

SUPREME COURT OF KOSOVO
PKL-KZZ- 73/2010
DATE: 2 April 2012

IN THE NAME OF THE PEOPLE

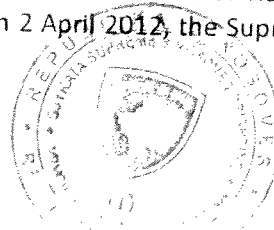
THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, EULEX Judge Elka Filcheva-Ermenkova and Kosovo Judges of the Supreme Court of Kosovo, Nesrin Lushta, Salih Toplica and Avdi Dinaj as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk, in the criminal case of the District Court of Prishtine/Prishtina against the juvenile:

M S , born on , in , father's name
, mother's name , a , having
, having

Charged with the criminal offences of Aggravated Murder contrary to Article 30 paragraph 2 sub-paragraphs 1,2,3 and 5 and paragraph 3 of the Criminal Law of Kosovo (CLK) read together with Article 24 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), and Attempted Aggravated Murder, contrary to Article 30 paragraph 2 sub-paragraphs 1,2,3 and 5 and paragraph 3 of the CLK as read with Article 24 of the CC SFRY punishable as per Article 30 paragraph 2 item 3 of CLK, as read with Article 19 of the CCSFRY, and Participation in a Group that Commits a Criminal Act or Acts contrary to Article 200 paragraph 1 of the CLK;

Deciding upon the Requests for Protection of Legality filed by defense counsel Av Zivojin Jokanovic on behalf of juvenile M: S against the Judgment of the District Court of Prishtine/ Prishtina P nr 573/08 dated 10 February 2009, against Judgment of the Supreme Court of Kosovo, Ap-Kz 198/2009, dated 3 March 2010,

Pursuant to Article 454 paragraph 1 of the Kosovo Criminal Code of Procedure (*hereafter* "KCCP"), and Article 51 paragraph 2 and Article 79 of the Juvenile Justice Code of Kosovo (*hereafter* "JJCK") after a session on deliberation and voting held on 2 April 2012, the Supreme Court of Kosovo issues the following:



JUDGMENT

To reject the Requests for Protection of Legality filed by defense counsel Av Zivojin Jokanovic on behalf of juvenile M S , against the Judgment of the District Court of Prishtine/ Prishtina P nr 573/08, dated 10 February 2009, against Judgment of the Supreme Court of Kosovo, Ap-Kz 198/2009, dated 3 March 2010, as unfounded and to confirm the Judgment of the Supreme Court according to Art 456 of the KCCP.

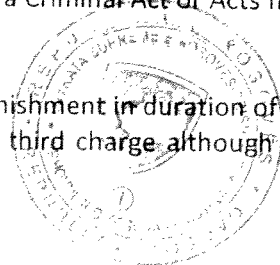
REASONING

I. PROCEDURAL BACKGROUND

On 18 November 2008, the International Public Prosecutor filed a motion and charging document against the juvenile M S . The public prosecutor alleged that on the 15th of June 1999 the juvenile Marko Simonovic in complicity with the suspects J B , I R , D C and others, in an organized manner and in furtherance of a joint criminal enterprise while motivated by ethnic hatred, committed the murder of four Kosovo Albanian persons, namely A B U A V B and N G , contrary to Article 30 paragraph 3 as read with paragraph 2, item 3 of the Criminal Law of Kosovo. The public prosecutor further alleged that the juvenile M S on the 15th of June 1999, in complicity with the defendants J B , I R , D C and other suspects, in an organized manner and in furtherance of a joint criminal enterprise, while motivated by base motives of ethnic hatred, attempted to murder two Kosovo Albanian Persons namely Z G and A G , contrary to Article 30 paragraph 3 as read with paragraph 2, item 3 of the Criminal Law of Kosovo, as read with Article 19 of the Criminal Code of Yugoslavia. Finally public prosecutor argues that on the 15th of June 1999 the juvenile M. S. jointly participated in a group that included J B , I R , D C and others, that committed a Criminal Act or Acts by taking the lives of A B , U A , V B and N G contrary to Article 200 (1) of the Criminal Code of Kosovo.

On 10 February 2009 the District Court of Prishtine/Prishtina found the juvenile M. Si guilty for having committed criminal offences of Aggravated Murder of four persons, in violation of Article 30 paragraph 2 sub-paragraphs 1,2,3 and 5 and paragraph 3 of CLK as read with article 24 of the CC SFRY, Attempted Aggravated Murder of two persons, in violation of Article 30 paragraph 2 sub-paragraphs 1,2,3,5 and paragraph 3 of the CLK as read with Article 24 of the CC SFRY, punishable as per Article 30 paragraphs 2 item 3 of the CLK, as read with Article 19 of the CC SFRY, and Participation in a Group that Commits a Criminal Act or Acts from Article 200 paragraph 1 of the CLK.

The first instance court imposed onto the juvenile an aggregated punishment in duration of ten (10) years of imprisonment for the first two charges while for the third charge although the



juvenile has been found guilty, the court did not impose a sentence since the court held that this charge is consumed in the first two charges. The time spent in the detention is credited and included with the punishment.

On 3 March 2010 the Supreme Court of Kosovo partly approved the appeal of the juvenile M S filed through his defense counsel Zivojin Jakonovic and modified the challenged judgment of the court rendered in the first instance. The juvenile M S has been found guilty of the Assisting in commission of one Aggravated Murder, in violation of Article 30 par (2) sub-par 1, 2, 3 and 5 and par 3 of CLK, as read together with Article 24 of the CC SFRY, and criminal offence of Attempted Aggravated Murder of one person, in violation of Article 30 par 30 par 2 sub-par 1, 2, 3 and 5 and par 3 of the CLK, as read with Article 24 of the CC SFRY. The judgment of the District Court of Prishtine/Prishtina dated 10 February 2009, P nr 573/2009, has been affirmed in the remaining parts. The sentence imposed on the juvenile is reduced to a single unified term of imprisonment of six (6) years.

Defense counsel on behalf of the juvenile, Av Zivojin Jakonovic filed the Request for Protection of Legality against the Judgment of the District Court of Prishtine/ Prishtina P nr 573/08 dated 10 February 2009, against Judgment of the Supreme Court of Kosovo, Ap-Kz 198/2009, dated 3 March 2010. Defense counsel requested modification of the challenged judgments; to acquit juvenile of all criminal charges, to return the matter for reconsideration to the court of the first instance.

The case was sent to the OPSK for an opinion.

By submission KMLP Nr 75/2010 dated 7 September 2010 the Office of State Prosecutor filed an opinion and proposed that the request for protection of legality be rejected as ungrounded.

II. SUPREME COURT FINDINGS

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

- a. The Request for Protection of Legality is admissible. The request is filed with the competent court pursuant to Article 454 par 1 and within the deadline pursuant to Article 452 par 3 of KCCP and in accordance to Article 79 of JJCK.
- b. 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.
- c. The request for Protection of Legality is ungrounded.

The Request for Protection of Legality alleges Violations of Criminal Law, Essential Violations of the Law on Criminal Procedure (*hereafter referred as "LCPK"*) and other violations of LCPK that are influential to the legality of the Judgment.

The Supreme Court of Kosovo notes that parts of the request for protection of legality refer to a large extent to the establishment of factual situation. The Supreme Court of Kosovo however is confined in its assessment by Article 451 and Article 455 of KCCP which foresees that the defense counsel may not file a request for protection of legality on the ground of an erroneous or incomplete determination of the factual situation. Consequently the contestation of the factual situation at this stage of the procedure is inadmissible.

In its assessment the Supreme Court of Kosovo finds no procedural errors in challenged judgments that would have to be taken into account *ex officio*. Accordingly, pursuant to Article 455 of KCCP, the Supreme Court of Kosovo shall confine itself to examining those violations of substantive and procedure law which the requesting party alleges in his request.

In the request for protection of legality defense counsel contended the following:

A. THE ERRONEOUS APPLICATION OF THE CRIMINAL CODE OF KOSOVO

1. Defense counsel alleges violation of the substantive law as the crime contained in Article 30 paragraph 2 of the CLK provides merely murder and not aggravated murder. The crime of aggravated murder does not exist in the CLK. Therefore defense counsel maintains the wrong qualification of the criminal offence.

The Supreme Court notes that it stands the fact that "Aggravated Murder" as evidently used in the challenged judgments and correctly put forward by the defence counsel in the Request for Protection of Legality does not exist in the CLK.

Article 30 of the CLK reads:

(1) Whoever takes another person's life shall be punished with at least five years of imprisonment.

(2) The term of imprisonment of at least ten years or a death penalty shall be pronounced against:

- (1) a person who takes another person's life in a brutal or insidious manner;*
- (2) a person who takes another person's life and while doing so intentionally endangers life of one or more persons;*
- (3) a person who takes another person's life for personal gain, in order to commit or conceal another criminal act, out of ruthless revenge or malice.*
- (4) a person who takes another person's life out of blood feud;*
- (5) a person who takes another person's life in wanton and violent manner;*
- (6) a person who takes the life of an official or a military person while he is performing the tasks of public security and enforcing law and order, while capturing a crime perpetrator or guarding an arrested person, or a person who takes the life of a person who, under the law or other provisions, performs the tasks pertaining to social self-protection.*

(3) *The punishment as per Para 2 of this Article shall be imposed on a person who committed several premeditated murders, excluding those stipulated in Articles 33 and 34 of this Law disregarding the fact that he is being tried for all the murders by the application of the regulations relating to concurrence or the fact that he was previously convicted of another murder.*

Article 30 paragraph 1 of CLK provides the definition of murder as "whoever takes another person's life" without specification of the circumstances in which the act is committed, be those aggravating and/or mitigating by nature. Paragraph 2, Items 1 – 6 of this Article defines the qualified (grave) forms of murder. That is known in the literature as "Aggravated Murder" when the act is committed in one of the aggravating circumstances provided for by the law. Such circumstances which make a murder qualified are those for instance related to the manner of commission of the murder, to the commission of murder in wanton and violent manner, endangering the life of another person, the base motives of the perpetrator, the role of a passive subject while performing certain official duties and the number of persons whose life was taken.

Unlike the theory, the CLK however provides only definition of murder, irrespective of the circumstances in which the act has been committed. The question therefore rises whether indication of phrase "aggravated" in the challenged judgments, although in fact the juvenile has been found guilty of acts committed in the aggravating circumstances, amounts to violation of the criminal law as the crime contained in Article 30 paragraph 2 of the CLK is merely murder committed in one of aggravated circumstances and not aggravated murder.

In addressing this point, the Supreme Court of Kosovo notes that although the previous instances erroneously indicated the phrase "aggravated", such "defect" is ineffectual *Inritus Irritus* as regards qualification of the criminal act. That is true especially because the challenged judgments make adequate reference to relevant legal provisions of the criminal law leaving no room for doubts as to the applied criminal law provision. The Judgment of the District Court of Prishtine/Prishtina, dated 10 February 2009, indicates that the juvenile M S is found guilty for having committed criminal offences of Aggravated Murder from Article 30 paragraph 2 sub-paragraphs 1,2,3 and 5 and paragraph 3 of CLK as read with article 24 of the CC SFRY, Attempted Aggravated Murder from Article 30 paragraph 2 sub-paragraphs 1,2,3,5 and paragraph 3 of the CLK as read with Article 24 of the CC SFRY, punishable as per Article 30 paragraphs 2 item 3 of the CLK, as read with Article 19 of the CC SFRY, Participation in a Group that Commits a Criminal Act or Acts from Article 200 paragraph 1 of the CLK. Further the Judgment of the Supreme Court of Kosovo dated 3 March 2010 states that the juvenile is found guilty of Assistance in the commission of Aggravated Murder of one person contrary to Article 30 paragraph 2 sub-paragraphs 1,2,3 and 5 and paragraph 3 of CLK as read with article 24 of the CC SFRY, Attempted Aggravated Murder of one person contrary to Article 30 paragraph 2 sub-paragraphs 1,2,3,5 and paragraph 3 of the CLK as read with Article 24 of the CC SFRY, punishable as per Article 30 paragraphs 2 item 3 of the CLK, as read with Article 19 of the CC SFRY, and Participation in a Group that Commits a Criminal Act or Acts from Article 200 paragraph 1 of the CLK.

The Supreme Court of Kosovo finds that the previous instances make an adequate reference to relevant legal provisions of substantive law. There is no doubt for what criminal acts the juvenile M Si has been convicted. The "defect" using phrase "aggravated" is mainly *lingua errori* that relates to non-essential issue which does not affect the qualification of the criminal act, or worsen the legal criminal position of the juvenile or change the identity of charge. Consequently, it is not a reason for the judgment to be annulled.

2. Defense counsel claims that the Supreme Court failed to account for the actual acts of the juvenile that constitute the Assistance to Murder and Attempted Aggravated Murder and to account for the criminal intent of the juvenile. The defense counsel claims that the courts in previous instances failed to provide reasons how, by what action, the juvenile assisted in the commission of the criminal acts.

In addressing this point, the Supreme Court of Kosovo finds that defense counsel raises doubts concerning the existence of facts relevant to the case which actually relate to alleged incomplete determination of the factual situation. However the contestation of the judgment on ground of factual situation at this stage of the procedure is inadmissible pursuant to Article 451 (2) of KCCP. This stand has repeatedly been taken by the Supreme Court of Kosovo in the various cases. For instance in the case of Runjeva and Dema (*Supreme Court of Kosovo, AP-KZ, dated 25 January 2008, page 20*), the Supreme Court of Kosovo in this context pointed out that *"appellate proceedings in the KCCP rest on principles that is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of fact where its evaluation has been "whole erroneous"*.

In the case at hand, it could not be detected such deficiencies which would warrant quashing of challenged judgments and return of the case for retrial. Therefore, this panel considers any reference and contestation of the judgments on the ground of factual situation not only futile but erroneous.

3. Defense counsel argues that the state of facts denies brutal violent behavior that would amount to category of aggravated murder. Defense claims that the ethnic hatred, although presenting morally negative incentive, does not fall under category of aggravated murder pursuant to Article 30 par 2 of CLK.

In addressing this point, as regards the possible motive/s that drove the juvenile in the commission of the criminal offence, this panel notes that the motive of a crime is/are not part of the crime itself as it is defined in the law. While it is unquestionable the relevance of the motives particularly with regard to determination of purpose of a crime and consequently of level of criminal responsibility, as well for purpose of determination the restrictive measures and length of punishment, nevertheless the motives are not constitutive elements of the figure

of the criminal offences for which the juvenile has been found guilty for. Consequently, this panel finds any further elaboration of the point superfluous.

4. The defense counsel claims that the court did not properly consider the *alibi* of the juvenile. His parents and sisters who even if not certain would confirm the alibi.

In addressing the appellant allegation, this panel notes that the first instance court evaluated the evidence and heard testimonies proposed by the parties to the procedure, namely public prosecutor and also defense counsel. Evidently the defense counsel had been given ample opportunities to challenge the evidences presented during the main trial. The fact that the court shared different view with defense counsel regarding whereabouts of the juvenile during the course of events, does not serve as an argument to conclude the erroneous determination of factual situation. Such allegations have been already addressed and properly dealt with in the course of previous instances. The Supreme Court of Kosovo finds nothing new from previous allegations raised by the defense counsel that would undermine the overall factual foundation of the charges. The Supreme Court of Kosovo notes that the judgment of the first instance court makes an adequate reference to evidences relied upon which were properly obtained, administered and evaluated by the trial court.

5. In the request defense counsel raises the issue of the sentencing based on Article 417 of LCPK. The second instance court acting upon the appeal has pronounced almost the maximum punishment of imprisonment for the act that the court pronounced the juvenile guilty for and ordered six years of imprisonment.

The Supreme Court of Kosovo respectfully disagrees with the view of the defense counsel with regard to length of the sentence. This case is particularly serious that demanded a serious sentence.

This panel notes that there is no obligation for the court to reduce the sentence due to the partial acquittal and/or modification of the challenged judgments. The court is only bound by the maximum penalty. As matter of fact, in the second instance, the juvenile has been found guilty of criminal offences of Assisting in commission of one Aggravated Murder, in violation of Article 30 par (2) sub-par 1, 2, 3 and 5 and par 3 of CLK, as read together with Article 23 of the CC SFRY, criminal offence of Attempted Aggravated Murder, in violation of Article 30 par 30 par 2 sub-par 1, 2, 3 and 5 and par 3 of the CLK, as read with Article 24 of the CC SFRY. The sentence imposed on the juvenile was reduced to a single unified term of imprisonment of six (6) years. The judgment of the District Court of Prishtine/Prishtina dated 10 February 2009, P nr 573/2009, was affirmed in the remaining parts.

Taking into account the circumstances related to the case, the manner in which the crime was committed – *modus operandi* as well as the intensity of the social risk of the criminal offence, this court concludes that the imposed punishment is fair and lawful, i.e. in compliance with the purpose of punishment, as foreseen by the law. Therefore the Supreme Court finds that the

court of second has fully and correctly examined all relevant circumstances when imposing the type and length of the punishment.

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

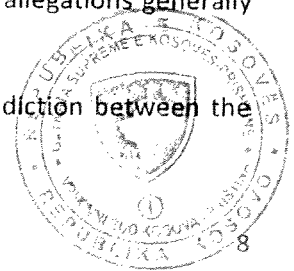
6. Defense counsel claims that the first instance court judgment is based on inadmissible evidence in that certain witnesses lack credibility and some of the witnesses had a motive to give false testimony. This results in violation of Article 403 par 1, item 8 and 12 of the LCPK. Defense counsel argues serious doubt on credibility of the witnesses as previous circumstances make them unreliable.

In addressing this point, this panel finds it relevant to stress that although the defense counsel indicates concerns with regard to admissibility, in fact the defense counsel rather contest the credibility of witnesses. As regards the admissibility of evidence, this panel notes that the request did not specifically indicate the evidence and/or evidences that the court relied upon which eventually defense counsel considers to have been taken in violation of the rules of evidences and/or which the defense counsel had not been given the opportunity to challenge. As indicated earlier, this panel finds that the defense counsel had been given ample opportunities to challenge the evidences presented during the main trial. In addition this panel finds that the judgment of the first instance court makes an adequate reference to evidences relied upon which were properly obtained, administered and evaluated by the trial court.

As regards the credibility of testimonies, in general it stands the fact that inconsistencies and contradictions in witness testimonies can result from objective and natural psychological processes of human perception, especially in witnesses who had undergone traumatic events and who due to procedural circumstances had to give their account of the same event before the authorities. This view is generally accepted. However, such events cannot serve as justification for disqualification in an arbitrary fashion of the statement. The credibility of a witness needs to be assessed and evaluated in case by case bases. It could not be questioned in advance the credibility of a witness and/or diminished the probative value of whole statement based on the general observation of the situation. In relation to credibility of a witness, it is essential other than general objective circumstances, some other circumstances are established such as those that clearly show bias, tendencies on part of that witness and/or evidences which reflect that the statement of the witness is in contradiction with other evidences in the case.

In the case at hand, this panel considers that the courts had correctly assessed and evaluated all the evidences in compliance with the rules of evidences and considers allegations generally submitted without a merit.

7. Defense counsel claims that the challenged judgments contains contradiction between the enacting clause and the reasoning.



In reviewing this point the Supreme Court of Kosovo could not establish any substantial deficiency as regards to the enacting clause of the appealed judgments. The Supreme Court of Kosovo finds that in this case the enacting clauses of the challenged judgments are sufficiently clear. They make an adequate reference to provisions of the criminal law, so clarifying what form of culpability was determined by court for the juvenile.

Defense counsel does not provide specifically which part of the enacting clause contradicts the reasoning part of the challenged judgments. The request rather submits that the factual situation was erroneously established by the first and second instance. This panel finds that these allegations do not stand since the factual description of the event provided in enacting clause of the second instance court complies in its entirety with the factual grounds, development of the event provided in charge. Seen in its entirety, there is no discrepancy and/or inconsistency between the enacting clause and reasoning of the challenged judgment.

Therefore this panel finds an argument of the defense counsel about the inconsistency of the judgment without merit.

C. OTHER VIOLATIONS OF LCPK THAT ARE INFLUENTIAL TO THE LEGALITY OF THE JUDGMENT

8. The defense counsel claims in his opening "General remarks" that the first instance court substantially violated the criminal procedure by failing to include the personal data of the juvenile in the enacting clause.

In addressing this issue, this panel notes that although the district court makes reference to the case file, erred in inclusion of the personal data of the juvenile as required by the provision of the law. Nevertheless this error on application of law was properly rectified by the court during the course of appellate procedure. Therefore such issue is not existent at this stage of the procedure, since it has already dealt with in the second instance. Consequently, this panel finds it improper any further comment on this issue.

III. CONCLUSION OF THE SUPREME COURT OF KOSOVO

For the reasons above, the Supreme Court of Kosovo concludes:

The Requests for Protection of Legality filed by defense counsel Av Zivojin Jokanovic on behalf of juvenile M S , against the Judgment of the District Court of Prishtine/ Prishtina P nr 573/08, dated 10 February 2009, against Judgment of the Supreme Court of Kosovo, Ap 198/2009, dated 3 March 2010, is unfounded.

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 73/2010, date 2 April 2012

Presiding judge:

Martti Harsia

Martti Harsia

EULEX Judge

Recording clerk:

Adnan Isufi

Adnan Isufi

EULEX Legal Advisor

Members of the panel:

Nesrin Lushta

Nesrin Lushta

Supreme Court Judge

Elka Filcheva-Ermenkova

Elka Filcheva-Ermenkova

EULEX Judge

Avdi Dinaj

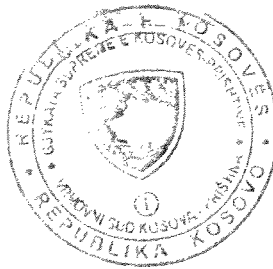
Avdi Dinaj

Supreme Court Judge

Salih Toplica

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).