SUPREME COURT OF KOSOVO

EK
NH
SB

PA II 3/2014

Date: 7 August 2014

THE SUPREME COURT OF KOSOVO, in the panel composed by EULEX Judge Elka Filcheva-Ermenkova as Presiding, EULEX Judge Esma Erterzi and Supreme Court Judge Valdete Daka members of the panel, in the presence of Kerry Moyes EULEX Legal Officer, acting in capacity of a recording clerk, on behalf of Natalie Dawson, EULEX Legal Officer, in the case against the Defendants:

EK and **SB**, in the first instance acquitted, and in the second instance CONVICTED of the criminal offence of:

War Crimes Against the Civilian Population, in co-perpetration, pursuant to Articles 22 and 142 Criminal Code of the Socialist Former Republic of Yugoslavia (hereafter CCSFRY), currently criminalized under Articles 31 and 153 paragraphs 2.1 and 2.14 of the Criminal Code of the Republic of Kosovo (hereafter CCRK) read in conjunction with Article 3 Common to the four Geneva Conventions of 12 August 1949 (hereafter Common Article 3) and Article 13.2 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions (hereafter Additional Protocol II),

AND

NH, in the first instance acquitted, and in the second instance CONVICTED of the criminal offence of:

Providing Assistance to Perpetrators after the Commission of Criminal Offences, pursuant to Article 305 paragraph 2 Criminal Code of Kosovo 2004 (hereafter CCK), currently criminalized under Article 388 paragraphs 1 and 2 CCRK,

Deciding upon the Appeals filed on 17 April 2014 by:

1. Defence Counsel Ethem Rugova on behalf of EK
2. Defence Counsel Vigan Rugova on behalf of SB
3. Defence Counsel Hajrip Krasniqi on behalf of NH

Against the Judgment of the Court of Appeals on 30 January 2014;

Considering the Opinion of the State Prosecutor filed on 21 May 2014,

Having held a public session on 7 August 2014, with all parties duly invited,

In the presence of:

Defendant EK, legally represented by Ethem Rugova
Defendant SB, legally represented by Qazim Xharra
EULEX Prosecutor, Judit Eva Tatrai
Injured Party, WDB, legally represented by Vladimir Mojsilovic

In the absence of:

Defendant NH and his legal representative, Hajrip KRASNIQI

Pursuant to Articles 430(1.2) and (2), 410(3), 411(1) and 415 Provisional Criminal Procedure Code of Kosovo (hereafter KCCP),

Following the deliberation and voting on 14 August 2014, pursuant to Article 420, issues the following:

JUDGMENT

1. **The Appeals filed by EK and SB are PARTIALLY GRANTED.**
2. **The Judgment of the Court of Appeals of 30 January 2014 is PARTIALLY MODIFIED in respect of EK and SB in relation to sentence only.**
3. **EK and SB are SENTENCED to two (2) years imprisonment.**
4. **The Appeal filed by NH is GRANTED.**
5. **The Judgment of the Court of Appeals of 30 January 2014 is PARTIALLY ANNULLED in relation to NH, and in relation to his co-accuseds MH, MH, NB and JK, pursuant to Article 419 KCCP.**
6. **NH, MH, MH, NB and JK are all ACQUITTED of the criminal offence of Providing Assistance to Perpetrators after the Commission of Criminal Offences, pursuant to Article 305 paragraph 2 Criminal Code of Kosovo 2004.**

REASONING

A. PROCEDURAL HISTORY

a. On 30 March 2011 the Special Prosecutor filed the Indictment PPS no. 75/2010 against the Defendants EK and one co-defendant at the District Court of Prizren. These Defendants were charged with the criminal offence of War Crimes Against the Civilian Population on 17 and 18 July 1998. The same Indictment charged the Defendant NH (along with four co-defendants) with the criminal offence of Providing Assistance to Perpetrators after the Commission of Criminal Offences.
b. On 29 April 2011 the Indictment was confirmed with Ruling KA No. 76/2011.
c. On 28 June 2011 the first trial commenced at the District Court of Prizren.

d. On 2 August 2011 the Panel issued Judgment P 134/2011. EK and NH were found guilty. K was sentenced to five (5) years imprisonment and H to six (6) months imprisonment.
e. On 31 May 2012 the Special Prosecutor filed the Indictment PPS no. 75/2010 against the Defendant SB at the District Court of Prizren, charging him with the criminal offence of War Crimes Against the Civilian Population in Opterushë/Opteruša on 17 and 18 July 1998.
f. On 30 May 2012 the Indictment was confirmed with Ruling KA 97/2012.
g. On 4 September 2012 the Supreme Court of Kosovo decided on Appeals filed by the Defence Counsel of K and H. Ruling Ap-Kz 20/2012 annulled the Judgment of the District Court of Prizren no. P 134/2011 (except the part relating to the acquittal of one co-defendant HM), and the case was returned to the first instance court for retrial.
h. On 7 November 2012 the Trial Panel of the District Court of Prizren joined the criminal proceedings against Defendants K and H (with their remaining co-defendants) with the criminal proceedings concerning the Defendant B under case number P 249/2012.
i. On 30 November 2012 the Main Trial commenced.
j. On 1 February 2013 the Trial Panel issued its Judgment which acquitted all Defendants.
k. On 28 May 2013 an Appeal was timely filed by the Special Prosecutor.
l. On 30 January 2014 the Court of Appeals issued its Judgment in case PAKR 271/2013 granting the Appeal of the Special Prosecutor and modifying the Judgment of the Basic Court of Prizren number P 249/2013.
m. The Court of Appeals found the Defendants K and B guilty of the criminal offence of War Crimes Against the Civilian Population on 17 and 18 July 1998, and found the Defendant H, along with four co-accused, guilty of the criminal offence of Providing Assistance to Perpetrators after the Commission of Criminal Offences.
n. The Defendants K and B were each sentenced to a term of imprisonment of five (5) years.
o. The Defendant H was sentenced to a term of imprisonment of six (6) months, suspended for one (1) year.
p. On 17 April 2014 Defence Counsel filed Appeals against the Judgment of the Court of Appeals PAKR 271/2013 on behalf of the Defendants K, B and H.
q. On 21 May 2014 the State Prosecutor filed an Opinion in respect of the Appeals.

B. THE POSITIONS OF THE PARTIES

a. <u>The Defence Counsel:</u>

K

Proposal: The Judgment of the Court of Appeals PAKR no. 271/2013 of 30.1.2014 should be: modified, acquitting the Defendant K or imposing a lesser sentence, or annulled and the case sent for retrial.

i. The Enacting Clause is incomprehensible as to the date and case number of the Judgment which is annulled; items 1 and 2 specify different dates and case numbers.

ii. At paragraph 19 of the Judgment, the Court of Appeals agrees with the determination of the facts established by the Trial Panel, however it reaches a different conclusion to that of the Trial Panel concerning the presence of the Defendant K.

iii. The Witnesses WDB and SB have changed their testimonies previously as to what the perpetrators were wearing and whether they were armed. It is highly unlikely that SB would recognise the Defendant K amongst 2,000 people present.

iv. The Court of Appeals does not state why the unit in which the Defendant K participated was an organised unit with superior orders which is subject to international conventions. It is not established which KLA unit participated and who was in command of it.

v. The Defendant K is found guilty on the basis of co-perpetration. The Court of Appeals found that the participation of the Defendant K is in itself incriminatory which makes him liable. This means that thousands of Serbian forces who participated in attacks and crimes in Kosovo should be brought to justice.

vi. The Court of Appeals contradicts the findings of the Supreme Court of Kosovo in Judgment Ap-Kz nr. 20/2012. The Panels in these two decisions are both at second instance.

vii. Can these people, who were heavily armed, be classed as ‘civilians’? If they were ‘civilians’ they should have been removed from the area. The war crimes provisions should not apply.

viii. The Court of Appeals found that the Defendant K was injured when he attend the hospital on 18 August 1998, however on that date he in fact attended for a medical check-up for a wound he sustained and was hospitalised for prior to this date. The Court of First Instance found he could not have been part of the attack on 18 July 1998 for this reason.

ix. Even if the Defendant K is guilty the sentence is excessive.

BYTYQI

Proposal: The Defendant B should be acquitted, or the Judgment of the Court of Appeals should be annulled and the case returned for retrial.

i. The Enacting Clause is incomprehensible as to the date and case number of the Judgment which is annulled; items 1 and 2 specify different dates and case numbers.

ii. The presence of the accused does not prove he is guilty as it is not proven in what capacity he was present and what incriminating actins he has undertaken.

iii. Was the group which allegedly participated in this attack an organised group under superior order, or were they simply organised villagers?

iv. The matters in issue are: was the Defendant B part of the KLA; was he wearing military uniform; was he carrying a weapon; what actions has he taken; were the persons at the house of the family ‘civilians,’ and who fired shots first? The Defendant B’s position is that the organised villagers fired as a response to an attack against them.

v. The Court of Appeals failed to provide reasons why it believed the testimonies of WDB and SB. These witnesses gave contradictory statement and they changed their testimonies. The factual situation was therefore determined erroneously.

vi. The Court of Appeals contradicts the findings of the Supreme Court of Kosovo in Judgment Ap-Kz nr. 20/2012.

vii. Even if the Defendant B is guilty the sentence is excessive.

HOTI

Proposal: The challenged Judgment should be cancelled and referred back for re-adjudication and retrial.

i. The Enacting Clause is unclear as to the date and case number of the Judgment which is annulled; items 1 and 2 specify different dates and case numbers.

ii. The Judgment against the Defendant H is not final because the proceedings against the co-defendant K are not yet final, and therefore the Indictment against the Defendant H is unlawful. These criminal prosecutions should not take place in parallel.

iii. The challenged Judgment is incomprehensible in relation to the relevant and decisive facts. There are contradictions between the reasoning of the Judgment regarding the statements given and what is said about the decisive facts. The determined factual situation is different to that given in the reasoning.

iv. The prohibited behaviour in Article 305(1) is limited to assistance provided with the purpose of avoiding discovery.

v. The direct interpretation of *'providing assistance to the perpetrator in order to avoid the discovery'* in Article 305(1) is related to hiding or covering the perpetrator's identity, and to assisting the perpetrator, the identity of whom is known, not to be caught.

vi. The use of the word 'discovery' in Article 305(1), as well as other offences within the CCK, is limited to situations where the perpetrator is not found out or caught.

vii. Providing a false statement as a witness during the pre-trial stage after the perpetrator was discovered cannot be covered by Article 305(1). The Defendant K was already in detention on remand when the Defendant H was interrogated. This situation goes beyond the formulation of Article 305(1) and therefore contravenes Article 7 ECHR, Article 33(1) Constitution of the Republic of Kosovo and the principle of *nullum crimen, nulla poena sine lege*.

b. <u>The State Prosecutor:</u>

Proposal: The Appeals are without merit and should be rejected and unfounded. The Judgment of the Court of Appeals should be affirmed.

K and B

i. The error in the Enacting Clause of the Court of Appeals Judgment is nothing more than a typographical error which may be remedied and does not justify annulling the Judgment. It is evident which Judgment was the subject of the Appeal.

ii. Article 426(1) KCCP permits the Court of Appeals to accept the material facts determines by the court of first instance but draw a different conclusion.

iii. The assessment of the evidence of the witnesses WDB and SB made by the Court of Appeals, and the conclusion of the Panel on the facts, is clear.

iv. The Defence that the Defendants were not present was rejected by the Court of Appeals.

v. That the exact roles of the Defendants in the armed group of KLA present are not established is acknowledged by the Court of Appeals. The Panel found that it was unnecessary to find their exact roles proved because they were present, in uniform, carrying weapons, with the armed KLA group which was carrying out an attack to further the common purpose of ridding the village of its Serbian population. The offence of War Crimes is therefore made out.

vi. The Court of Appeals established that the house was occupied by civilians. It is not proved that their possession of rifles was for any other purpose than their self-protection.

vii. The allegation of the Defence that the household started the shooting is unsubstantiated.

viii. The punishment is not severe and is the minimum allowed by the most favourable law, the CCSFRY.

HOTI

ix. The Appeal is simply a reiteration of the Partially Dissenting Opinion of Judge Timo Vuojolahti attached to the Court of Appeals Judgment of 30.2.2014.

x. The Court of Appeals Judgment is free from any of the procedural violations alleged.

xi. The Appeal does not contest the finding that the Defendant H's statement was false.

xii. As to the term, *'discovery of the perpetrator,'* the Prosecutor concurs with the finding of the Court of Appeals. When the Defendant K was on detention on remand he was not yet the perpetrator, only a suspect.

C. FINDINGS OF THE COURT:

<u>C 1 The Competence of the Supreme Court</u>

i. Pursuant to Articles 21 and 22 of the Law on Courts (Law no. 03/L-199) the Supreme Court is the competent court to adjudicate upon this matter.

ii. In accordance with Article 21(6) Law on Courts (Law no. 03/L-199) and Article 3 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03/L-053), the Panel of the Supreme Court is properly constituted.

C 2 The Applicable Procedural Law

iii. The transitional provisions of the current Criminal Procedure Code (hereafter CPC) stipulate that in criminal proceedings which were initiated prior to the CPC entering into force, in respect of which the Trial commenced but was not completed with a final decision, the provisions of the Criminal Procedure Code of Kosovo (hereafter KCCP) apply *mutatis mutandis* until the decision becomes final.

iv. This is confirmed by Legal Opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in a General Session on 23 January 2014.

v. The applicable criminal procedural law is therefore the KCCP.

C 3 The Admissibility of the Appeals

vi. The Appeals were filed on 17 April 2014. Pursuant to Article 398(1) KCCP the Appeals are therefore timely filed, and therefore admissible.

C 4 Procedural Errors

vii. The Panel concurs with the Appellate Prosecutor that the error in the Enacting Clause of the Judgment of the Court of Appeals of 30 January 2014 is a typographical error. The Panel considers that the intention of the Court of Appeals is entirely clear, based on the knowledge of all parties to the proceedings of the progress of this case.

C 5 EKand SB – THE FINDING OF GUILT

C 5.1 Was EK present on the evening of 17 July 1998?

viii. The Supreme Court Panel considered carefully the various statements of the Injured Parties, WDB and SB. This includes records of witness hearings of 26 and 27 October 2010; the Minutes of the Main Trial of 4 December 2012; the Minutes of the Main Trial of 28 and 29 June 2011.

ix. The Panel concludes that these statements are consistent throughout and provide detailed information in relation to both EK and SB. The Panel finds that these statements therefore provide credible and compelling evidence.

x. In relation specifically to the Defendant K, the witness WDB was clear and consistent at all stages of the proceedings that he heard someone, in Albanian, ‘D, don’t get out,’ D being a name everyone in the village referred to her husband by. WDB is equally certain that the person shouting was the Defendant EK, who she refers to as ‘J.’

xi. In the Minutes of the Main Trial on 28 June 2011, WDB accepts she could not have recognized the voice as that of the Defendant K herself, but that her husband could. She stated, ‘How not to recognize him, when they are neighbours?... They used to socialize and drink together in the shop.’ When asked earlier in the hearing by Ethem Rugova on behalf of EK, WDB said she did not know all the villagers, but that her,’ husband socialized with everybody.’

xii. Furthermore it is clear that this recognition of the Defendant K’s voice was immediate. Without prompting, WDB’s husband told her that the voice belonged to the Defendant K. She told the Prosecutor on 27 October 2010, and confirmed to the Prosecutor at the Trial hearing on 28 June 2011 that when she tried to stop her husband going to the door, he said, ‘Don’t worry, J is calling.’ This statement confirms that not only did her husband recognize the voice as that of the Defendant K, he in fact interpreted the fact that it was the Defendant K as a reason not to have fear.

xiii. This account given by WDB was not shaken on cross-examination. She was consistently clear throughout the proceedings that this is her account.

xiv. The Panel finds that WDB had no reason to doubt her husband’s recognition of the voice as that of the Defendant K. The Panel finds that WDB’s husband could not have mistaken the identity of the person speaking given their previous relationship, and in any event stated it was the Defendant K without any prompting from his wife.

xv. The Panel finds beyond reasonable doubt that the Defendant K was present at the property on the evening of 17 July 1998.

C 5.2 Were EK and SB present on the morning of 18 July 1998?

xvi. WDB is also consistent in her evidence that she saw both EK and SB at the property in the morning of 18 July 1998 with her own eyes.

xvii. She stated in the witness hearing on 26 October 2010 that the Defendant B was also there in the yard of her house on the morning of 18 July 1998.

xviii. WDB confirmed this account in her testimony at the Main Trial hearing on 28 June 2011. The witness had some trouble with her recollection of the specifics at that hearing, but confirmed that the account given in her witness hearing was correct.

xix. At the Main Trial on 4 December 2012, WDB was asked to specifically focus on the morning of 18 July 1998 by the Prosecutor. In her testimony she stated that of the people in her yard that morning she recognized SB. She confirmed that she recognized him because she would ‘see him from time to time, we were neighbours… When we would go to our field we would see them… I know him because he came to the house and in his house he had a shop.’ The witness confirmed that she had seen him over a period of time.

xx. The Panel finds that there is no doubt that WDB knew the Defendant B, and correctly identified him amongst those present in her yard on the morning of 18 July 1998.

xxi. The WSB is only able to provide an account concerning individual present in the yard on the morning of 18 July 1998. In her witness hearing on 26 October 2010 she confirmed that ‘J’ was present in the yard, and stated she ‘recognised SB.’ She went on to state that she saw, ‘S… immediately after exiting my house.’

xxii. In her testimony on 29 June 2011 WSB states that she recognized defendant SB. She also confirmed that she saw EK, and gave an account of how she knows him and therefore why she recognized him. When asked if she had any doubts, WSB stated she did not, and that she ‘recognized him by face.’ When asked why she struggled to recognize him from a photograph on 27 October 2010, she explained that she ‘had forgotten. I forgot my husband, let alone anyone else.’ The Panel finds it convincing that a person in such a terrifying situation, and in recalling and reliving such a situation after the event, might have difficulties in recognition. The Panel does not find cause for concern about the credibility of WSB’s recognition of the Defendant K.

xxiii. During the Trial hearing on 4 December 2012, WSB confirmed that she saw EK and SB in the yard on the morning of 18 July 1998. As regards the Defendant B, WSB required some prompting however she explained she had suffered a stroke and had difficulty with her memory. The Panel accepts that this is the case, particularly since, having been prompted, the witness was able to give details about how long she had known the Defendant B. These details demonstrate the witness has known the Defendant B for a significant period of time. This adds weight to her recognition of B. She also confirmed that she saw him as soon as she went out of the house.

xxiv. The Trial Panel on 1 February 2013 and the Court of Appeals on 30 January 2014 found that the statements of EK and SB as to their whereabouts on 17 and 18 July 1998 were not credible. Having considered the totality of the evidence in the case, the Supreme Court concurs with this assessment.

xxv. The Panel finds beyond reasonable doubt that both EK and SB were present in the yard of the house on the morning of 18 July 1998.

C 5.3 Were EK and SB wearing uniforms and armed?

xxvi. In her witness hearing on 26 October 2010, WWDB does not specify whether the Defendant B was wearing a uniform or whether he was armed. This witness gave evidence on 28 June 2011 that the people who entered the yard of her premises on the morning of 18 July 1998 were armed ‘with rifles.’ She also states that one of the people who entered the yard was ‘S.’

xxvii. In her witness hearing on 26 October 2010, WWDB is clear in her recollection that the Defendant K ‘was wearing a black uniform and he was armed with a rifle.’ Earlier in the hearing she stated that the uniform had ‘KLA patches on their caps and shoulders.’

xxviii. On 4 December 2012, WWDB also confirmed that the Defendant B was wearing a uniform, which she described as ‘multi-colour green clothes,’ and confirmed that this was a ‘camouflaged uniform’ when asked by the Prosecutor.

xxix. In response to a question about whether the Defendant B was carrying anything, she replied that ‘they had rifles.’ When asked specifically about whether the Defendant B was armed, she stated she could not remember due to the passage of time since the incident.

xxx. Later in her testimony, WWDB was asked what the Defendant B was doing. The witness replied, ‘I was not watching what they were doing because when they collected us we were not allowed to lift our heads to see, I remember this well.’ During the Trial proceedings on 29 June 2011, WSB stated that ‘out of fear we did not look,’ in explaining why she cannot recall some specific details.

xxxi. The Panel finds it entirely plausible that events took place in this way, and therefore that the witness WWDB would only have had a limited opportunity to view the individuals she recognized in her yard. Given her previous knowledge of these individuals however, she still had sufficient time to identify them and to catch sight of what they were wearing and carrying.

xxxii. The Panel finds it entirely plausible that WWDB may not have been able to recall exactly the details of the events when she testified on 4 December 2012, particularly in light of the fact she had previously given her account on two occasions. The Panel therefore places greater weight on her account in her witness interview on 26 October 2010 and her testimony on 29 June 2011, and finds these consistent accounts to be credible and capable of better reflecting the events of 18 July 1998.

xxxiii. In her witness hearing on 26 October 2010, the witness WSB stated that most of the people in the yard on the morning of 18 July 1998 were wearing ‘camouflage and black uniforms…,’ about which she provided details such as caps, balaclavas, KLA patches and black arm stripes. She stated that, ‘all of them were armed with rifles.’

She specifically stated that 'S was also armed and with a uniform. I saw him immediately after exiting my house.'

xxxiv. WSB confirmed to the court on 29 June 2011 that the people in the yard on the morning of 18 July 1998 were armed and were wearing 'green and black uniforms.' She further stated that all the people in the yard were all dressed in uniform and armed.' When asked to be more specific about the 'kind of uniform' EK was wearing, WSB questioned 'how can one remember after 10 years the kind of uniform?' For the reasons given at paragraph xxii, the Panel finds it understandable that the witness could not give a more specific of the uniform than she previously had.

xxxv. WSB clearly confirmed at the Trial hearing on 4 December 2012 that SB was wearing a green uniform and was carrying a rifle.

xxxvi. The Panel is satisfied beyond a reasonable doubt that the Defendants K and B were wearing uniforms and were armed with rifles on the morning of 18 July 1998.

C 5.4 Was the attack perpetrated by an organized group of Kosovo Liberation Army soldiers?

xxxvii. The descriptions given by both witnesses of the uniforms worn and weapons carried by the individuals present in the yard of the property on the morning of 18 July 1998, including the Defendants K and B, satisfies the Panel beyond a reasonable doubt that the attack was perpetrated by a group of Kosovo Liberation Army (hereafter 'KLA'). The Panel is further satisfied that this group of KLA was an organized unit. The evidence is that a significant group of people, wearing KLA uniforms, carrying arms, were all present in the yard of the property from 17 to 18 July 1998. The Panel concludes that without organization, as part of which at least one member of the group must have taken the lead and given orders, this group would simply not have come together in this way and perpetrated this attack.

xxxviii. The Panel is therefore satisfied beyond a reasonable doubt that the attack was perpetrated by an organised group of KLA soldiers.

C 5.5 Conclusion - Are EK and SB guilty of the criminal offence of War Crimes Against the Civilian Population?

xxxix. On 29 June 2011, in cross examination by Defence Counsel on behalf of the Defendant K, WWDB told the court that on the morning of 18 July 1998, 'the yard was full,' and that the Defendant K, in company with other individuals, was 'going through the yard.'

xl. On 4 December 2012, in cross examination by Defence Counsel on behalf of the Defendant B, WSB told the court that on the morning of 18 July 1998, the Defendant B and others were 'running around in the yard, they were going from one house to another. They were taking elderly women from their houses and they were bringing them to the yard where we were standing.' In cross examination from the same Defence Counsel, WDB told the court that the Defendant B and others were 'running around in the courtyard and they were hitting the door.'

xli. The Supreme Court concurs with the assessment of the Court of Appeals Panel of the elements of War Crimes set out at paragraphs 27 to 31 of it Judgment of 30 January 2014. Following this assessment the Supreme Court is satisfied that the Serbs present in the property on 17 and 18 July 1998 were civilian persons, not taking part in the hostilities, and using their arms for their own protection. The categorization of these individuals as civilians gives them protected status pursuant to Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II, and falls squarely within the definition of War Crimes Against the Civilian Population in Articles 22 and 142 CCSFRY, and Article 31 and 153, paragraphs 2.1 and 2.14, CCRK.

xlii. The Supreme Court examined the thorough and accurate analysis of the law including jurisprudence of the International Tribunal for the Former Yugoslavia (hereafter 'ICTY')[1] on joint criminal enterprise made by the Court of Appeals Panel, which is set out at paragraphs 34 to 41, and adopts this analysis in its entirety. The Panel finds that the Defendants K and B shared the common purpose of the KLA group, that being to rid the village of its Serbian population, and contributed thereto. The Panel considers that ICTY jurisprudence is a legitimate source of precedent for cases prosecuted within the Republic of Kosovo, and any other part of the Former Yugoslavia, and finds that it is entirely appropriate and justified to refer to jurisprudence of the ICTY in dealing with cases of War Crimes at the domestic level. In that respect the Court finds it appropriate to note that the responsibility of a person for war crimes and other internationally recognized crimes is based on the individual criminal responsibility. However the individual criminal responsibility may take the form of both commission of a crime in person, and by participation in a group committing crimes. Joint criminal enterprise[2] is one of the possible ways of participation. The Court is aware that the concept of that kind of responsibility is still questioned by scholars and professionals of the legal world. This Panel however is of the opinion that the joint criminal enterprise is a valid form of responsibility whereas the contrary would mean that in most of the cases prosecution of crimes like war crimes, genocide, crimes against humanity would be impossible.

xliii. **Taking into account the totality of the evidence and circumstances of this incident the Panel is satisfied beyond a reasonable doubt that both EK and SB were present at the property throughout the night of 17 July, into the morning of 18 July 1998, and played an active part in the action perpetrated by the organized KLA group.**

xliv. **The Panel is therefore satisfied that the criminal offence of War Crimes Against the Civilian Population is proved. The Supreme Court concurs with the Court of Appeals and the Trial Panel that EK and SB are found guilty.**

C 5.6 The Findings of the Supreme Court on 4 September 2012

xlv. The Panel notes the comments made in the Appeals before the court about the findings in the previous second instance Judgment of the Supreme Court of 4 September 2012. Since that Judgment was issued another Trial hearing has taken place, and further evidence was heard by the Trial Panel. The case was adjudicated upon following the evidence before the District Court of Prizren on 1 February 2013 when it issued its Judgment. The Court of Appeals decided the Appeals before it on 30 January 2014 in accordance with the same evidence. Both courts were entitled to make their own findings on the evidence, circumstances and arguments put before it during the individual stages of the proceedings. This Panel decides the case at Third Instance having regard to all the evidence which has been presented in the case from beginning to end.

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[1] In particular, *Tadic*, case number IT-94-1-A, judgment of 15 July 1999

C 6 EK and SB – The Sentence

xlvi. The defendants were both sentenced to 5 years imprisonment.

xlvii. It is correct that an offence under Article 142 CCSFRY must be punished by not less than five (5) years imprisonment. Article 42(2) CCSFRY specifically allows the court to reduce the sentence below the specified minimum: '1) when provided by statute that the offender's punishment may be reduced; 2) when it finds that such extenuating circumstances exist which indicate that the aims of punishment can be attained by a lesser punishment.' The wording of the equivalent provision in the CCK, Article 66, confirms this application, its formulation placing 'or' between the paragraphs for clarity. The Panel therefore concludes that paragraph (2) can be applied in isolation.

xlviii. Notwithstanding the fact that the Defendants formed part of a group which, taken together, caused threat and fear to the Injured Parties and their families between 17 and 18 July 1998 several extenuating circumstances should be considered when individualizing the punishment. One of the defendants (i.e. K) called from outside the house to keep the civilians inside in order to prevent the happening of unnecessary harm. The witnesses (injured parties) were not subject to any cruel, inhuman, degrading or threatening attitudes by both K and B. The witnesses were released after a short period of time. WSB stated on 26 October 2010 that while in custody they were given food, and that money taken from them was later returned by KLA soldiers.

xlix. In addition no aggravating circumstances are identified.

l. The dangerousness of the offense and the offenders is much lower compared to similar cases.

li. The Panel is also mindful of the time which has elapsed since this criminal offence was committed.

lii. Therefore, in preponderance of mitigating circumstances, as they are recorded and in order to achieve the objectives of punishment (deterrence and retribution) the court considers that it is most appropriate to determine the punishments pursuant to Art. 42 (2) *supra*, namely the punishment of "imprisonment for a term of 2 years", which is below the minimum prescribed for this kind of crime.

liii. In that regard the Panel disagrees with the assessment made by the Court of Appeals at paragraphs 47 and 48 of its Judgment of 30 January 2014, insofar as it finds there are mitigating circumstances other than the simple passage of time. The Panel does agree with the Court of Appeals that EK and SB should be punished equally for the offence.

liv. As noted above the Panel finds it is proportionate in all the circumstances to reduce the sentence for each Defendant to two (2) years imprisonment.

lv. **EK and SB are therefore each sentenced to two (2) years imprisonment.**

C 7 NH

lvi. The Panel finds that, notwithstanding the fact that the decision on the charges against EK is not yet final, proceedings against NH are not unlawful or precluded.

lvii. The Panel notes that the Appeal filed on behalf of NH does not challenge the finding of the Court of Appeals that he gave a false statement. The Appeal is filed only on the basis that the false statement given did not constitute a criminal offence pursuant to Article 305 CCK.

lviii. The issue for the determination of the Panel is whether the act of providing a false statement perpetrated by the Defendant NH amounts to a criminal offence as defined in Article 305 CCK.

lix. The Panel carefully examined the wording of Article 305, specifically deals with aiding a perpetrator to elude discovery in any way.

lx. The Panel finds that Article 305 relates to physical acts which precludes the discovery of the perpetrator of the crime. It is the finding of the Panel that these acts do not include giving false testimony after the perpetrator's identity is already known and in particular when that perpetrator is already in the custody of the authorities.

lxi. In this regard the Panel concurs with the Dissenting Opinion given by Judge Timo Vuojolahti during the proceedings before the Court of Appeals and appended to the Judgment of 30 January 2014.

lxii. The Panel finds it is unnecessary to repeat the entire content of the Dissenting Opinion in this Judgment. It suffices to say that, following the detailed examination and reasoning of the law, the Panel finds that the wording 'to elude discovery' refers to a time period before the identity of the perpetrator of the criminal offence is identified, or before that perpetrator is physically discovered, in other words found or captured.

lxiii. At the time that the NH and his co-defendants gave their false statements, the perpetrator of the primary offence was identified and in the custody of the authorities. Therefore the false statements cannot be said to have been provided with the aim of aiding the perpetrator to elude discovery. The false statements given cannot therefore constitute a criminal offence under Article 305 CCK.

lxiv. The Panel notes that Article 307 criminalizes providing false statements given during court proceedings. An examination of the English and Albanian language versions of the CCK confirms that, in Article 307, they both specifically state 'court proceedings.' The false statements given by the DH and his co-defendants did not fall within the scope of court proceedings, and therefore they could not be charged with, and convicted of, an offence under Article 307.

lxv. The Supreme Court makes clear that the action taken by the Defendant H and his co-defendants to obstruct and frustrate the proceedings was in no way justified or acceptable. However, neither of the criminal offences in force at the time cover the time period when the Defendant H and his co-defendants gave their false statements.

lxvi. The basic principle in Article 2 CCK and Article 7 of the European Convention on Human Rights and Fundamental Freedoms dictates that the Panel must apply the most favourable interpretation of the law in force at the time of the act in question. Therefore the Panel simply cannot interpret either Article 305 or Article 307 to include these particular false statements given at this particular stage of the investigation. Accordingly, and for this reason only, the Panel cannot find the Defendant H, or his co-defendants, guilty of an offence under Article 305 CCK.

lxvii. **The Panel therefore finds that it must acquit the Appellant NH. In doing so the Supreme Court applies Article 419 KCCP and also acquits the co-defendants MH, MH, NB and JK.**

Presiding judge:

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Elka Filcheva Ermenkova
EULEX Judge

Recording officer:

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Kerry Moyes

Legal Officer:

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Natalie Dawson
Legal Officer*

Members of the panel:

____

Esma Erterzi
EULEX Judge

____

Valdete Daka
Supreme Court Judge

*The EULEX Legal Officer in this case is Natalie Dawson. Natalie Dawson was present at the Session of the Supreme Court and carried out preparatory work and written drafting in the case. Natalie Dawson was unavailable on the day the Panel deliberated and reached its decision. Kerry Moyes acted as Recording Officer on behalf of Natalie Dawson in the deliberation only.

SUPREME COURT OF KOSOVO
PA II 3/2014
7 August 2014