COURT OF APPEALS

Case number: **PAKR 271/13**

Date: **30 January 2014**

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge and EULEX Judge Timo Vuojolahti and Judge Rasim Rasimi as members of the Panel, with the participation of Anna Malmström, EULEX Legal Officer, acting as Recording Officer, in the criminal proceeding against

E.K and **S.B,** in first instance acquitted of the criminal offence **War Crimes Against the Civilian Population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 153 paragraphs 2.1 and 2.14 of the Criminal Code of the Republic of Kosovo (CCRK) read in conjunction with Article 3 Common to the four Geneva Conventions of 12 August 1949 (Common Article 3) and of Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (Additional Protocol II);

M.H.1, **M.H.2**, **N.H**, **N.B** and **J.K**, in the first instance all acquitted of the criminal offence **Providing Assistance to Perpetrators after the Commission of Criminal Offences** pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo 2004, currently criminalized under Article 388 (1) and (2) CCRK;

acting upon **the Appeal of the Special Prosecutor of the Republic of Kosovo filed on 28 May 2013 against the Judgment of the Basic Court of Prizren no P 249/12 dated 1 February 2013;**

having considered Responses to the appeal by Defence Counsel Osman Zajmi on behalf of **M.H.1** and Defence Counsel Brahim Sopa on behalf of **M.H.2** both filed on 4 June 2013 and Defence Counsel Hajrip Krasniqi on behalf of **N.H** filed on 5 June 2013;

having also considered the Response of the Appellate Prosecutor within the State Prosecutor's Office, no PPA/I.-KTŽ 236/12 dated 26 August 2013 and filed on the same day;

after having held a public session on 30 January 2014, with all parties duly invited, in the presence of the defendants **E.K** and **S.B**, State Prosecutor Claudio Pala, Injured Party **D.B** and her legal representative Vladimir Mojsilović;

having deliberated and voted on 30 January 2014,

pursuant to Articles 420 and the following of the Criminal Procedure Code of Kosovo (KCCP)

renders the following

JUDGMENT

I. The Appeal of the Special Prosecutor filed on 28 May 2013 against the Judgment of the Basic Court of Prizren no. P 249/12 dated 1 February 2013, is hereby granted.

II. The Judgment of the Basic Court of Prizren no. P 249/13 dated 29.03.2012 is hereby MODIFIED with the enacting clause as follows:

The accused **E.K**, born on XX 19XX in ( ), son of K, citizen of Kosovo, residing in , with high school education, in detention from 14 December 2010 until 2 August 2011 and;

the accused **S.B**, born on XX 19XX in the village of ( ), son of M, citizen of Kosovo, residing on , in detention from 18 April 2012 until 1 February 2013;

Are

FOUND GUILTY

because on the night of 17 July and in the early morning of 18 July 1998, in their capacity as members of the Kosovo Liberation Army (KLA), and in co-perpetration with other so far unidentified KLA soldiers, applied measures of intimidation and terror against the Serbian civilian population of by taking part in a deliberate armed attack against the Serbian households in said village. The attack was carried out by shooting of firearms, for several hours during the night, against the house of the **B** family, where around 15 Serbian inhabitants were gathered.

By reason thereof the accused **E.K** and **S.B** committed in co-perpetration the criminal offence of **War Crimes Against the Civilian Population**, pursuant to Articles 22 and 142 of the Criminal Code of the Socialist Republic of Yugoslavia (CCSFRY), currently criminalized under Articles 31 and 153 paragraphs 2.1 and 2.14 of the Criminal Code of the Republic of Kosovo read in conjunction with Article 3 common to the four Geneva Conventions of 12 August 1949 and of Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions.

The accused **E.K** and **S.B** are both **sentenced** to a term of five (5) years of imprisonment, pursuant to Article 38 paragraph 1 and Article 142 CCSFRY.

The time spent in detention on remand, from 14 December 2010 until 2 August 2011 by **E.K** and from 18 April 2012 until 1 February 2013 by **S.B**, shall be credited pursuant to Article 50 paragraphs 1 and 3 CCSFRY.

The accused **M.H.1**, born on XX 19XX in village, son of H and Q, citizen of Kosovo, residing in village, primary school education, working as a carpenter;

the accused **M.H.2**, born on XX 19XX in village, son of H and Q, citizen of Kosovo, residing in R village, high school education, working as a carpenter;

the accused **N.H**, born on XX 19XX in village, son of A and F, citizen of Kosovo, residing in village, primary school education, owner of a café bar;

the accused **N.B**, born on XX 19XX in village, son of B and F, citizen of Kosovo, residing in village, bachelor of economy and;

the accused **J.K**, born on XX 19XX in , son of M and Q, citizen of Kosovo, residing in , ;

Are

FOUND GUILTY

because they assisted **E.K** (under investigation for the criminal act of War Crimes Against the Civilian Population), to elude discovery by giving false witness statements supporting **E.K's** alibi defence, more specifically, when heard in their capacity as witnesses by EULEX War Crimes Investigation Unit Officer in village on 23 February 2011 (**M.H.1** and **M.H.2**), on 3 March 2011 (**N.H** and **N.B**) and on 8 March 2011 (**J.K**), they falsely stated that **E.K** was wounded in the beginning of July 1998. In this way they assisted **E.K** after the commission of the criminal offence of which **E.K** was found guilty.

By reason thereof **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** committed the criminal offence of **Providing Assistance to Perpetrators after the Commission of Criminal Offences**, pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo 2004 (CCK), currently criminalized under Article 388 of the Criminal Code of the Republic of Kosovo.

M.H.1, **M.H.2**, **N.H**, **N.B** and **J.K** are all **sentenced**, pursuant to Article 36 paragraph 1, Article 38 paragraphs 1 and 2 and 305 paragraph 2 CCK to six (6) months imprisonment.

Pursuant to Article 41 paragraph 1, item 1 and Article 43 paragraphs 1 and 2 CCK the sentences are suspended for a period of one (1) year.

Each of the convicted persons shall – one for all and all for one – reimburse the costs of criminal proceedings pursuant to Article 102 paragraph 1 and Article 105 of the Criminal Procedure Code of Kosovo (KCCP) with the exception of the costs of interpretation and translation as well as the costs of apprehension and escort for **E.K** and **S.B**. **E.K** and **S.B** shall additionally cover the respective costs of apprehension and escort. A separate ruling on the amount of the costs shall be rendered by the court when such data is obtained pursuant to Article 100 paragraph 2 KCCP.

REASONING

I. Procedural history of the case

1. On 30 March 2011, the Special Prosecutor filed with the District Court of Prizren the indictment PPS no 75/2010 against the defendants **E.K** and **H.M** and charged them with the criminal offence of War Crimes Against the Civilian Population in on 17 and 18 July 1998 and against the defendants **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** for the criminal offence of Providing Assistance to Perpetrators after the Commission of Criminal Offences. The indictment was confirmed with the Ruling KA. No 76/11 on 29 April 2011.

2. The first trial commenced on 28 June 2011 before a panel of the District Court of Prizren and on 2 August 2011 the panel issued the judgment P 134/11 whereby **E.K** was found guilty and sentenced to five (5) years of imprisonment, **H.M** was acquitted and **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** were found guilty and each of them were sentenced to six (6) months of imprisonment suspended for a period of one (1) year.

3. On 31 May 2012 the Special Prosecutor filed with the District Court of Prizren the indictment PPS no 75/2010 against **S.B** and charged him with the criminal offence of War Crimes Against

the Civilian Population. The indictment was confirmed with the ruling KA 97/12 on 30 May 2012.

4. On 4 September 2012 the Supreme Court of Kosovo, deciding on the appeals of the Defence Counsel of **E.K** and **N.H**, issued the ruling Ap-Kz 20/2012 whereby the judgment of the District Court of Prizren no. P 134/11, except the part related to the acquittal **H.M** which was not subject to the appeals, was annulled and the case was sent back to the first instance court for retrial.

5. On 7 November 2012 the trial panel of the District Court of Prizren decided upon the Special Prosecutor's application for joinder of the criminal proceedings, issued the ruling whereby joined the criminal proceedings in the criminal case against **E.K**, **M.H.1**, **M.H.2**, **N.H**, **N.B**, **J.K** and the criminal proceedings in the criminal case against **S.B**, under the case no P 249/12.

6. The main trial started at the Basic Court of Prizren on 30 November 2012 and was concluded on 29 January 2013. The judgment, in which the trial panel found all the defendants not guilty, was announced on 1 February 2013.

7. On 28 May 2013 an appeal was timely filed by the Special Prosecutor. Responses to the appeal were filed by Defence Counsel Osman Zajmi on behalf of **M.H.1** and Defence Counsel Brahim Sopa on behalf of **M.H.2** on 4 June 2013 and Defence Counsel Hajrip Krasniqi on behalf of **N.H** on 5 June 2013. The opinion of the Appellate Prosecutor was filed on 26 August 2013.

II. Submissions of the parties

1. The Appeal of the Special Prosecutor

8. The Special Prosecutor challenges the Impugned Judgment on the grounds of Erroneous determination of the factual situation. He submits that he finds the Court's reasoning illogical. The Court found it proven beyond reasonable doubt that **E.K** and **S.B** were present and armed with a rifle in the yard of the Serbian house in the morning of 18 July 1998 "immediately after the Serbs surrendered and the attack was finished". The Court also acknowledged that the witnesses stated that the two defendants on that occasion were wearing KLA uniforms. While undisputedly there's no direct eyewitness evidence that **E.K** and **S.B** took part in the attack and what actions they did during the shooting, their participation in the attack is the only logical conclusion that flows from the Court's reconstruction of the events. The only possible explanation for **E.K's** and **S.B's** presence in the Serbian house yard with other KLA soldiers immediately after the end of the attack, both armed with a rifle and in KLA uniforms, is that the two defendants were among the soldiers who took part in the attack. The alternative explanation that they were simple passers-by is clearly unsatisfactory and must be excluded.

9. No evidence emerged from the main trial as to what specific action either accused carried out during the attack. What is known is that they were part of the KLA unit which carried out the attack. A military unit functions in such a way that different tasks are divided between its members. Everybody is supposed to be contributing to the ultimate goal of the military action (in this case, the attack on the house). The exact proof of their specific actions is not required in order to establish that they participated in the attack and ultimately in the crime. The Special Prosecutor moves the Court of Appeals to find **E.K** and **S.B** guilty as charged in the indictment.

10. The acquittal of **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** is linked to that of **E.K**. The Special Prosecutor thereby moves the Court of Appeals, after recognizing **E.K's** criminal responsibility, to affirm the facts as established by the Basic Court of Prizren and to convict the five accused.

2. The Responses by the Defence Counsel

11. Defence Counsel Osman Zajmi (of **M.H.1**) and Defence Counsel Brahim Sopa (of **M.H.2**) in identical responses submit that the alleged criminal offences of **M.H.1** and **M.H.2** were not proven with any relevant substantial evidence during the main trial. None of the witnesses have implicated that **M.H.1** or **M.H.2** has been perpetrators of this criminal offence. The appeal of the Special Prosecutor should be dismissed.

12. Defence Counsel Hajrip Krasniqi (of **N.H**) submits that the term perpetrator means the person who committed a criminal offence against whom criminal proceedings have been conducted. The guiltiness of the assistance may be confirmed once the perpetrator is found guilty by a court. **N.H** could not be found guilty since the court found the perpetrator **E.K** not guilty. The factual situation is fairly established as wells as the assessment of the facts and credibility of the given statements of the accused.

3. The Response by the Appellate Prosecutor

13. The Appellate Prosecutor in her response proposes the Court of Appeals to grant the appeal of the Special Prosecutor and find the defendants guilty. She submits that although the retrial concluded in the acquittal of all accused, yet, significant parts of the reasoning of the judgment of the District Court of Prizren were copied identically to the reasoning of the Impugned Judgment. Some parts of the reasoning are copied with certain modifications. The panel of the Basic Court – unlike the previous panel – avoids identifying that the armed attack on the Serb civilians in fact came from KLA, and also that KLA members filled up the yard in the morning after the attack. Conclusively, the Basic Court seems to overlook the nexus between the armed conflict and the conduct alleged in the indictment, despite that there is ample evidence in support

of such findings. This adds to the erroneous determination of the factual situation as submitted by the Special Prosecutor.

III. The Findings of the Court of Appeals

1. Competence of the Court of Appeals

14. The Court of Appeals is the competent court to decide on the Appeal pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

15. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053).

2. Applicable Procedural Law

16. The criminal procedural law applicable in the respective criminal case is the (old) Criminal Procedure Code of Kosovo (KCCP) that remained in force until 31 December 2012.[1] The proper interpretation of the transitory provisions of the (new) Criminal Procedure Code (CPC), in force since 1 January 2013, stipulates that in criminal proceedings initiated prior to the entering into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the KCCP will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal Opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23 January 2013.

3. Findings on merits

3.1. The Case of E.K and S.B

3.1.1. The Factual Situation

17. The Trial Panel of the Basic Court of Prizren has found the following facts proven beyond reasonable doubt. The night of 17 July and into the early morning of 18 July 1998 a group of unknown people attacked the civilian house of **D.B** and her family in the village of (district of). Present in the house during the attack were almost all of the Serbian inhabitants of the village, about 15 in total. During the attack the Serbian males returned fire with rifles and pistols. In the morning of 18 July 1998 the Serbian families gave up their resistance

[1] Kosovo Code of Criminal Procedure in force from 06.04.2004 until 31.12.2012 (under the name of Provisional Criminal Procedure Code of Kosovo until 06.01.2009).

and surrendered. The yard of the **B** house was filled with unknown people. Present in the yard, immediately after the attack, were **E.K** and **S.B**. They were both armed with rifles.

18. The Trial Panel has not found it proven beyond reasonable doubt that **E.K** and **S.B** were present in the evening of 17 July and during the night into 18 July 1998 and consequently the Trial Panel has not found it proven beyond reasonable doubt that **E.K** and **S.B** participated in the attack.

19. The Court of Appeals agrees with the Trial Panel's establishment of the facts and finds that they are proven beyond reasonable doubt. The Court of Appeals does not however agree with the Trial Panel's findings regarding the presence of **E.K** and **S.B** and furthermore the Court of Appeals does not agree with the conclusions drawn by the Trial Panel.

20. The only evidence available in this case to establish what happened during 17 and 18 July 1998, apart from the defendants themselves, are the two witnesses **D.B** and **S.B** who were both present in the house during the attack. The Trial Panel found the statements of the two women trustworthy and credible but found that they were not able to give the court any evidence with regards to who exactly attacked them.

21. The Court of Appeals does not see any reason why this assessment made by the Trial Panel should be considered as incorrect. **D.B** and **S.B** have described the events in a similar way throughout the various statements given, even after a long time has passed. Even though they naturally have a strong wish to see the perpetrators punished, the Court of Appeals see no reason why they would lie about what they have seen or heard and their statements seem in no way deliberately exaggerated. They, especially **D.B**, have described the events in detail.

22. **D.B** has described the attack as to have started at around 1.00 or 2.00 am on 18 July 1998. It started with the power going off. Shortly thereafter they heard somebody from outside calling out the name of **D.B's** husband, telling him not to go out. The person calling was identified by **D.B** to have been **E.K**. His voice was recognized by both **D.B** herself and her husband. At that moment they heard a burst of machine gun fired at their house. Right after others also started shooting at their house. The shooting came from all directions and the shooting lasted until the early morning hours of 18 July 1998. At some point a hand grenade exploded nearby the house.

23. **D.B** and **S.B** have both described the presence of KLA soldiers in the village before the attack and how the yard of the **B** house immediately after the attack filled up with KLA soldiers. The soldiers were dressed in uniform and carrying weapons. Among the soldiers they both recognized were **E.K** and **S.B**. The women knew **E.K** and **S.B** from the village and could therefore recognize them. **E.K** and **S.B** were also dressed in uniform and carrying rifles. **D.B** has further testified to the presence of **E.K** before the attack, something she has maintained all through her statements.

24. The Basic Court Trial Panel found the statements of **E.K** and **S.B** doubtfully credible. **E.K** has stated that he was not present in the village at all on 17 and 18 July 1998 and that he was not aware that there had been an attack. The Trial Panel found that it was unlikely that he would not know about the attack. **E.K** also stated that he was in hospital when the attack took place after he was wounded on 11 July 1998. The Trial Panel found this to be untrue and found it proven that **E.K** was wounded in August 1998, after the attack. **S.B** also stated that he was not present in the village on 17 and 18 July 1998. When considering the statements of **D.B** and **S.B** and seen in connection with the statements of the other defendants the Trial Panel found **S.B** not to be credible.

25. The Court of Appeals does not see any reason why the Trial Panel's assessment of **E.K's** and **S.B's** statements would be incorrect.

26. Based on all the evidence and in particular the testimonies of **D.B** and **S.B** the Court of Appeals finds it proven beyond reasonable doubt that the attack of the **B** house was executed by the KLA. The Court of Appeals further finds it proven beyond reasonable doubt that both **E.K** and **S.B** were present in the yard of the house immediately after the attack, dressed in uniform, carrying rifles. In the case of **E.K** the Court of Appeals also finds it proven that he was present outside the **B** house just before the attack started.

3.1.2. The Elements of War Crimes

27. The Court of Appeals fully concurs with the findings of the Basic Court Trial Panel in relation to the assessment of war crimes.

28. In line with the case law of the International Criminal Tribunal for former Yugoslavia (ICTY)[2], as cited in the Impugned Judgment, the Court of Appeals finds it established that an internal armed conflict existed in Kosovo at the time of the attack in the village of on 17 and 18 July 1998. Common Article 3 of the Geneva Conventions and Article 13.2 of Additional Protocol II are applicable on the conflict in Kosovo.

29. The Court of Appeals finds it proven beyond reasonable doubt that the attack on 17 and 18 July 1998 was directed towards the Serbian civilian population of . The house that was attacked was occupied by Serbian civilian persons; none of the persons had a status other than civilian. The Serbs that were gathered in the house had access to weapons and they were used during the attack. The Court of Appeals has found no reason to doubt that these weapons were not used for anything but self-protection.

30. The Court of Appeals thus finds it proven beyond reasonable doubt that all the Serbians gathered in the house of the attack on 17 and 18 July 1998 were civilians not taking part in the

[2] Case IT-04-84, Judgment of 3 April 2008 and Case IT-05-87/1-T, Judgment of 23 February 2011.

hostilities between the KLA forces and the Jugoslav (Serbian) Army that took place from April 1998 to mid-July 1999. They were therefore under the protected status as civilians in Common Article 3 and Article 13.2 of Additional Protocol II.

31. The Court of Appeals finds that the attack of the Serbian population in on 17 and 18 July 1998 was in violation of Common Article 3 and Article 13.2 of Additional Protocol II, all rules of international law effective at the time of the internal armed conflict in Kosovo. The attack also constitutes an armed attack on the civilian population as prohibited and punishable by Articles 22 and 142 CCSFRY, currently criminalized under Articles 31 and 153 paragraphs 2.1 and 2.14 CCRK.

3.1.3. Legal Assessment of the Factual Situation

32. As stated above the Court of Appeals does not agree with the conclusions drawn from the established facts by the Basic Court Trial Panel.

33. The Court of Appeals has found it proven beyond reasonable doubt that **E.K** and **S.B** were present in the **B** yard immediately after the attack, dressed in uniforms and armed with rifles. In the case of **E.K** the Court of Appeals has also found it proven that he was present in front of the **B** house just before the attack. This is however only an additional argument. The Court of Appeals has also found it proven that the attack was executed by a KLA group. From the evidence presented it has not been possible to establish exactly what happened during the attack and what those who took part in it specifically and individually did. Apart from the presence of **E.K** before the attack the same was established by the Basic Court Trial Panel. The conclusions drawn from this by the Trial Panel was that it has not been proven beyond reasonable doubt that **E.K** and **S.B** participated in the attack.

34. The Special Prosecutor has argued that exact proof of the defendants' specific actions is not required in order to establish that they participated in the attack. What is known is that they were part of the KLA group that launched and waged the attack. The Court of Appeals agrees with the Special Prosecutor's arguments.

35. The defendants in this case are charged with the criminal offence of War crimes against the civilian population, committed in co-perpetration pursuant to Article 22 CCSFRY. The article reads:

> If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.

From a direct reading of the article it is clear that it does not matter in what way a person participates in the commission of the criminal offence. As with any criminal offence proof of

intent, *mens rea*, is required for criminal liability (Article 11 CCSFRY) but what cannot be read from the article is what kind of action and intent of the individual participant must be proven in order to establish criminal responsibility in the jointly committed criminal offence.

36. The criminal responsibility of co-perpetrators, acting as part of an armed group in an armed conflict, has been developed in the international jurisprudence, predominately from the ICTY. It has been described as the concept of joint criminal enterprise. The participation in a joint criminal enterprise as a form of liability, or the theory of common purpose as the Chamber referred to it, was established in the *Tadić* Appeals Judgment[3] when the Chamber found that it was implicitly established in the Statute of the ICTY and existed in customary international law at the time of the facts:

> 220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. […].
>
> 226. The Appeals Chamber considers that the consistence and the cogency of the case-law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and the general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international law.

37. The *Tadić* Appeals Judgment sets out three categories of cases regarding joint criminal enterprise[4], the first one being the relevant in the case at hand:

> 196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

[3] ICTY case no IT-94-1-A, judgment of 15 July 1999.
[4] For a summary of all three categories see *Krnojelac* Appeals Judgment of 17 September 2003, ICTY case no IT-97-25-A, para 30.

38. The same Judgment then sets out the constituent elements of the *actus reus* and *mens rea* of this form of liability. The Appeals Chamber declares that the *actus reus* comprises of the following three elements:

> (i) *A plurality of persons.* They need not be organized in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.
>
> (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranges or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example murder, extermination, torture, rape etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[5]

With regards to the *mens rea* the Appeals Chamber considered for this category what is required is the intent to perpetrate a certain crime (this being the shared intent of all co-perpetrators).[6]

39. The Court of Appeals finds that this form of criminal liability is applicable in the Kosovo jurisdiction for the criminal offence of War Crimes Against the Civilian Population. As referred to by the ICTY it is a form of criminal liability established in international criminal law and such an interpretation can be inferred from Article 22 CCSFRY (Article 31 CCRK).

40. In the present case the Court of Appeals has found it proven beyond reasonable doubt that the attack on the **B** house was executed by a KLA group. From the actions of the group, the attack itself and what happened after the attack, it can be inferred that the aim, or the common purpose, of the group was to make the Serbian villagers leave their houses and the village. **E.K** and **S.B** were both members of the KLA. They were, immediately after the attack, present at the scene of the attack along with the other KLA soldiers. They were dressed in uniforms and were carrying rifles. The additional argument that **E.K** was proven as present also before the attack is not decisive. Already the factual situation established by the Basic Court Trial Panel would suffice for the conclusions by the Court of Appeals. The Court of Appeals finds that the explanation that the two defendants were casual passers-by, simply standing aside their KLA comrades, not sharing the common will of the group, is unreasonable and illogical. The only conclusion to be

[5] *Tadić* Appeals Judgment para 227.
[6] *Ibid.*, para 228.

drawn from the evidence is that **E.K** and **S.B** gave their contribution to the action of the KLA group that launched the attack on the **B** house and later entered the house yard. Accordingly the only possible inference to be drawn is that they also had the intention to further the common purpose to rid the village of the Serbian population.

41. Consequently the Court of Appeals finds that it has been proven beyond reasonable doubt that **E.K** and **S.B** committed the criminal offence of War Crimes Against the Civilian Population as described in the indictments.

3.1.4. Sentencing

42. **E.K** and **S.B** have been found guilty of violation of Articles 22 and 142 CCSFRY which is currently criminalized under Articles 31 and 153 CCRK. Based on the principle of applying the most favorable law, Article 3 CCRK (Article 4, paragraph 2 CCSFRY), the court must first establish which law is the most favorable to the defendants in the current case.

43. The CCSFRY had punishments for War Crime Against the Civilian Population that included death penalty and prison sentences ranging between five (5) and fifteen (15) years[7]. However a maximum punishment of twenty (20) years of imprisonment could be imposed for criminal acts eligible for the death penalty[8]. The death penalty was abolished on 12 December 1999[9], without any replacement. On 27 October 2000 the death penalty was replaced with forty (40) years of imprisonment[10]. Based on this, in the period 12 December 1999 until 27 October 2000 the punishment for War Crime Against the Civilian Population was imprisonment between five (5) and fifteen (15) years since no acts were any longer eligible for the death penalty.

44. The punishment in the current case according to CCRK would be imprisonment of not less than ten (10) years or by life long imprisonment[11].

45. The principle of the most favorable law means that the court must apply the law most favorable to the defendant that has been in force at any time between the time the criminal offence was committed and the time when the punishment is imposed. In this case therefore the most favorable law was the one in place in the period 12 December 1999 until 27 October 2000 with the punishment of imprisonment between five (5) and fifteen (15) years.

[7] Article 142 CCSFRY; minimum 5 years or death penalty, Article 38 (1) CCSFRY; maximum imprisonment of 15 years.
[8] Article 38 (2) CCSRFY.
[9] UNMIK Regulation 1999/24, Article 1 (5).
[10] UNMIK Regulation 2000/59, Article 1 (6).
[11] Article 153 paragraph 1 subparagraph 1.2 CCRK.

46. When deciding on punishment the court has, according to Article 41 CCSFRY, to consider both the aggravating and the mitigating circumstances. However in the present case the Court of Appeals also has to consider the following:

47. In the first trial **E.K** was found guilty of the criminal offence and was sentenced to five (5) years of imprisonment by the Trial Panel of the District Court of Prizren. An appeal against the judgment was filed by the Special Prosecution. The appeal was, however, declared inadmissible by the Supreme Court and therefore, due to the principle of *reformatio in peius*, the Court of Appeals is limited by the judgment of the District Court of Prizren and cannot impose a more sever sentence than five (5) years of imprisonment, which is also the minimum sentence set by law. The only mitigating circumstance is the long period of time that has passed since the commission of the criminal offence. Furthermore there is no extraordinary mitigating circumstance, as envisioned by Article 41 paragraph 2 CCSFRY, that would allow the Court of Appeals to go below the minimum sentence set by law. Therefore **E.K** is sentenced to imprisonment of five (5) years.

48. For **S.B** there is no such upper limitation as in the case of **E.K**. However the Court of Appeals finds that it would not be just to apply a different level of guilt for **S.B** than for **E.K**. There are also no circumstances more mitigating or more aggravating than in the case of **E.K**. The principle of proportionality must dictate the punishment and therefore **S.B** is also sentenced to imprisonment of five (5) years.

49. According to Article 50 paragraphs 1 and 3 CCFSRY the time served in detention on remand shall be credited to the punishment of imprisonment.

50. **E.K** has served time in detention on remand from 14 December 2010 until being released on 2 August 2011. This period shall be deducted from his imprisonment sentence of five (5) years.

51. **S.B** has served time in detention on remand from 18 April 2012 until being released on 1 February 2013. This period shall be deducted from his imprisonment sentence of five (5) years.

3.2. The Case of the Accused M.H.1, M.H.2, N.H, N.B and J.K

3.2.1. The Factual Situation

52. The Basic Court Trial Panel has found it proven beyond reasonable doubt that **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K**, when interviewed as witnesses, all gave false statements to the investigators as to the date **E.K** was wounded, in order to provide an alibi for **E.K**.

53. The Court of Appeals fully concurs with the assessment of the Trial Panel. **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** have all stated – although all of them not sure about the exact date – that **E.K** was wounded before the attack on 17 and 18 July 1998. They have all given reasons for why

they remember the timing of **E.K** being wounded. Based on the reasons given, as elaborated in detail by the Trial Panel, the Court of Appeals also finds it unlikely that they would remember the exact timing.

54. Based on the statement of Doctor **A.H** given to the investigators on 21 December 2010, which the Court of Appeals finds more credible than the one given to the court on 30 June 2011, and the evidence in form of a log book given to the investigators by the same, the Court of Appeals finds it more likely that **E.K** was wounded in August 1998. Having already found it proven beyond reasonable doubt that **E.K** was in participating in the attack, the Court of Appeals finds it also proven beyond reasonable doubt that the statements of **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** were false.

3.2.2. The Legal Assessment of the Factual Situation

55. The Basic Court Trial Panel acquitted the five defendants with the reasoning that because **E.K** was acquitted of the criminal offence he was charged with there was no legal ground to find the defendants guilty of Providing Assistance to Perpetrators after the Commission of Criminal Offences.

56. The Court of Appeals has now found **E.K** guilty of War Crimes Against the Civilian Population. The question then again arises if the other elements of the criminal offence as listed in Article 305 CCK have been fulfilled. The relevant paragraphs are the following:

> (1) Whoever harbors the perpetrator of a criminal offence prosecuted *ex officio* or aids him or her to elude discovery by concealing instruments, evidence or in any other way or whoever harbors a convicted person or takes steps towards frustrating the execution of a punishment or an order for mandatory treatment shall be punished by imprisonment of up to one year.
>
> (2) Whoever assists the perpetrator of a criminal offence punishable by imprisonment of more than five years shall be punished by imprisonment of six months to five years.

57. The legal question at stake is the meaning of the words *elude discovery*. When is a perpetrator discovered? The Court of Appeals takes the view that discovery must be interpreted as to mean discovery of the real perpetrator of a crime. The real perpetrator of a crime is not found until he or she has been found guilty by a court. The Court of Appeals finds that Article 305 CCK must be seen as a general provision covering those cases when a person gives false statements to protect a perpetrator of a crime that are not covered by another legal provision, such as Article 307 CCK which regulates false statements in court proceedings. When interpreting a legal provision that is not clear in its wording one must consider the rationality of the legislator, the *ratio legis*. The Court of Appeals finds that it would be against *ratio legis* to allow false statements during the investigation. The *ratio legis* and the general status of Article

305 is further substantiated by the fact that pursuant to Article 164 paragraph 2 KCCP a witness must always be warned before giving his or her statement that giving a false testimony constitutes a criminal offence. There is no limitation to this in different stages of the procedure. In the stage of the investigation the act of giving false testimony is covered by Article 305 CCK as the general rule and in the phase of court proceedings it is covered by Article 307 CCK as the specific provision limited for the court proceedings.

58. **E.K** has been found guilty of the criminal offence he was charged with. Had he not been found guilty he could not be considered as the perpetrator of the criminal offence, hence he would not have been discovered as the perpetrator of a criminal offence. When giving false statements to the investigators **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** assisted **E.K** in eluding discovery, or being found as the real perpetrator of a criminal offence.

59. The Court of Appeals finds it clear that **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** were aware that they were not speaking the truth to the investigators, and regardless of their motive for doing so, they were doing it to protect **E.K**. Thereby the Court of Appeals finds it proven beyond reasonable doubt that they also had the intent, the *mens rea*, to commit the criminal offence.

3.2.3. Sentencing

60. The law in force at the time of the criminal offence was the CCK[12]. Because a new criminal code entered into force on 1 January 2013, the CCRK, also for these defendants the Court of Appeals must establish the most favorable law.

61. Providing Assistance to Perpetrators after the Commission of Criminal Offences is currently criminalized under Article 388 CCRK. There has been no change in the sentences provided for the criminal offence. There has, however, been a change in the description of the criminal offence. Article 388 (1) CCRK reads as follows:

> (1) Whoever harbors the perpetrator of any offence other that as provided in paragraph 2 of this Article or aids him or her to elude discovery or arrest by concealing instruments, evidence or in any other way […].

62. The legislator has in CCRK added the words "elude discovery *or arrest*". This is the only change of substance. The Court of Appeals finds that this change does not change the interpretation of the provision itself. The provision is still to be seen as a general provision and eluding discovery means not being found as the real perpetrator of a criminal offence, i e being found guilty of a criminal offence. The Court of Appeals thereby finds that no law is more

[12] Provisional Criminal Code of Kosovo (UNMIK/REG/2003/25) in force from 06.04.2004 until 31.12.2012.

favorable in this case and therefore the applicable law is the law in effect at the time the criminal offence was committed, namely the CCK.

63. Because War Crimes Against the Civilian Population is punishable by imprisonment of more than five years the punishment for providing assistance to the perpetrator of that criminal offence is imprisonment of six (6) months to five (5) years, Article 305 (2) CCK.

64. **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** were also found guilty in the first trial and they were by the District Court of Prizren sentenced to six (6) months of imprisonment, suspended for one (1) year according to Articles 43-44 CCK. As in the case of **E.K** no admissible appeal was filed by the Prosecution. Due to the principle of *reformatio in peius* the maximum punishment the Court of Appeals can impose is six (6) months of imprisonment, suspended for one year. Six (6) months of imprisonment is also the minimum punishment and also in the case of these accused there is no particularly mitigating circumstance required by Article 66, paragraph 2 CCK that would allow to go below the minimum set by law.

65. **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** are therefore, according to Article 305 (2) CCK sentenced to six (6) months of imprisonment, suspended for a period of one (1) year, pursuant to Article 41 paragraph 1, item 1 and Article 43 paragraphs 1 and 2 CCK.

3.3. Cost of Criminal Proceedings

66. According to Article 102 (1) KCCP the court shall decide that a person found guilty must reimburse the costs of criminal proceedings. The Court of Appeals finds that **E.K**, **S.B**, **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** shall reimburse the costs of the criminal proceedings. This applies also to the proceedings in the Court of Appeals pursuant to Article 105 KCCP.

67. As all the defendants found guilty must reimburse the costs of the criminal proceedings against themselves, they shall do so jointly and severally pursuant to Article 102 (3) KCCP as the specific costs for each of them cannot be specified more accurately. The respective costs of apprehension and escort during the court proceedings shall however be covered by **E.K** and **S.B** alone.

68. The Court of Appeals found no need to hold a hearing, pursuant to Article 412 KCCP, since the Court found that there had not been an erroneous establishment of the factual situation. Further the Court of Appeals found that since the material facts had been correctly established by the Basic Court Trial Panel but having regard to the determination of the factual situation a different judgment should have been rendered. Therefore the Court of Appeals finds that there

are grounds to modify the Impugned Judgment pursuant to Articles 424 and 426, paragraph 1 KCCP.

Presiding Judge

_____

Hajnalka Veronika Karpati

EULEX Judge

Panel member	Panel member	Recording Officer
_____	_____	_____
Timo Vuojolahti EULEX Judge (With dissenting opinion)	Rasim Rasimi Judge	Anna Malmström EULEX Legal Officer

Dissenting opinion of Timo Voujolahti is attached.

LEGAL REMEDY: Pursuant to Article 430 paragraph 1 subparagraph 3 and paragraph 2 KCCP the authorized persons may file an appeal of this judgment within fifteen (15) days of the day the copy of the judgment has been served.

Prepared in English, an authorized language. Reasoned Judgment completed and signed on 3 March 2014.

Case PAKR 271/13

PARTLY DISSENTING OPINION OF JUDGE TIMO VUOJOLAHTI

I disagree with the majority what comes to the charges against defendants **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K**.

Framing of the question

I consider the relevant facts are as stated by the majority in the judgment. I only add, that **E.K** was ordered under the measure of detention on remand on 14 December 2010. Thus, it is proven that these five defendants intentionally gave a false witness statement during the pre-trial stage supporting **E.K's** alibi, namely, when heard in the capacity of a witness either by the EULEX investigators or by the prosecutor in February or March 2011 they all falsely stated that **E.K** was wounded in the beginning of July 1998. The only logical conclusion for the reason of doing this is that they wanted to support **E.K's** false alibi according to which he was not in the village of / on 17-18 July 1998 because he was wounded in a battle on 11 July 1998 and stayed in hospital for 15 days.

The Prosecutor has charged these five defendants with the criminal offence of Providing Assistance to Perpetrators After the Commission of Criminal Offences, pursuant to Article 305 paragraph 2 of the Criminal Code of Kosovo (CCK – the law in force before 1.1.2013). Thus, I find myself faced with the question does the criminalization under Article 305 of the CCK cover also this situation; namely giving a false statement to the police investigator or to the prosecutor at the pre-trial stage.

The law

The headline of Article 305 of the CCK is 'Providing Assistance to Perpetrators After the Commission of Criminal Offences'. The first Paragraph of the Article reads:

> *Whoever harbors the perpetrator of a criminal offence prosecuted ex officio or aids him or her to elude discovery by concealing instruments, evidence or in any other way or whoever harbors a convicted person or takes steps towards frustrating the execution of a punishment or an order for mandatory treatment shall be punished by imprisonment of up to one year.*

Paragraphs 2 and 3 prescribe a more severe punishment if the criminal offence in question is punishable with a certain maximum punishment of imprisonment.

Article 307 (False Statements) Paragraph 1 of the CCK reads:

> *A witness, expert witness, translator or interpreter who gives a false statement in court proceedings, minor offence proceedings, administrative proceedings before a notary public or disciplinary proceedings shall be punished by a fine or by imprisonment of up to one year.*

Moreover, Article 306 of the CCK deals with False Reports and criminalizes such actions as untruthfully reporting that a particular person has committed a criminal offence or a criminal offence has been committed.

Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads:

> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
>
> *2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.*

Article 33 Paragraph 1 of the Constitution of the Republic of Kosovo reads:

> *1. No one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.*

Pursuant to article 22 of the Constitution of the Republic of Kosovo the European Convention for the Protection of Human Rights and Fundamental Freedoms has direct applicability in Kosovo.

Nullum crimen, nulla poena sine lege

The European Court of Human Rights (ECtHR) has in several cases stated that the guarantee enshrined in Article 7 should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment . Article 7 § 1 of the Convention sets forth the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege). It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. (See e.g. cases S.W. v. the United Kingdom and C.R. v. the United Kingdom, 22.11.1995; Camilleri v. Malta 22.01.2013)

As the ECtHR has considered that in consequence of the principle that laws must be of general application, the wording of statutes is not always precise. This means that also in criminal law there will always be need for judicial interpretation (see e.g. Camilleri v. Malta 22.01.2013). However, and as I understand there is no doubt on this, the criminal law must not be extensively construed to an accused's detriment by analogy.

Assessment

In this case I have to interpret what is the "true intent" of Article 305 Paragraph 1 of the CCK – without violating the certainty in the application of law. The core question is what is the content of these two parts of the provision: '*harbors*' and '*aids him or her to elude discovery… in any other way*'.

The literal interpretation of the verb *'to harbor'*, as a starting point, refers to concrete acts like hiding the perpetrator or giving a shelter to him/her. Taking into account also the second way to conduct the offence (the *actus reus*), aiding to elude discovery, gives reasons to conclude that harboring, in the meaning of this provision, is something that must take place before the perpetrator is, to use common language, caught by the authorities. Thus, I find it impossible to include '*giving a false statement'* in the literal meaning of *harboring.*

The more problematic part of the provision is the second part; '*aids him or her to elude discovery… in any other way*'.

First, I have to state how I interpret the elements of this crime (Providing Assistance to Perpetrators After the Commission of Criminal Offences). The prohibited act is not only '*aiding the perpetrator'* in whatever way, the prohibited conduct of the offence (the act) is restricted to situations when the aid is given with the intention to help the perpetrator

to elude discovery. This restriction is done by the lawmaker and I have to put emphasis on the fact that the lawmaker has used the word 'discovery', and only that word (not e.g. sentencing).

Second, I have to interpret the meaning of discovery. The common meaning of the word discovery can be defined as the act of finding or learning something for the first time. Thus, the literal interpretation of '*aiding the perpetrator to elude discovery'* would be related to concealing or covering up the identity of the perpetrator so that the identity of the perpetrator would not be established. Moreover, the literal interpretation can also cover up situations when the given assistance is directed at to aid a perpetrator, whose identity is already known, not to be captured.

When considering if the CCK has used the word 'discovery' in another, and maybe in a more extensive, judicial meaning I first refer to Article 304 (Failure to Report Criminal Offences or Perpetrators) of the CCK. The Paragraph 1 reads: *Whoever, having knowledge of the identity of the perpetrator of a criminal offence … or of the commission of such a criminal offence, fails to report such fact even though the discovery of the perpetrator or of the criminal offence depends upon such a report…*

In this provision '*discovery*' seems also to refer primarily to finding and catching the perpetrator.

In Article 109 Paragraph 6 of the CCK the term 'support to a terrorist group' is defined as meaning, e.g. obstructing the discovery or apprehension of a terrorist group or its members. Also in Article 251 (Unjustified Giving of Gifts) Paragraph 3 of the CCK it is stated that if the perpetrator reports the offence before it was discovered or before he or she found out that it was discovered, the court may waive the punishment.

These provisions show that the lawmaker has used the word discover or discovery in the CCK in the same meaning as described above in the literal interpretation. Moreover, it must be also noted that facilitating the escape of a person who has been lawfully deprived of liberty is separately criminalized pursuant to Article 314 Paragraph 1 of the CCK. Thus, my conclusion is, that the literal and also the judicial meaning of the word *discovery* as used in Article 305 Paragraph 1 of the CCK justifies to consider, that the act which aids the perpetrator to elude discovery is restricted to situations when the perpetrator is not yet discovered; this means when the identity is not established or the perpetrator is not yet found or captured.

After reaching this conclusion I find that giving a false statement as a witness when heard by the police or prosecutor during the pre-trial stage after the perpetrator has

been discovered may not be covered by the provision of Article 305 Paragraph 1. Extending the interpretation so that this situation is included within the definition of '*aiding the perpetrator to elude discovery*' would mean going beyond the wording of the law in detriment of the defendant and thus violating the principle in Article 7 of the ECHR. In this case the perpetrator, **E.K**, was already discovered and ordered under the measure of detention on remand when the interrogations of **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K** were conducted.

Moreover, I will give my assessment what has been the intention of the lawmaker and the purpose this provision aims to achieve and how this purpose was implemented.

Article 164 Paragraph 2 of The Criminal Procedure Code of Kosovo (CPCK, the old procedure code) reads:

A witness shall first be told that it is his or her duty to speak the truth and … he or she shall be warned that false testimony constitutes a criminal offence.

Pursuant to Article 237 Paragraph 1 of the CPCK the provision in Article 164 shall apply mutatis mutandis when hearing a witness before the public prosecutor, but no oath shall be administered in this situation.

On one hand it is clear that any legal system should not accept lying when a person is heard as a witness. Articles 164 and 237 of the CPCK give reasons to believe that the lawmaker doesn't accept, as a starting point, giving false statements at any stage of the criminal proceedings. On the other hand, the intention and purpose of the lawmaker can't fill the gaps where the individual can't know from the wording of the relevant provision and from the legal praxis what acts will make him/her criminally liable. It is the responsibility of the lawmaker to pass the criminal laws in such a way that the requirements provided by Article 7 of the ECHR are fulfilled – a court can't fill a clear gap in the criminal law.

What comes to false statements the lawmaker has clearly defined in Article 307 of the CCK that giving a false statement as a witness in court proceedings is subject to punishment. Compared to this provision Article 305 Paragraph 1 of the CCK, because of the very general and vague content of the provision, raises the question, can this later provision in any case be interpreted as covering false statements given before the court proceedings, even though the real perpetrator might still be undiscovered.

As already stated above I find that giving a false statement when heard as a witness during the pre-trial stage and after the perpetrator of the criminal offence under

investigation has been discovered is not subject to punishment under the provisions of the CCK. Taking into account the facts of the case as described above I acquit the charges against the defendants **M.H.1**, **M.H.2**, **N.H**, **N.B** and **J.K**.

TV