

COURT OF APPEALS

Case number: PAKR NO. 39/2015

Date: 5 April 2016

THE COURT OF APPEALS OF KOSOVO in the Panel composed of EULEX Judge Elka Filcheva-Ermenkova as presiding and reporting Judge, Piotr Bojarczuk EULEX Judge and Kosovo Court of Appeals Judge Fillim Skoro as panel members, with the assistance of Vjollca Kroci-Gerxhaliu, EULEX legal advisor, as the recording officer, in the criminal case against the following defendants:

I.H.1, father's name xxx, mother's name xxx, born on xxx in xxx, residing in street xxx, Kosovo Albanian, married;

SH.H.2, father's name xxx, mother's name xxx, born on xxx in xxx, residing in xxx, Kosovo Albanian, married, xxx;

N.Q., father's name xxx, mother's name xxx, born on xxx in xxx, residing in street xxx in xxx, Kosovo Albanian, married;

S.S., father's name xxx, nickname xxx, mother's name xxx, born on xxx in xxx village, xxx, residing in xxx, Kosovo xxx, xxx;

All charged through the Indictment filed on 13 November 2013 by the Special Prosecution Office of the Republic of Kosovo, as follows:

- 1. I.H.1: War Crimes against the Civilian Population provided for and punished** by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under 152 of the Criminal Code of Kosovo (CCK) in violation of Article 3 Common to the four Geneva Convention of 12 August 1949 and of Articles 4 and 5 of 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 times relevant to the indictment, the defendant in his capacity as KLA soldier, in co-perpetration with N.Q. and another KLA soldier identified as 'xxx':
 - **Violated the bodily integrity and health of witness A**, a Kosovo Albanian female civilian, more precisely, the defendant took part in the crime by using his position of authority to keep the victim as the disposal of the direct perpetrators

of the criminal offence and allowing them to carry out the beatings; in xxx village, Municipality of xxx, on an unspecified date in late 1998 early 1999;

- **Tortured witness B**, a Kosovo Albanian female civilian by repeatedly beating her and forcing her to write a false confession concerning her alleged cooperation with the Serbian authorities, more precisely, the defendant took part in the crime by using his position of authority to keep the victim at the disposal of the direct perpetrators of the criminal offence and allowing them to carry out the criminal acts, in xxx village, Municipality of M., on an unspecified date in late 1998 early 1999;
- **War Crimes against the Civilian Population provided for and punished** by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under 152 of the Criminal Code of Kosovo (CCK) in violation of Article 3 Common to the four Geneva Convention of 12 August 1949 and of Articles 4 and 5 of 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 times relevant to the indictment, the defendant in his capacity as KLA soldier **treated inhumanely witness A and witness B by staging a mock execution** whereby the defendant made the victims kneel on the ground and then fired firearm shots from behind their back, in an unspecified location between the villages of V. and L. on an unspecified date in late 1998 early 1999.

2. **SH.H.2: War Crimes against the Civilian Population provided for and punished** by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under 152 of the Criminal Code of Kosovo (CCK) in violation of Article 3 Common to the four Geneva Convention of 12 August 1949 and of Articles 4 and 5 of 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 times relevant to the indictment, the **defendant raped witness A**, a Kosovo Albanian female civilian detained at the hands of the KLA by having sexual intercourse with her against her will, in V. village, Municipality of M., on an unspecified date in late 1998 early 1999;

3. **N.Q.: War Crimes against the Civilian Population provided for and punished** by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under 152 of the Criminal Code of Kosovo (CCK) in violation of Article 3 Common to the four Geneva Convention of 12 August 1949 and of Articles 4 and 5 of 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 times relevant to the indictment, the defendant in his capacity as KLA soldier, in co-perpetration with **I.H.1** and another KLA soldier identified as ‘**H.**’:

- **Violated the bodily integrity and health of witness A**, a Kosovo Albanian female civilian, by repeatedly beating her with various tools, in V. village, Municipality of M., on an unspecified date in late 1998 early 1999;
 - **Tortured witness B**, a Kosovo Albanian female civilian by repeatedly beating her with various tools and at the same time forcing her to write a false confession concerning her alleged cooperation with the Serbian authorities, in V. village, Municipality of M., on an unspecified date in late 1998 early 1999;
4. **S.S.: War Crimes against the Civilian Population provided for and** punished by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalized under 152 of the Criminal Code of Kosovo (CCK) in violation of Article 3 Common to the four Geneva Convention of 12 August 1949 and of Articles 4 and 5 of 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 times relevant to the indictment, the defendant in his capacity as high – ranking KLA member, in co-perpetration with other so far unidentified KLA members, **violated the bodily integrity and health of witness A and B**, two Kosovo Albaniana female civilians, by repeatedly beating them, in L/L., S. Municipality, on an unspecified date in late 1998 early 1999.

Adjudicated in the first instance by the Basic Court of Mitrovica with Judgment no. P. 9412013, rendered on 29 May 2014, as follows:

1. **The accused I.H.1** is **ACQUITTED** of three counts of committing the criminal offence of War Crimes against the Civilian Population, provided for and punished by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of Article 3 Common to the four Geneva Conventions of 12 August 1949, and of Articles 4 and 5 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions,.
2. **The Accused SH.H.2** is **ACQUITTED** under one count of committing the criminal offence of War Crimes against the Civilian Population provided for and punished by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under 152 of the Criminal Code of

the Republic of Kosovo (CCRK), in violation of Article 3 Common to the four Geneva Conventions of 12 August 1949, and of Articles 4 and 5 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions,.

3. **The Accused N.Q.** is ACQUITTED under two counts of committing the criminal offence of War Crimes against the Civilian Population provided for and punished by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of Article 3 Common to the four Geneva Conventions of 12 August 1949, and of Articles 4 and 5 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions.

4. **The Accused S.S.** is ACQUITTED under one count of committing the criminal offence of War Crimes against the Civilian Population provided for and punished by Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY), currently criminalized under 152 of the Criminal Code of the Republic of Kosovo (CCRK), in violation of Article 3 Common to the four Geneva Conventions of 12 August 1949, and of Articles 4 and 5 of Protocol II of 8 June 1977, Additional to the 1949 Geneva Conventions.

Same day of the Judgment, the Basic Court of Mitrovica issued a Ruling on termination of the detention on remand for **I.H.1**, **N.Q.** and **SH.H.2** in relation to this case only.

Deciding on the Special Prosecutor's appeal filed on 27 August 2014 against the Judgment of Acquittal of the Basic Court of Mitrovica;

Having reviewed the following responses of the defense counsel to the appeal of SPRK:

- a) The defense counsel Gani Rexha on behalf of the defendant **SH.H.2**, on 11 September 2014;
- b) The defense counsel Mahmut Halimi on behalf of the defendant **I.H.1**, and
- c) The defense counsel Bajram Tmava on behalf of the defendant **N.Q.**.

having reviewed the motion of the appellate state prosecutor filed pursuant to Article 412 CPC on 10 April 2015;

acting pursuant to Articles 389, 390, 394, 398, 471 of the Criminal Procedure Code - Law no. 04/L-123 (CPC):

Held a public session of the appellate panel on 5 April 2016 and

Deliberated and voted on 5 April 2016;

renders the following

JUDGMENT

- **The Appeal of the SPRK filed on 27 August 2014 against the Judgment P. no. 941/13 of the Basic Court of Mitrovica rendered on 29 May 2014, is partially Granted;**
- **The Judgment P. no. 941/13 of the Basic Court of Mitrovica rendered on 29 May 2014, in relation to the defendant I.H.1. for the criminal offence of War Crimes against the Civilian Population, namely the violation of the bodily integrity and health of witness A and torture of witness B, is hereby confirmed;**
- **The Judgment P. no. 941/13 of the Basic Court of Mitrovica rendered on 29 May 2014, in relation to the defendant N.Q. for the criminal offence of War Crimes against the Civilian Population, namely the violation of the bodily integrity and health of witness A and torture of witness B, is hereby confirmed in its entirety;**
- **The Judgment P. no. 941/13 of the Basic Court of Mitrovica rendered on 29 May 2014 in the part related to the involvement of the defendant I.H.1. in mock execution, is annulled and case is sent back for retrial to the first instance court.**
- **The Judgment P. no. 941/13 of the Basic Court of Mitrovica rendered on 29 May 2014 in the part related to the defendants S.S. and SH.H.2. is annulled and case is sent back for retrial to the first instance court.**

REASONING

1. Relevant Procedural Background

Indictment PP 07/13 dated 13 November 2013 was filed by SPRK on the same date and charged the above-named defendants with the criminal violations as above-described. An Initial hearing was held on 13 December 2014.

From the commencement of the investigation until the conclusion of the Main Trial, numerous detention orders were issued and other Decisions, Orders and Rulings made by the Court.

Defendants **I.H.1** and **N.Q.** have been held in detention on remand since 25 September 2013. Defendant **S.S.** has been held in detention on remand since 31 May 2013 in a different criminal proceeding (criminal case P 938/13 before BC M. Defendant **SH.H.2** has been held in detention on remand since 20 June 2013¹.

The Main Trial hearings open to the public were held on 14 April 2014 and on 07, 08 May and partly on 19 May 2014, and in closed session on 22, 23, 24, 25 April 2014, and on 6 May 2014 and partly on 19 May 2014.

From the commencement of the investigation until the conclusion of the Main Trial, numerous detention orders were issued and other Decisions, Orders and Rulings made by the Court.

On 29 Maj 2014, the Basic Court of xxx rendered its Judgment of Acquittal in the case P. no. 941/13.

Same day of the Judgment, the Basic Court of Mitrovica issued a Ruling on termination of the detention on remand for **I.H.1**, **N.Q.** and **SH.H.2** in relation to this case only.

2. THE IMPUGNED JUDGMENT

On 29 Maj 2014, the Basic Court of Mitrovica rendered its Judgment in the case P. no. 941/13, pronouncing all defendants not guilty for the criminal offences as charged by the Indictment.

3. SUBMISSIONS OF THE PARTIES

The Appeal of the SPRK

¹ Court of Appeals Ruling PN 109/14, 6 March 2014

Against the Judgment of the Basic Court of Mitrovica the SPRK filed an appeal on 27 August 2014. The appeal of the prosecutor is timely filed in accordance with Article 380 (1) of CPC.

The SPRK in her appeal challenges the Judgment of the Basic Court of Mitrovica on the grounds of:

- a) Substantial violations of CPC, namely violation of Article 383 (1) 1.1) in conjunction with Article 384 of CPC, and
- b) Erroneous and incomplete determination of factual situation, namely the violation of Article 383 (1) 1.3) in conjunction with Article 386 CPC.
- c) Additionally to this, pursuant to Article 408 (3) of CPC, the SPRK appeals also the Court's Ruling on 22 April 2014 in relation to the in-court identification.

a) **The Substantial violations of CPC**

In relation to the Substantial violations of CPC, namely violation of Article 383 (1) 1.1), the SPRK submits that the Judgment is not drawn up in accordance with the Article 370 of CPC. The court has failed to act according to this provision since it had not stated clearly and exhaustively which fact was found proven or not proven in relation to the mock execution. The court didn't provide sufficient grounds to explain the certainty of love relationship between **H.2.** and witness A.

The SPRK further submits in his appeal that the findings regarding the rape are stated without any transparent and thorough reasoning. He further states in his appeal that the court didn't establish the fact that **H.1.** was a regular soldier considering that there is a statement of the witness H. I. who stated that he knew that **H.1.** was a commander at V. prior to the winter of 1998. Therefore the SPRK moves the Court of Appeals to reverse the Judgment by annulling it and return the case to the Basic Court for the re-trial and decision.

b) **Erroneous and incomplete determination of factual situation**

In relation to the Erroneous and incomplete determination of factual situation, the SPRK in his appeal states that the court has incorrectly determined the evidence which led to the wrong acquittal of the four defendants. He appeals the identification evidence of the following defendants:

- The defendant **H.1.** by saying that the first instance court failed to analyze the majority of evidence relevant to the identification for the defendant **H.1.** ;
- The identification evidence in relation to **S.S.** and **L.** by saying that the court did not consider cumulatively the three facets of the identification of **S.**, namely the

ones related to **L.**, the second is the use of the names ‘**S.**’ and ‘**S.S.**’ and the third is the recognition of **S.** from the media. In addition to this, the court should have allowed in- court identification procedures to confirm the identification from the mass media.

In relation to the Armed Conflict, the SPRK submits that the judgment incorrectly assessed the evidence in relation to the defendant **H.2.** when states that ‘*H.2. acted for personal reasons and because of his prior love relationship with witness A. This utterly fails to have any military component*’. In relation to this, the SPRK states that there is no legal requirement in Kosovo or internationally to have the military component, instead, the existence of an armed conflict is required at the time of incident and that if it was not for the armed conflict, the incident would not have occurred. He further submits that it is settled by the international law that any civilian, including the defendant **H.2** can commit a war crime considering that the rape of the witness **A.** occurred whilst she was detained in KLA base for allegedly being a Serb collaborator and that if she would not have been held captive, the rape would not have occurred.

The SPRK further submits that the court is not bound by the Prosecutor’s legal qualification of the criminal acts. Therefore, if despite the evidence, the Court’s assessment would be that there was insufficient evidence to prove that **SH.H.2** committed the rape as a war crime, the Court should have convicted him of violation of bodily integrity as a war crime. Therefore, the SPRK asks the Court of Appeals to convict **H.2** of the **war crime of violation of bodily integrity** if it finds that there is insufficient evidence of the criminal offence of Rape.

c) In-court identification

The SPK in his appeal alleges that the court did not permit the Prosecution to carry out any in-court identification, especially the identification of **S.S.**. By doing this, the Court has substantially violated the Article 384 (2) 2.1) and violated the Article 7 of CPC.

The SPRK requests the Court of Appeals to accept the Prosecutors appeals, modify the Judgment of the Basic Court by convicting all defendants of all charges or, annul the Judgment and return the case to the Basic Court for re-trial and decision and overturning the Ruling of the Basic Court permitting the Prosecutor to conduct the in-court identification.

4. The responses of the defense counsel to the appeal of SPRK

On the appeals of the SPRK, the following defense counsel filed the response:

- The defense counsel Gani Rexha on behalf of the defendant **SH.H.2**, on 11 September 2014;
- The defense counsel Mahmut Halimi on behalf of the defendant **I.H.1**, and
- The defense counsel Bajram Tmava on behalf of the defendant **N.Q.**.

The defense counsel Gani Rexha on behalf of the defendant **SH.H.2**, in his response states that the Judgment of the first instance is fair and based on the facts and evidence that were carefully evaluated. He proposes to the Court of Appeals to reject the Prosecutor's appeal as ungrounded and affirm the Judgment of the first instance court.

The defense counsel Mahmut Halimi on behalf of the defendant **I.H.1** in his response states that the allegations given by the Prosecutor in his appeal in relation to the defendant **I.H.1**. are incorrect. The court has correctly explained the lack of credibility of the witness in relation to the identification of the defendants. So, based on the testimonies of the witness A and B, the first instance court could not achieve the threshold beyond any doubt that such an identification can be accurate and reliable. He further submits that the allegations of the Prosecutor in his appeal are ungrounded. The court of the first instance has carefully assessed the testimonies of the witness' and found the contradictions that resulted in an inability to believe beyond reasonable doubt these testimonies. In relation to the military position of the **defendant I.H.1**, defense counsel states that it can be seen from the application for recognition of the status of KLA veteran that **I.H.1**. was only a soldier within the Operational Zone of Shala. The defense counsel in his response proposes to the Court of Appeal to reject the appeal of the SPRK as ungrounded and affirm the appealed Judgment in its entirety.

The defense counsel Bajram Tmava on behalf of the defendant **N.Q.** in his response refers to his final speech presented in the trial. He states that the testimonies of witness A, B and C are primary evidence in which the appealed Judgment is based. The testimonies of these witnesses were correctly assessed by the court of the first instance. The testimonies of other witnesses should be treated as circumstantial evidence and that these testimonies have nothing to do with his client **N.Q.**. He further states that there are inconsistencies in the statement of the witness A and B and that this evidence is not supported by other evidence found in the case file. The defense counsel finds the Judgment of the first instance court as correct and therefore proposes to the Court of Appeal to reject the appeal of the SPRK as ungrounded and affirm the appealed Judgment in its entirety.

5. The Motion of the Appellate Prosecutor

On 10 April 2015, the Appellate Prosecutor filed the motion PPA/I-KTZ no. 45/15. In her motion, she states that the first instance court failed to provide the concise and logical

assessment of the identification and recognition evidence. She submits that the first instance court should have followed the approach of the International Criminal Tribunal in relation to the principles on evaluation of the identification and recognition evidence before reaching its conclusion on the acquittal. She proposes to the Court of Appeals to grant the appeals of the SPRK modify the impugned Judgment and find all defendants guilty of the criminal offences they are charged with.

6. Court Competency and the Composition of the Panel

The Panel of the Court of Appeals is constituted in accordance with Article 19 (1) of the Law on Courts and Article 3 of the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo - Law no 03/L-053 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 amending Law no. 04/L-273 (also known to the public as the EULEX Omnibus Law) in Article 1.A defines what cases constitute ongoing cases which fall within the jurisdiction of EULEX judges. The present case clearly constitutes an on-going case pursuant to Article 1A (1) of the said law. The investigation in the case was initiated in 2013, the first instance judgment issued in May 2014 and the case has been pending before the Court of Appeals since 2 February 2015.

Having affirmed the jurisdiction over the case, the next issue that arises is the panel composition of an ongoing EULEX case.

Pursuant to Article 3.3 of the Law no. 04/L-273 the panels on cases under jurisdiction of EULEX should be composed of majority of Kosovo judges unless the Kosovo Judicial Council (KJC) decides that the panel should be composed with the majority of EULEX Judges.

This provision and the requirement for a decision from the KJC gave rise to Section 2 of the Agreement between EULEX and the Kosovo Judicial Council of 18 June 2014. The KJC through this Agreement decided that in all ongoing cases the trial panels will consist of majority of EULEX judges and “will continue with a majority of EULEX judges on the panel for the continuation of all phases of the trial and the remainder of the proceedings.” The term “remainder of the proceedings” must be read as a clear reference to the proceedings with legal remedies. The provision therefore extends also to the appellate proceedings in such ongoing cases.

Pursuant to the above legal basis, the Appellate Panel in the case at hand is therefore correctly composed of two EULEX judges and one Kosovo CoA Judge.

In the appellate session held on 05 April 2016, the defense counsel Mahmut Halimi objected the composition of the panel alluding that the panel before the Court of Appeals in this case should be composed by two Kosovo Court of Appeals Judges and one EULEX Judge.

After the remarks of the defence counsel Mahmut Halimi, the Panel withdrew for short deliberation. The panel by majority vote concluded that the Panel is competent to make the decision on the appeal pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

Pursuant to the above legal basis, the Appellate Panel in the case at hand is therefore correctly composed of two Eulex judges and one Kosovo CoA Judge.

7. Merits of the Case

a) The acquittal of the defendant I.H.1. and N.Q.

In the case at hand, the panel of the CoA will first discuss the acquittal of the defendants **I.H.1.** and **N.Q.**.

Both of the defendants were charged for the criminal offence of War Crimes against the Civilian Population under multiple counts. After the public sessions, the defendants were acquitted of all charges by the first instance Court. The prosecution appealed alleging the essential violations of criminal proceeding, erroneous and incomplete determination of factual situation.

In relation to the defendant **I.H.1** and **N.Q.**, the first instance court finds both of them not guilty because it was not proven beyond reasonable doubt that the defendant **I.H.1** and the defendant **N.Q.**, in their capacity as KLA soldiers, in co-perpetration with each other and another KLA soldier so far identified as “H.”, **violated the bodily integrity and health of Witness A**, a Kosovo Albanian female civilian, and **tortured Witness B**, a Kosovo Albanian female civilian, by repeatedly beating her and forcing her to write a false confession concerning her alleged cooperation with the Serbian authorities. It was not proven beyond reasonable doubt that the defendant **I.H.1** took part in the crime by using his position of authority to keep the victims at the disposal of the direct perpetrators of the criminal offence and allowing them to carry out the criminal acts, in **V.** village (M. municipality), on an unspecified date in late 1998/early 1999.

The main allegation made by the Prosecutor in his appeal is that the first instance court did not give sufficient weight to the evidence of witness A, B and C.

The Panel of the CoA finds the impugned Judgment in relation to the defendants **I.H.1** and **N.Q.** sufficiently reasoned. The identification of these two defendants was not conclusively established, therefore their participation in the crimes at hand was not proven. Neither witness A, nor witness B could positively testify about the participation of these two defendants in the events, described in the indictment. At the same time no other evidence could conclusively relate these 2 defendants to the crimes at hand.

For the reasons set forth, the Panel of the CoA rejects the Prosecution's allegation in relation to the defendants **I.H.1** and **N.Q.** and affirms the impugned judgment of the Basic Court of M. as provided in the enacting clause of this Judgment.

8. The Alleged Substantial violations of CPC

The Prosecutor in his appeal submits that the judgment was not drawn up in accordance with Article 370 of CPC thus substantially violated Article 384 (1) 1.12)of CPC.

The first instance court has failed to act according to this provision since it had not stated clearly and exhaustively which fact was found proven or not proven in relation to the **mock execution**. The court didn't provide sufficient grounds to explain the certainty of the love relationship between **H.2.** and witness A.

The SPRK further submits in his appeal that the findings regarding the rape are stated without any transparent and thorough reasoning.

9. Findings of the Panel in relation to the mock execution and defendant I.H.

In the impugned Judgment the Court states that it was not proven beyond reasonable doubt that the defendant in his capacity as KLA soldier **treated inhumanely Witness A and Witness B by staging a mock execution** whereby the defendant made the victims kneel on the ground and then fired firearm shots from behind their backs, in an unspecified location between the villages of V. and L./L., on an unspecified date in late 1998/early 1999. As a preliminary remark this Panel notes that CoA applies in general the principle that it is required to give some substantial degree of deference to the findings of fact of the trial panel as it has heard the evidence and is in the best position to assess its weight and value. In the case at hand however the Judgment lacks any statements of facts related to the mock execution. From the arguments one cannot see whether the Court found whether the mock execution occurred at all and if yes whether the defendant **I.H.1.** was identified to be part of the alleged event. Thus the court did not

fully adjudicate the substance of the charge, which is a violation of article 384 (1) 1.7) 1.12) in relation to article 370 and article 7 of CPC.

10. Alleged erroneous or incomplete determination of the factual situation

The SPRK in his appeal submits that the court has incorrectly determined the identification evidence of the defendant S.S. in relation to the charge as provided by the Indictment of SPRK, and the involvement of the defendant **SH.H.2.** in the event of rape. The SPRK in his appeal also claims that the court did not permit the Prosecution to carry out any in-court identification, especially the identification of **S.S.** By doing this, the Court has substantially violated the Article 384 (2) 2.1) and violated the Article 7 of CPC.

11. Identification of defendants S.S. and Involvement of the defendant SH.H. in the event of rape

The defendant S.S. was charged and acquitted for violation of bodily integrity and health of witness A and B, two Kosovo Albanian female civilians, by repeatedly beating them. The event allegedly took place in L., S. Municipality, on an unspecified date in late 1998, early 1999, where the defendant was a high ranking member of KLA.

The Accused SH.H.2. was found not guilty because it was not proven beyond reasonable doubt that the Defendant raped Witness A, a Kosovo Albanian female civilian detained at the hands of the KLA, by having sexual intercourse with her against her will, in V. village (M. municipality), on an unspecified date in late 1998/early 1999'. He was also acquitted for the accusation of torturing witness B, by repeatedly beating her with various tools.

The alleged implication of the defendant S.S. comes forward from the testimonies of the witness A² and B³ as direct witnesses and victims in this case. It can be read that both witnesses are certain concerning the identity of the defendant S.S.. However, the first instance court stated that there is no direct evidence of the location where the events took place as well as there was no credible evidence that the witnesses ever travelled to Likovc or that the witnesses had a direct contact with defendant S.

² Testimony of the witness A during the session dated 22 April 2014;

³ Testimony of the witness B during the session dated 24 April 2014;

In this regard this Panel finds the argumentation of the Basic court incomprehensible.

There is no analysis in the judgement that would enlighten an unbiased reader as to why the testimonies of these two witnesses were not credited at all towards the identification of Mr S. In addition to that there is no reasonable explanation as to why the in-court identification of Mr S. was not allowed. There is no prohibition against in-court identification in the Criminal procedure code and there is no formal reason to refuse it. It is a completely different issue whether the result of this identification will or will not be credited, it will be valued as any other evidence, separately and in the totality of all evidences.

This Panel completely relates to all doubts expressed both by the first instance court and the defense towards the probative value of such identification, but this can only be estimated when the identification is performed and only after that the results of it are assessed individually and in the totality of all evidence administered.

The Panel as well finds it peculiar that so much weight is given to the argument that the direct witnesses are very often mistaken in their testimonies over the past events, that they have witnessed.

The Panel agrees with the general validity of the argument that a human being, voluntarily or involuntarily, is often mistaken when describing events he/she has witnessed and more so when the events were stressful, dramatic and/or harmful. It is known that witness testimonies are often inaccurate and uncertain, because they are based on subjective perceptions which undergo various changes caused by error, self-deception, suggestion or desire to lie. In addition this Panel agrees that witness identification should always be approached with great caution especially in cases when the witness had for example a very brief look on the perpetrator, because such a witness if honest could be very convincing. However none of this is relevant to the case at hand, because the witnesses did not just have a quick glance on the defendant S. but had the opportunity to see him very well for much more than just a moment.

Most importantly prejudging that a testimony is by default unreliable, would mean that hardly ever and hardly any witness statement would be considered as carrying evidentiary value in criminal proceedings. This Panel disagrees with such possibility and points out that witness statements may have the same evidentiary value (with the limitations, provided for in the law, *e.g.* art 262 CPC) as any other evidence in criminal proceedings and their weight towards acquittal or conviction should always be analyzed as careful as any other evidence. Let alone that in certain cases crime is witnessed only by the victim

and the perpetrator and then the only available evidence is the testimony of this particular victim.

By refusing to even to conduct the in-court identification the Basic Court has violated art. 7 (1) of the CPC which imposes on the Court the obligation to establish the facts which are important for rendering a lawful decision.

Respecting the principle of presumption of innocence and without prejudicing the outcome of the decision, the Panel opines that in the case at hand, the in-court identification of the defendant S. should be conducted.

Further on it is incomprehensible why so much weight was given to the unclarity regarding the place where the witnesses allegedly saw Mr. S. (i.e. L.) but no importance was granted as to what exactly they witnessed in relation to that defendant – where was he sitting, what was he drinking, what was he saying, what did he do, etc. This makes the position of the Basic court unclear and difficult to understand, thus in violation of art. 370 (7) which, as mentioned above, requires the court to give the grounds for accepting certain facts as proven or not.

Relating to the case at hand for the CoA remains incomprehensible for example why the statements of witness A related to the kidnapping were credited but related to the events in V. and then allegedly in L. were considered unreliable. There is no analysis that would explain why about one set of events (the kidnapping) A was fully trustworthy and on the contrary, completely unreliable for other set of events (those in V. and L.). The existence of an intimate relationship between **H.2.** and witness A prior to the war does not justify such an approach.

There is no mentioning of the fact that witnesses A and B did not insist on identifying the defendant **H.1.** for example (p. 32 and p. 41 of the minutes of the session of 22 April 2014 and page 11 of the minutes of 25 April) which led to his acquittal and how this may or may not reflect their credibility.

Another statement of fact (point 10 on page 11 of the Judgement – English version), namely that it was not clear whether the sexual intercourses in V. between the defendant **H.2.** and witness A happened without her consent makes it very difficult to understand what exactly is the stance of the Basic Court regarding the events there (violation of art. 370 (7), regarding statements of facts and grounds for it).

On one hand the Court positively accepts that A was kidnapped by **H.2.;** then obviously positively accepts that there were intercourses while she was in captivity and then contrary to any common sense assumes that these intercourses may have happened with

the consent of witness A, just because these two, witness A and the defendant **H.2.** had had intimate relationship prior to the events at hand. It is absurd even to assume that someone in captivity, subject to the will of the captor would be able to validly express consent. The history of crime knows cases of victims “voluntarily” bonding to their captors and developing feelings for them, so called Stockholm syndrome. However, there is no reason to believe this was the case, regardless of any previous intimate rapports between **H.2.** and A, but even if it was the case, a traumatic bonding of that kind would be a psychological condition and any consent expressed by a victim in such circumstances would hardly be considered legally valid.

In addition to that the events took place during the times of war, i.e. in a coercive environment and consent under such circumstances would be void by default. Reference is made to the definition of rape, given by the ICTR in the case of Prosecutor v. Jean-Paul Akayesu.

Adding to the confusion related as to what the Court actually accepted to have happened in V. it should be noted that in a different place of the judgement it is said that the Court cannot find any objective evidence that the rape (verbatim: “that criminal act”) ever took place (page 14 of the English version, last sentence before “Abduction in the cafe”). This makes it even more difficult to understand as to what did the Court accepted as a fact: did the Court accept that there were intercourses or not at all?

Finally it is irrelevant whether the defendant **H.2.** had any association with the military.

Respecting the principle of *presumption of innocence* and without prejudicing the outcome of the decision, the Panel opines that in the case at hand, the defendant **SH.H.2.** could have committed a war crime, since the military capacity of the perpetrator is not required.

In order to determine whether the actions of the defendant constitute a war crime, the following elements must be addressed, accordingly:

- Was there an on-going armed conflict in Kosovo, in V. village, Municipality of Mitrovica, on an unspecified date in late 1998 early 1999;
- And if yes, what was the applicable set of norms governing the, then ongoing armed conflict (was the armed conflict of an international or non-international nature);
- Was witness A protected persons under international law;
- Was there a *causal* link between the armed conflict and the criminal offence;

The evidence and the circumstances of the case at hand fulfill all abovementioned requirements.

12. Final Remarks

From the reasons mentioned above, the impugned judgment, in the parts as specified above, contains substantial violations of provisions of CPC and incomplete determination of factual situation. Due to the failure of the first instance court to establish the material fact, the Panel of the CoA returns the case to the competent court, namely to the Basic Court of Mitrovica, for re-trial.

In the retrial, the first instance court will have to comply with the aforementioned remarks and proceed in accordance with Article 406 of CPC in relation to the alleged participation of the defendant **I.H.1** in the mock execution of the witness A and B; to allow the conduct of in-court identification of the defendant **S.S.** in relation to the events in L. during the time period as specified in the Indictment and, involvement of the defendant **SH.H.2** in the event of rape as specified in the Indictment.

In relation to the defendants **I.H.1** and **N.Q.** the Judgment P. no. 941/13 of the Basic Court of Mitrovica rendered on 29 May 2014 is confirmed.

For the reasons stated above, pursuant to Article 389 of the CPC, the Court of Appeals decided as in the enacting clause.

The costs of the criminal proceedings for all defendants shall be paid from budgetary resources.

Presiding Judge

Elka Filcheva-Ermenkova, EULEX Judge

Panel Members

Fillim Skoro, Kosovo CoA Judge

Piotr Bojarczuk, EULEX Judge

Recording Officer

Vjollca Kroçi - Gërxhaliu, EULEX Legal Advisor

COURT OF APPEALS

PAKR 39/2015

5 April 2016