

COURT OF APPEALS
PRISTINA

Case number: PAKR 397/14
Date: 24 March 2015

Basic Court: Pristina, PKR 955/13

Original: **English**

The Court of Appeals, in a Panel composed of EULEX Court of Appeals judge Hajnalka Veronika Karpati, as presiding and reporting judge, EULEX Court of Appeals judge Elka Filcheva-Ermenkova and Kosovo Court of Appeals judge Fillim Skoro as panel members, assisted by Alan Vasak, EULEX legal officer, acting in the capacity of a recording officer,

in the case concerning the defendant:

I.R.;

charged under the Special Prosecution Office of the Republic of Kosovo's (SPRK) indictment PPS 85/2013 filed on 25 September 2013 with:

War Crime against the Civilian Population under Articles 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized in Articles 31 and 152 of the Criminal Code of the Republic of Kosovo (CC), in violation of Common Article 3 to the four Geneva Conventions of 1949, and Articles 4, 5 (1) of Additional Protocol II of 8 June 1977, additional to the 1949 Geneva Conventions, all rules of international law effective at the time of the internal armed conflict in Kosovo and at all material times, the accused, as a member of the Serbian reserve police, in co-perpetration with at least ten other members of various Serbian forces (including reserve police and paramilitaries), violated the bodily integrity and the health of approximately 40 Albanian male civilians (including B.B, H.B. and D.B.) gathered at the bus station in Fushë Kosovë/Kosovo Polje Municipality on 26 March 1999;

adjudicated in first instance by the Basic Court of Pristina with judgment PKR 955/13, dated 12 February 2014, by which the defendant I.R. was found guilty and sentenced to an imprisonment term of 8 (eight) years;

seised of the appeal filed by defence counsel Brkljač Miodrag on 28 April 2014 against judgement PKR 955/13 rendered by the Basic Court of Pristina on 12 February 2014;

having considered the response of the SPRK, filed on 20 May 2014;

having considered the motion of the appellate state prosecutor, filed on 22 Augustus 2014,

after having held a public session of the Court of Appeals on 24 March 2015;

having deliberated and voted on 24 March 2015;

acting pursuant to Articles 389, 390, 394, 398 and 401 of the Criminal Procedure Code of Kosovo (CPC);

renders the following:

JUDGEMENT

I. The appeal of defence counsel Brkljač Miodrag for the defendant I.R. against the judgment of the Basic Court of Pristina PKR 955/13 dated 12 February 2014 is hereby rejected as unfounded.

II. The judgment of the Basic Court of Pristina PKR 955/13 dated 12 February 2014 is hereby *ex officio* modified in its sentencing part. The sentence imposed on the defendant I.R. for the criminal offence of War Crime against Civilian Population, committed in co-perpetration, pursuant to Articles 22, 142 of CC SFRY is modified as follows:

defendant I.R. is sentenced to 6 (six) years of imprisonment. The time spent in detention on remand since 26 July 2013 shall be credited towards the sentence.

III. In the remaining parts the judgment is affirmed.

REASONING

I. PROCEDURAL BACKGROUND

On 14 November 2012 the criminal investigation against the defendant was initiated by the SPRK prosecutor.

On 25 September 2013 the special prosecutor filed the indictment PPS 85/2013 dated 24 September 2013.

The defendant was arrested on 26 July 2013 and has been held in detention on remand since then.

The main trial in the case was held on 15, 16, 22 and 28 January 2014 and 4, 6 and 12 February 2014 with the verdict announced on 12 February 2014. The trial panel, in a separate ruling, also extended detention on remand against the defendant until the judgment becomes final.

The written judgment was served to the defendant on 14 April 2014 and to the Defence counsel on 11 April 2014. The defendant, through his defence counsel, appealed the judgment, filed on 28 April 2014.

On 20 May 2014 the SPRK filed a response to the appeal.

The case was transferred to the Court of Appeals for a decision on the appeal on 1 August 2014.

On 22 August 2014 the appellate state prosecutor filed a motion.

The session of the Court of Appeals Panel was held on 24 March 2015 in the presence of the defendant, his defence counsel and the appellate state prosecutor Judit Eva Tatrai.

The Panel deliberated and voted on 24 March 2015.

II. SUBMISSIONS OF THE PARTIES

A. Appeal of the defence

Defence counsel Brkljač Miodrag filed an appeal on behalf of the defendant on the grounds of

- a. Substantial violation of the provisions of criminal proceedings

- b. Violation of the criminal law
- c. Erroneous and incomplete establishment of the factual situation
- d. Decision on criminal sanctions

and proposes the Appellate Court to annul the judgment and to return the case for retrial.

The defence submits that there is no evidence that the defendant was actually identified with certainty by the prosecution witnesses. The Basic Court erroneously assessed the administered evidence, erroneously established the factual situation and therefore also erroneously applied the substantive law when it found the defendant guilty, rather than acquitting him.

The defence further submits that the Basic Court did not act in accordance with the ruling of the Supreme Court of Kosovo Kz. No. 186/03 (V.) as the Basic Court failed to accurately examine the testimonies of the witnesses. The Basic Court completely ignored the contradictions and inconsistencies in the testimonies, which should have led to the conclusion that the witnesses could not be treated as credible and reliable. Witnesses H.J., S.G., H.B., N.B. and S.J. all have given inconsistent and contradictory statements and therefore their identification of the defendant at the crime scene should not be given credibility. The assertion of the Basic Court that it did indeed consider the inconsistencies and contradictions is untrue and the motivation of the Basic Court why certain witness statements were deemed credible lacks proper and substantial justification.

Concluding, the big and numerous differences in the testimonies of the witnesses who identified the defendant should, at the very least, give rise to a serious doubt whether or not the defendant was present at the crime scene and the judgment should therefore be annulled.

The defence also points out that it is not acceptable that the criminal report was filed after more than 11 years since the criminal offence was committed.

The defence further proposes to terminate the measure of detention on remand with immediate effect so that the defendant is able to defend himself at liberty.

B. Response of the SPRK

The special prosecutor filed a response to the appeal of defence counsel Brljac Miodrag and requests the Court of Appeals to reject the appeal as unfounded and affirm the judgment of the Basic Court.

The special prosecutor submits that it is clear from the written judgment that the Basic Court has considered the factual situation and evidence exhaustively and competently and therefore there

are no grounds for an appeal based on an erroneous or incomplete determination of the factual situation.

The special prosecutor further submits that it is obvious from the written judgment that the Basic Court very carefully considered the issue of identification. All alleged inconsistencies or conflicting pieces of evidence raised by the defence in his appeal have already been carefully weighed, considered and reasoned by the Basic Court. The Basic Court therefore has correctly discharged its duty as per Article 370 of the CPCK.

In relation to reporting the matter earlier, the prosecutor submits that some of the witnesses did indeed report the incident earlier.

C. Motion of the Appellate Prosecution Office

The appellate prosecutor filed a motion to reject the appeal as unfounded, to affirm the judgment of the Basic Court in its entirety and further to reject the motion to terminate the measure of detention on remand as groundless.

The appellate prosecutor endorses the reply of the SPRK Prosecutor.

The appellate prosecutor further submits that the evidence of the witnesses in the present case stands the probe of standards set out in the decision of the Supreme Court of Kosovo Kz. No. 186/03, because the contradictions or inconsistencies in the witness statements do not pertain to the actions attributed to the accused or the time and place of his actions. Furthermore, the contradictions highlighted by the defence counsel do not relate to the recognition of the accused by the witnesses as they all recognized him for he had been their neighbor for a long period of time and not based on his clothing and headwear. Conclusively, the appellate prosecutor submits the appeal is without merit.

III. FINDINGS OF THE PANEL

A. Competence

Pursuant to Article 472 (1) CPC the Panel has reviewed its competence and since no objections were raised by the parties the Panel will suffice with the following. In accordance with the Law on Courts and the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 as amended by the Law no. 04/L-273 and clarified through the Agreement between the Head of EULEX Kosovo and the Kosovo Judicial Council dated 18 June 2014, the Panel concludes that EULEX has jurisdiction over the case and

that the Panel is competent to decide the respective case in the composition of one Kosovo judge and two EULEX judges.

B. Admissibility of the appeal

The appeal is admissible. The defendant was served with the reasoned judgment on 14 April 2014. The appeal on behalf of the defendant was filed within the 15-day deadline pursuant to Article 380 (1) CPC. The appeal was filed by the authorized person and contains all other information pursuant to Article 376 et seq CPC.

C. Credibility and reliability of the witnesses

The defence challenges the credibility and reliability of witnesses H.J., S.G., N.B.1, N.B.2, S.J., B.B. and H.B. and alleges that the defendant was not present at the crime scene and therefore is innocent. The appeal of the defence elaborates on the inconsistencies and contradictions of the witness statements, predominantly regarding the evidence given by the witnesses concerning the outfit of the defendant on which the identification of the defendant at the crime scene is based.

As a general remark concerning witness statements the Panel notes that it is well aware of the difficulties associated with identification and/or recognition evidence and that it must carefully evaluate any such evidence, before accepting it as a basis for sustaining a conviction.¹ With this in mind the Panel has carefully analyzed the statements of the witnesses in this criminal proceeding along with the reasoning of the Basic Court in the impugned judgment. The Panel further has carefully reviewed the arguments presented in the appeal, the reply of the SPRK and the motion of the appellate prosecutor.

The Basic Court in the impugned judgment in detail analyses the evidence administered during the main trial. In the view of the Panel, the Basic Court comes to logical conclusions in its assessment of that evidence. The Panel examined the thorough analysis of the factual findings which is set out at pages 48 to 65 of the impugned judgment (English version pagination), and adopts this analysis in its entirety. The Panel with specific attention reviewed the analysis of the Basic Court with regard to the inconsistencies and contradictions of the evidence given by the witnesses, addressed in the impugned judgment at pages 55 to 57 (English version pagination). The Panel is fully persuaded by the conclusions and reasoning of the Basic Court and finds no contradiction in the stance of the Basic Court. The Panel concurs with this reasoning and furthermore finds it in accordance with the principles set out in the decision of the Supreme Court of Kosovo Kz. No. 186/03 (V.).

¹ *Prosecutor v. Kupreskic et al. (Appeal Judgement)*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 23 October 2001, paragraphs 34-41. *Prosecutor v. Clément Kayishema and Obed Ruzindana (Trial Judgement)*, ICTR-95-1-T, International Criminal Tribunal for Rwanda (ICTR), 21 May 1999, paragraphs 71-72. *Prosecutor v. Haradinaj et al. (Trial Judgment)*, IT-04-84-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2008, paragraph 29.

The Panel does not see a need to repeat the complete detailed analysis of the Basic Court. The Panel will however elaborate on the following.

a. S.G., N.B., S.J. and H.B.

The witnesses S.G., N.B., S.J. and H.B. all identified the defendant as one of the perpetrators committing the criminal offence on 26 March 1999.

In summary:

- S.G. gave evidence that she knew the defendant from when the defendant was a customer at her shop and that she had known the defendant's family for 6 to 7 years. She stated that she recognized the defendant at the crime scene and then asked him if he was 'I', to which the defendant replied he was.²
- N.B. gave evidence that she had known the defendant since childhood and that he was her neighbor. She stated that she recognized the defendant by sight and his voice.³
- S.J. gave evidence that he knew the defendant since they were children and that they lived close to each other. He stated that he knew the defendant very well and that prior to the war he saw him from time to time. He stated that he recognized the defendant by his manner of speaking and his face.⁴
- H.B. gave evidence that the defendant was her neighbor and that her husband's family knew him from before. She stated that she recognized the defendant based upon his body figure and because the perpetrators kept referring to each other by name.⁵

The witnesses all recognized the defendant as one of the perpetrators that was present during the occurrence of the criminal offence. Furthermore, it is clear from their statements that the witnesses all knew the defendant from previous experiences prior to the criminal offence committed on 26 March 1999. The Panel considers that the reliability of the recognition and identification of the defendant by the witnesses is strengthened by the witnesses' knowledge of the defendant prior to the criminal offence.

Bearing in mind the foregoing and given the circumstances - as set out at pages 48 to 57 of the impugned judgment (English version pagination) - of identification of the defendant by the witnesses, the Panel finds that the evidence given by the relevant witnesses concerning the identification of the defendant at the crime scene is credible and reliable. It is in this regard that the Panel concurs with the assessment of the Basic Court that there is enough reliable and credible evidence in the form of witness statements to establish that the defendant was indeed present at the crime scene.

² Record of the main trial of the Basic Court of Pristina (PKR 955/13) of the session held on 22 January 2014, page 9 (English version).

³ Record of the main trial of the Basic Court of Pristina (PKR 955/13, GJPP 413/2012, PPS 85/2013) of the session held on 16 January 2014, page 23 and 25 (English version).

⁴ Record of the main trial of the Basic Court of Pristina (PKR 955/13, GJPP 413/2012, PPS 85/2013) of the session held on 16 January 2014, page 5 and 9 (English version).

⁵ Record of the main trial of the Basic Court of Pristina (PKR 955/13) of the session held on 22 January 2014, page 18 and 23 (English version).

With regard to the inconsistencies and contradictions of the witness statements concerning the outfit of the defendant, the Panel considers the exact outfit of the defendant a matter of less significance and one that may be explained by an inaccuracy of perception or a faulty memory, which does not affect the reliability of the statements as a whole. Particularly considering the group of perpetrators consisted out of numerous persons and one or more persons in the group could (also) have been wearing (a mixture of) the aforementioned clothing and thus influencing the witness' recollection of the exact outfit of the defendant. It is in this regard that the Panel finds the inconsistencies and contradictions of the statements of the witnesses

- S.G., who identified the defendant at the crime scene and described him as wearing police clothes and a mask⁶;
- N.B., who identified the defendant at the crime scene and described him as wearing camouflage trousers and a scarf⁷;
- S.J., who identified the defendant at the crime scene and described him as wearing paramilitary clothing, a helmet with a visor and underneath a black hat⁸; and
- H.B., who identified the defendant at the crime scene and described him as wearing green trousers, a white T-shirt and a scarf⁹,

as acceptable discrepancies. In the Panel's view the aforementioned discrepancies therefore do not detract from the credibility and reliability of the evidence of the witness statements regarding the recognition and identification of the defendant.

b. H.J.

As with regard to the witness H.J., she did not personally identify the defendant at the crime scene, but instead heard her uncle say 'I' was there. Her statement regarding the presence of the defendant at the crime scene is therefore circumstantial evidence, but can be used to corroborate the evidence given by witnesses S.G., N.B., S.J. and H.B. The Panel notes that in her initial statement in March 2012 H.J. did not mention that her uncle told her 'I' was there. The Basic Court however already addressed this issue when examining H.J. during the main trial on 28 January 2014. The presiding judge asked H.J. why she did not mention her uncle's remark during her initial statement in March 2012 when she was asked whether or not she knew any of the perpetrators. In reply to this question H.J. answered: "*He asked me do I know them and I said no, because I don't, I just heard my uncle say or what I told you he said.*"¹⁰ The Basic Court furthermore addressed this issue in the impugned judgment, page 30 of the judgment (English

⁶ Record of the main trial of the Basic Court of Pristina (PKR 955/13) of the session held on 22 January 2014, page 7 (English version).

⁷ Record of the main trial of the Basic Court of Pristina (PKR 955/13, GJPP 413/2012, PPS 85/2013) of the session held on 16 January 2014, page 23 (English version).

⁸ Record of the main trial of the Basic Court of Pristina (PKR 955/13, GJPP 413/2012, PPS 85/2013) of the session held on 16 January 2014, page 11 (English version).

⁹ Record of the main trial of the Basic Court of Pristina (PKR 955/13) of the session held on 22 January 2014, page 19 (English version).

¹⁰ Record of the main trial of the Basic Court of Pristina (PKR 955/13, GJPP 413/2012, PPS 85/2013) of the session held on 28 January 2014, page 12 (English version).

version pagination). Accordingly, the Basic Court specifically assessed this issue and subsequently came to the conclusion it did not detract from the credibility and reliability of the witness statement. The Panel sees no reason to find that in doing so the Basic Court erred and the Panel concurs with the reasoning of the Basic Court.

c. N.B. and B.B.

The evidence given by witnesses N.B. and B.B. was not relied upon when determining the specific issue of the defendant's presence at the crime scene and the Panel shall therefore refrain from elaborating on their statements and will suffice by referring to the findings of the Basic Court as set out at pages 48 and 49 of the impugned judgment (English version pagination), which the Panel affirms.

d. Property dispute

The defence alleges that the motivation of the witnesses for accusing the defendant stems from a property dispute. This is a very serious allegation, but not an accurate one.

The Panel, after having carefully reviewed the arguments presented by the defence, the reasoning of the Basic Court and the case file as a whole is not persuaded by the defendant when he claims that the witnesses fabricated the recognition and identification they testified to. The Basic Court adequately addressed this issue in the impugned judgment, pages 42-43 (English version pagination) and since the defence did not bring forth any new arguments, the Panel affirms the conclusions and reasoning of the Basic Court.

e. Conclusion

In conclusion, the Panel is satisfied that the Basic Court completely and correctly established the factual situation and that the arguments raised in the appeals do not undermine these findings. The appeal of the defence is therefore rejected as unfounded.

D. Time period

The defence raises the issue of the relatively long period of time that has passed since the occurrence of the criminal offence and the filing of the criminal report. However, the defence failed to define any legal consequence or alleged violation regarding this issue. Insofar as the defence alleges a violation of the statutory limitation; such argument is unclear and also unfounded. Pursuant to Article 100 CC SFRY and Article 111 CPC no statutory limitation shall apply to the offense of war crimes. There is accordingly no violation in this regard.

E. Armed conflict

The Panel concurs with the reasoning of the Basic Court that an ongoing armed conflict existed in Kosovo, including Fushë Kosovë/Kosovo Polje, on 26 March 1999 when the criminal offence

was committed. Moreover, the nexus between the conduct of the defendant and the said armed conflict has also been correctly established by the Basic Court. Seeing as the defence did not dispute the existence of the armed conflict, nor the elements of the underlying offence, the Panel will refrain from further elaboration on this issue. The Panel affirms the findings of the Basic Court, as set out at pages 8 to 24 of the impugned judgment (English version pagination).

F. Erroneous application of criminal law

Although not submitted by the defence, the Panel *ex officio* finds that whilst the Basic Court correctly relied on the CC SFRY and UNMIK Regulation 1999/24, UNMIK Regulation 2000/59 is not applicable to this criminal proceeding. The Court of Appeals has previously discussed this issue in other cases as well and the Panel shall therefore iterate its findings from the G. case.¹¹

The applicable law at the time the criminal offence was committed was the CC SFRY. UNMIK Regulation 1999/24 defined the applicable law to be the law in force in Kosovo on 22 March 1999. The regulation also stated in Section 3 that it shall have deemed to enter into force as of 10 June 1999. In Section 1.5. the Regulation 1999/24 abolished the capital punishment.

On 27 October 2000 the Special Representative of Secretary General promulgated UNMIK Regulation 2000/59, which included the following provision as its section 1.6.:

“For each offence punishable by the death penalty under the law in force in Kosovo on 22 March 1989, the penalty will be a term of imprisonment between the minimum as provided for by the law for that offence and a maximum of forty (40) years.”

The same regulation however also included an explicit provision that this new section 1.6 shall only apply to crimes committed after 27 October 2000.

Due to the general principle of non-retroactivity of criminal law and the explicit provision contained in the UNMIK Regulation 2000/59 itself, it is clear that this regulation does not apply to the criminal offence committed on 26 March 1999.

Pursuant to Article 3 of the current Criminal Code the law in effect at the time the criminal offence was committed shall be applied to the perpetrator and in the event of change of applicable law prior to a final decision, the law most favorable for the perpetrator shall apply. The same provision was included in the Criminal Code in force from 6 April 2004 until 31 December 2012 under Article 2 and in the CC SFRY under Article 4.

The Panel notes the general rule of criminal law theory that the courts must take into account all laws that could have been applied to the perpetrator in the time period from the commission of the criminal offence until the rendering of a final decision, even though they may not be in force anymore.

¹¹ Decision of the Court of Appeals (G.), PAKR 55/14, 29 October 2014, p. 21 et seq.

The Panel finds that the law most favorable for the defendant is the CC SFRY as amended by UNMIK Regulation 1999/24 abolishing the death penalty. The subsequent laws are not more favorable as they carry longer punishments for the committed criminal offences.

Pursuant to Article 142 CC SFRY the punishment for the criminal offence of War crime against civilian population was at least five years of imprisonment or the death penalty. As noted, the death penalty was abolished by UNMIK Regulation 1999/24. The general maximum term of imprisonment prescribed by the CC SFRY was 15 years pursuant to Article 38(1) CC SFRY.

The sentence prescribed for the criminal offence under Article 142 CC SFRY is imprisonment from 5 years to 15 years. The Basic Court by deciding that the applicable law for the punishment prescribes imprisonment from 5 years to 40 years therefore committed an error in law, which must be rectified.

With the exception of the above, the Panel finds no errors in the application of criminal law by the Basic Court. The Basic Court correctly established the elements of the criminal offence and found the defendant responsible for the criminal offence of War Crime against Civilian Population pursuant to Articles 22 and 142 CC SFRY.

G. Decision on the criminal sanction

The Panel, as has been discussed above, notes that the prescribed punishment for the criminal offence under Article 142 CC SFRY read in conjunction with UNMIK regulation 1999/24 is imprisonment from 5 to 15 years.

Further, the Panel carefully reviewed the aggravating and mitigating circumstances established by the Basic Court.

In light of the mitigating and aggravating circumstances correctly established by the Basic Court and considering the maximum punishment prescribed for the criminal offence is 15 years (and not 40 years) of imprisonment, the Panel decides that the sentence of 6 (six) years of imprisonment is the appropriate punishment for the defendant for having committed the established criminal offence. The Appellate Panel in accordance with article 41 CC SFRY imposes the punishment within the limits provided by the law and taking into account all the relevant circumstances as well as the purposes of the punishment set out in Article 33 CC SFRY. The time spent in detention on remand since 26 July 2013 shall be accredited towards the defendant's sentence.

H. Closing remarks

The Court of Appeals - for reasons elaborated above - rejects the defence appeal and *ex officio* modifies the impugned judgment regarding the application of criminal law with regard to the

imposed criminal sanction and the length of the sentence imposed. The Panel modifies the impugned judgment so as to impose a sentence of 6 (six) years of imprisonment against the defendant for the committed criminal offence under Articles 22 and 142 CC SFRY. In the remaining parts the impugned judgment is affirmed.

Reasoned written judgment completed on 7 April 2015.

Presiding Judge

Hajnalka Veronika Karpati
EULEX Judge

Panel member

Panel member

Elka Filcheva-Ermenkova
EULEX Judge

Fillim Skoro
Kosovo Judge

Recording Officer

Alan Vasak
EULEX Legal Officer

Court of Appeals
Pristina

PAKR 397/14

24 March 2015