushë Kosovë/Kosovo Polje, born on 11 August 1976, in Fushë Kosovë/Kosovo Polje, single, not having done military service, average economic status, can read but cannot write, has been in detention since 19 April 2004, currently at Dubrava Prison;

Charged of the criminal offence of:

Attempted Murder, contrary to Article 30 paragraph (2) items 1) and 5) of the Criminal Law of Kosovo (CLK), read with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia, (CC SFRY), as read with Article 147 paragraphs (5) and (6) of the Criminal Code of Kosovo (CCK), and Article 2 paragraph (1) and Article 23 of the CCK;

Acting upon the request for protection of legality filed on 12 October 2009 by the defence counsel of the defendant and filed on 10 November 2009 by the Public Prosecutor of Kosovo against the judgment of the Supreme Court of Kosovo, **Ap.-Kž. No. 165/2007**, dated 19 May 2009

Issues the following

JUDGMENT

-To reject the Request for Protection of Legality filed by the defence counsel of defendant Mehmet Morina and to reject the Request for Protection of Legality filed by the State Prosecutor as unfounded and confirm the Judgment of the Supreme Court according to Art 456 of the CPCK

REASONING

Procedural history

The District Court of Prishtinë/Priština with the verdict dated 22 July 2005 found Mehmet Morina guilty in the criminal offense of Attempted Murder of Zlatibor Trajkovic committed on 17 Mars 2004 acting in complicity with other persons and in aiding and abetting one another in violation of article 30 § 2 n° 1 and 5 of the CLK read with article 22 of the CCSFRY and article 147, § 5 and 6 of the PCCK read with article 2 and 23 of the PCCK. The Court found him not guilty of the charge of Participation in a group that commits a criminal act.
Mehmet Morina received a sentence of 18 years of imprisonment, in which the time spent in detention was calculated.
An appeal was filed by the Public Prosecutor on 19 of October and by the defendant on 16 of October 2006. The Prosecutor filed an answer the 4 November 2008.
The file was transferred from UNMIK to the EULEX Judge on 6 January 2009.
The Supreme Court, in a panel composed by two EULEX judges and three local judges, with a judgment on 19 May 2009, rejected the appeal of the Public Prosecutor and partly granted the appeal of the defense counsel. The Supreme Court modified the verdict as to the qualification of the criminal offence for which Mehmet Morina is found guilty for Attempted Aggravated Murder in complicity with other persons, as defined by Article 30 paragraph (2) item 3) of the CLK in connection with Articles 19 and 22 of the CC SFRY. It sentenced the defendant to a term of twelve (12) years of imprisonment in which the time spent in detention on remand since 19 April 2004 is credited.
Against this judgment, a request for protection of legality was filed on 12 October 2009 by the defence counsel of the defendant and and on 10 November 2009 by the Public Prosecutor of Kosovo.
The request for protection of legality filed on behalf of the defendant alleges on the essential violations of the provisions of criminal procedure and violations of criminal law. In particular, the defence counsel:
1) challenges the composition of the panel in the first instance (that should have been three professional and two lay judges while it was composed by three professional international judges) and in the second instance (composed of five judges which is opposite to the provision of Art. 4.7 of the LoJ). By this according to the defence counsel the panel has committed the essential violation of Art. 403 par.1 point 1 of the CPCK.
2) challenges the enacting clause of the first instance verdict, as it does not contain features of the criminal offence for which the defendant was found guilty, and the Supreme Court decision, that modifies the legal qualification (Art. 30 par.2 point 3 of CLK) without explaining the relevant reasons. The defence alleges that both verdicts contain essential violations of the provisions of criminal procedure Art. 403 par1 point 1 and 11 of the CPCK.
3) alleges that the legal qualification of the criminal offence should have been grave bodily injury Art. 38 of CLK. **The State Prosecutor in its reply** asks for the SC to reject the request as ungrounded and gives this analysis:
The Request for Protection of legality filed by the State Prosecutor attacks the verdict of the DC and the Judgment of the SC of Kosovo on the grounds of substantial violations of the provisions of criminal procedure and criminal law. In particular,

1) The SC would have committed substantial violation of the provisions of criminal procedure: Article 386 par.1 and 2 and Art. 426 of the CPCK. Although the State Prosecutor did not appeal the confirmation ruling, the Supreme Court should have conducted its own qualification of the criminal act and to apply the criminal law to the facts of the case. Instead of re-qualifying the criminal offence Attempted Murder/Murder the SC re-qualified the aggravating circumstances only.
2) Both first instance and second instance Court violated Article 19 CCSFRY since there were enough elements to infer that the criminal act was not an attempted murder but a murder since the intent to kill has been rightfully established by the DC and SC. The latter should have approved the appeal of the Public Prosecutor and should have re-qualified the criminal act as a murder sentencing the defendant accordingly.

Reasons

The composition of the panel of first instance

The second instance decision was correct while stating that the panel of first instance was legally composed by three international UNMIK judges; actually the panel was established on the base of the decision of the Special Representative of the Secretary General Soren-Jessen-Peterson, issued on 8 December 2004 pursuant to UNMIK Regulation n° 2000/64 (extended on until 15 December 2005 in conformity with article 554 § 1 of the KCCP by the consequent UNMIK Regulations 2001/34, 2002/20, 2003/36 and 2004/54).

The composition of the panel of second instance

The appeal panel was composed by five judges, two EULEX SC Judges and 3 local SC Judges upon a decision of the President of the Assembly of EULEX Judges on 18.01.2010
The defence counsel affirms that the panel should have been composed by three judges according to article 4.7 of the Law on Jurisdiction.
Even if the argument that a panel of five is a greater guarantee for the defendant then a panel of three is not taken in consideration, the Supreme Court is of the opinion that the composition of the panel was legal.
For a correct solution of the problem of the composition of EULEX panels (id est: of panel EULEX Judges are assigned to according to the Law on Jurisdiction and the Rules on case selection and case allocation adopted by the Assembly of EULEX Judges) the following elements have to be considered:
a) The mains rules on EULEX panels' composition can be found in article 3.7 LoJ with reference to the cases of primary or exclusive competence and the cases of secondary competence ruled by article 3.3. and 3.4 LoJ ("Panels in which EULEX judges exercise their jurisdiction in criminal proceedings will be composed of a majority of EULEX judges, and presided by one EULEX judge.") and in article 4.7 LoJ with reference to the cases of secondary competence linked to a disqualification procedure ("Panels in which EULEX judges exercise their jurisdiction in those criminal proceeding to which they are assigned to pursuant to the provisions of paragraphs 1-5 of this Articles will always be composed of three judges, of which at least two being EULEX judges and of which one EULEX judge will be the presiding judge")

b) The problem of the panels' composition is different for District Court and Supreme Court panels
c) In connection with first instance and DC appeals EULEX panels, the main issue to solve is related to the presence of a majority of lay judges in the District and Municipal Courts for graver offences and appeal degree (article 22 and 24 KCCP).
The Supreme Court reckons that EULEX panel shall be composed only by (EULEX and Kosovo) professional Judges on the base of the following arguments:

c1) the KCCP sets the rule of the majority of lay judges in the ordinary composition of the panels

c2) the LoJ sets the rule of the majority of EULEX Judges

c3) the LoJ, establishing the jurisdiction and competence of EULEX Judges, contains special provisions compared to general provisions of KCCP regarding the composition of panels (lex specialis derogat generali, id est: when two or more laws contradict, the more specific law has precedence over the general law)

c4) the rule on majority of EULEX Judges prevails on the rule on majority of lay judges

c5) "Kosovo judge" in the LoJ "means a resident of Kosovo appointed as judge according to the applicable law" (article 1).

d) in point of number of panels' members (for graver offenses and appeal degree) at Municipal Court and District Court level, the absence of lay judges raised the issue of which is the rule to be applied. Based on analogy argumentation, the rule of article 4.7 can be applied to all cases of secondary competence under articles 3.3., 3.4 and 4 (they present the same "ratio legis" - to provide the correct and impartial functioning of justice by the way of the substitution of a Kosovo Judge by an EULEX Judge) and to cases of primary competence (where the evaluation of the needed presence of EULEX judges is done in advance and in abstract by the law on the base of the graveness or complexity of the criminal offenses)
e) Supreme Court panels are composed by five or three professional Judges depending from the gravity of the offences or the degree of the decision (article 26 KCCP). Based on the principle *in claris non fit interpretatio*, EULEX panels shall be composed by five or three members. According to article 3.7 LoJ the presiding judge shall be a EULEX Judge and the majority of the panel has to be of EULEX Judges if the President of the Assembly doesn't decide differently.
f) The conclusion is that EULEX panels are always composed of three judges in first instance and DC appeals and of five or three Judges depending from the gravity of offences or the degree of the decision at Supreme Court level.

The admissibility of the request for protection of legality of the Public Prosecutor

The request for protection of legality of the Office of the State Prosecutor of Kosovo (OSPK), dated 09 November 2009, was registered with the Registry of the District Court of Prishtine/Pristina on 10 November 2009. Since the challenged Judgment of the Supreme Court of Kosovo, dated 19 May 2009, was submitted to the parties and especially to the defendant on 29 July 2009, and the request of the OSPK was registered about 4 (four) months later, the question occurs whether or not the action of the OSPK was outdated, according to Article 452, paragraph 3 as read together with Article 443, paragraph 1 of the KCCP.
The Supreme Court of Kosovo, on the base of its consolidate jurisprudence, finds that in terms of requests for Protection of Legality the Public Prosecutor is not bound to the deadline as provided by Article 452, paragraph 3 of the KCCP.

Article 452 § 3 of the KCCP imposes the respect of that term to *the persons listed in the final sentence of Article 443 paragraph 1 of the present Code.*
Technically the term "person" is referred only to natural or legal persons. As a consequence, the public prosecutor has to be excluded from the deadline of Article 452, § 3 as read together with Article 443§ 1 of the KCCP, since the public prosecutor, when acting in a case, never acts "personally", meaning as a natural person and also each office of a public prosecutor necessarily is just a body of the state, but not a legal person.
The unsatisfying fact that as a consequence the public prosecutor theoretically could request for Protection of Legality even after a period of several years, for the time being might be reduced in its importance by Article 6 § 1 of the European Convention on Human Rights (ECHR), which is part of the legal system of Kosovo, on the right to a fair trial in a due time.
Anyway, in the present case, the delay in the delivery of the Request for Protection of Legality as submitted by the OSPK was reasonable and it didn't have consequence on the duration of the trial. Therefore, it needs to be taken into consideration.

The qualification of the criminal offense

Both the defense counsel and the Public Prosecutor contest the legal qualification of the action committed by the defendant and well described in the first instance and second instance verdicts.
In the opinion of the defendant the appeal judge wrongly qualified the facts as attempted murder; the right qualification should be - in the absence of a proofed willingness of killing - grave bodily injuries.
On the contrary, the Prosecutor affirms that we are in presence of an accomplished murder. For supporting his request, the Prosecution Office (which did not appeal from the confirmation of the indictment) doesn't submit to the Court new legal grounds. It simply refers to the dissenting opinion to the second instance decision without reporting and endorsing its main arguments and without attaching the document to the Request for Protection of Legality for getting it integral part of its reasoning. Those arguments have not been taken in consideration.
It has to be underlined that the Court is not facing a problem of facts. As already affirmed in the second instance decision, facts are well established. The problem is their subsumption under a legal provision (bodily injured, attempted murder, murder).
In a factual point of view, it has been determined that, in the contest of the so called March riots of the 17 March 2004 in Fushe Kosova, the defendant, together with other aggressive persons, struck the victim with a metal bar – "with two hands, as one would use an axe to split wood" – ; the victim fell into a ditch, thus being unable to move again and the defendant – together with others – hindered police to save the victim and bring him to the hospital for proper medical treatment. Later the same afternoon (it was not possible to establish the time framework) the victim was set on fire and died as a direct consequence of "the hypoxia tisularis due to the lack of oxygen and the presence of carbon monoxide during a fire".
The intention of the accused and of his unknown co-perpetrator was clearly directed to kill the victim of the attack. This conclusion is based on the modalities of the action, on the means used for realizing it (bars/sticks), on the behavior after the beating. All these factual elements converge in demonstrating the willingness of killing.
That excludes the possibility to qualify the facts as grave bodily injuries.

Then, it has to be determined if we are in presence of an accomplished or of an attempted murder.
In the assumption of the Prosecution Office, the right qualification of the criminal offense is "accomplished murder" based on the fact that the consequences to the beating trauma would be sufficient to provoke the death of the victim.
Based on the forensic report and on the expert witness examination, it can be affirmed that: the victim received severe injuries caused by the impact on the skull; when he was put on fire, he was still alive ("Some of the burns that were observed show vital reaction, which means that the person was still alive when being burned. You can see reaction from the tissues that can only be present when you are alive, if you were dead you wouldn't have any reaction"); he lost consciousness and gets burned to a carbonized state.
It means that - even if the trauma was severe enough for being an autonomous cause of death - after the beating an unforeseeable event sufficient to produce the cause of death intervened.
For avoiding the well known excesses of the theory of the equivalency theory, article 14 of the CCK ("A person is not criminally liable if there is no causal connection between the action or omission and the consequences or there is no possibility of the realization of the consequences") has to be interpreted in the sense that the causal series is terminated (and the causal link is interrupted) when there is the interference (like the one above described) of an autonomous independent fortuitous series. In this case the author of the action that directly provoked the event is liable for the accomplished crime while who initiated the interrupted causal series will be responsible for the committed actions or omissions if all the elements of a criminal offence are realized.
In the case examined by the Court, all the elements of an attempted murder are duly gathered.
Consequently both re-qualification requests of the criminal offence of the Prosecutor and of the defense counsel have to be rejected.

The enacting clause of the first instance verdict and the reasoning of the second instance decision.

Both the first instance and second instance enacting clauses (as a whole with the judgments) are comprehensible.
The Supreme Court, in the appeal verdict, is soundly reasoned. It explained concisely but clearly the reasons for the application of different aggravating elements and for keeping the qualification of the crime as attempted murder.
No violation of the CPCK have been committed.

SUPREME COURT OF KOSOVO in Prishtinë/Pristina

Pkl-Kzz 119/09

Presiding judge

Maria Giuliana Civinini

Panel member

Gerrit Marc Sprenger

Panel member

Zait Gjemajli

Panel member

Gjuran Demaj

Panel member

Avdi Dinaj

Partially dissenting opinion of Judge Gerrit-Marc Sprenger pursuant to Article 420, paragraph 3 of the KCCP:

The Supreme Court panel on Protection of Legality has not been able to find an unanimous decision on the question, whether the crime at hand has to be qualified as (Aggravated) Murder or as (Aggravated) Attempted Murder. Despite the question, whether or not there are aggravating circumstances established and which is not subject of this dissenting opinion, the qualification of the crime as a full-fledged and completed Murder or as an Attempted Murder depends on a difficult legal discussion on causality and criminal liability.

Although I agree with all other decisions of the panel, I respectfully disagree with the decision of the majority of my colleagues to qualify the crime committed by the accused as Attempted Murder only. The accused clearly has committed a completed Murder.

Insofar and for the arguments I first of all refer to the dissenting opinion of Judge Norbert Koster, which was attached to the Second Instance Judgment (Ap.-Kz. No. 165/2007). Especially the argument, why the accused should benefit from the torching or the arsonist from the beating, which would be the case if both of them would be sentenced for an attempt only, just because there was also another – independent – perpetrator involved, seems convincing.

A. Causality Problems and criminal liability:

However, the question of liability depends on the constellation of causalities in the case at hand, which is based on the following facts:

I. The factual situation:

The accused, together with unidentified co-perpetrators, has beaten up the victim, thus using an iron bar so heavily that the victim sustained serious fractures of his head and skull and fell down into the ditch, thus being unable to move anymore. After a while, another unidentified perpetrator poured petrol over the still alive victim and set him on fire.

Based on the Autopsy Report dated 17 March 2004, the Forensic Expert stated on 13 July 2004 in front of the District Public Prosecutor of Prishtine/Pristina and described the causing of the death of the victim as follows:

" ... (The) person "died as a result of Neurogenic Shock due to encephalic contusions, due to blunt force trauma to the head and hypoxia due to the lack of oxygen and presence of carbon monoxide during the fire" (Record of Expert Witness Examination, dated 13 July 2004, p. 6). The victim had sustained *"at least five impacts"* (p.6). Moreover, *"the injuries observed caused by the impact to the skull and brain were severe enough to cause the death of the person, setting aside the fire. So that means that these injuries can*

be the cause of death by themselves (p.7). On request of the Public Prosecutor, the Expert Witness stated that *the combination of blows could have been fatal, but also one single blow causing the fracture to the skull could have been also fatal"* (p.8).

During the session on 07 July 2005, this Expert Witness statement was read into the Main Trial Minutes by the First Instance panel according to Article 156, paragraph 2 of the Provisional Criminal Code of Kosovo (PCPCK), (p.2). [On this background it seems quite surprising and deems the First Instance Judgment as being inconsistent in itself, when in the reasoning of the sentence for just Attempted Murder it later sais: *"The Act was not completed, because from the medico legal report it had not been conclusively established that the victim died as a direct result of the blow inflicted on him by the accused"* (p.22)].

II. The legal problem of causality theories:

In the context of causality problems, a number of causality theories have been developed and are quite well accepted within the majority of continental criminal – as well as civil - law traditions in Europe.

Especially **the equivalency theory** as a basic criminal law theory of causation, thus meaning that causality is given if a condition was set up, without which the criminal result would not have come into effect (*condition sine qua non*) is widespread in continental legal systems. It is accomplished by the widely accepted **adequacy theory**, which first was developed in the fields of civil law, thus proposing that a condition is the adequate cause of harm if it is of the type which increases the objective probability of harm of the type actually suffered by a significant amount (instead of many others: Wessels, Johannes/Beulke, Werner, Strafrecht (Allgemeiner Teil), 32nd edition, Heidelberg 2002, p. 53 f. and – for civil law - Liu, Xinping; A Study of Causation Theory in Torts (Abstract); to be found under http://www.lawgd.com/en/news_show.asp?id=1141, found on 25 January 2010).

In accordance with these theories, which is important in the lights of the case at hand, the **Supreme Court of Yugoslavia** has pointed out that *"Causation as an objective connection between man's act and a consequence does exist in the sphere of criminal law not only where incriminated act amounts to a direct requirement for taking place of the prohibited consequence, but also where such act, together with acts of other persons or requirements of other kinds, have contributed to materialization of the prohibited consequence, so that it emerged as it's cause"* (Supreme Court of Yugoslavia, Ruling Kz-36, dated 17 June 1969, in *Zbirka sudskih Odluka, Sluzbeni list SFRJ*, Belgrade, No. 3/1969, p. 134 (quoted after Igor Vukovic, "Applying the Equivalence Theory in Criminal Law: Some Issues of Interest" in: *The Annals of the Faculty of Law in Belgrade (2007)*; p. 151-163 (157), footnote 21; to be found under http://www.ius.bg.ac.yu/Anali/Annals%202007/Annals%202007%20pg%20151-163.pdf found on 25 January 2010).

III. Causality in the case at hand:

Having in mind the abovementioned basic causality theories, for the case at hand several causality constructions, thus leading to different results, need to be considered as being given:

1) The case at hand is clearly **not a case of hypothetic causality**, which would be forbidden to take into consideration at all. A case according to which a perpetrator kills his or her victim, but the victim, if the killing would not have happened, would have died a few minutes later nevertheless (because his or her booked plane explodes immediately after the start) is not given. It in the case at hand would not be possible to consider that the victim because of the fire had died nevertheless and that therefore the torching by the accused could not be taken as an act setting a final reason for the dead.

2) The realization of the danger, being set up by both perpetrators in my opinion also **cannot be considered just as bypassing causality**, which would be the case, if the chain of causality had been interrupted, respectively if the death of the victim was caused by him being set on fire only, so that the injuries sustained by being beaten up with an iron bar remained without any effects. In this case, Mehmet Morina indeed would be liable for attempted Murder only, whilst the unknown second perpetrator, who has set the victim on fire, had committed a completed Murder.

3) In the case at hand, according to the autopsy analysis and the statement of the forensic expert, the victim died as a result of both, the torching on the head and skull and the fire, but would have died nevertheless as a result of the head and skull/brain injuries sustained from the iron bar alone. Even only one of these injuries would have caused the death of the victim. Because of this, the case at hand needs **to be considered as a case of double-causality** and as a consequence the criminal acts of both perpetrators, Mehmet Morina as well as the so far unidentified perpetrator who set the victim under fire, need to be qualified as completed Murders.

IV. Causality and the subjective side of the defendant's deed:

Accordingly, Article 13 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) stipulates as follows:

> *A criminal act is premeditated if the offender is conscious of his deed and wants its commission; or when he is conscious that a prohibited consequence might result from his act or omission and consents to its occurring.*

In the case at hand, the defendant has not only injured the victim so heavily by beating him several times with an iron bar onto the head and skull, that the victim fell into the ditch, thus being unable to move again and would have died from these injuries also setting aside the fire, which was later set on him. The defendant – together with others – after the beating up of the victim has also hindered police to save the victim and bring him to the hospital for proper medical treatment.

The intension to leave the victim alone with his unavoidable fate, cannot be made clearer, thus having in mind that at that time the victim already was badly injured, thus laying on the ground, unable to move.

B. Result:

As a result, I believe that there was no other possible choice than to find the defendant guilty for completed Murder and to sentence him accordingly.

Gerrit-Marc Sprenger
Criminal Judge at the Supreme Court of Kosovo