Supreme Court of Kosovo
PKL.-Kzz. No. 23/2009
11 December 2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo in a panel composed of EULEX Judge Norbert Koster as Presiding Judge, with EULEX Judges Guy van Craen and Gerrit-Marc Sprenger and Supreme Court Judges Fejzullah Hasani and Miftar Jasiqi as members of the panel, assisted by Murlan Prizreni as recording clerk,

in the criminal case against the defendant V[redacted] M[redacted],
[redacted]
K[redacted]

held in pre-trial detention from 8 November 2003 until 24 November 2003 and since 12 June 2006,

charged with two (2) criminal acts of murder contrary to Article 30 Paragraphs 1, 2 and 3 of the Criminal Law of the Autonomous Province of Kosovo (CLK), equivalent to Aggravated Murder contrary to Article 147 Paragraph 11 of the Provisional Criminal Code of Kosovo (PCCK, now Criminal Code of Kosovo, CCK),

deciding upon the request for protection of legality, dated 11 November 2008 and filed by Defence Counsel F[redacted] B[redacted] on behalf of the defendant on 13 November 2008, against the Judgment No. 389/2004, rendered by the District Court of Peja/Peć on 12 June 2006, and the Judgment No. 583/2206, rendered by the Supreme Court of Kosovo on 5 August 2008,

in a session, held on 11 December 2009, after a deliberation and voting renders this

JUDGMENT

The request for protection of legality is granted. The Judgment of the District Court of Peja/Peć, dated 12 June 2006, and the Judgment of the Supreme Court of Kosovo, dated 5 August 2008, are annulled. The case is returned to the court of first instance for retrial.

Reasoning:

I. Procedural History

On 8 November 2003, on or about 17.00 hrs in Dushnjë village, the victims S[redacted] Z[redacted] and S[redacted] Z[redacted] were shot dead. The defendant, at the time of the incident a KPS officer off duty, was arrested on the same day. He immediately claimed that he had been attacked by the victims and shot due to fear for his life.

With indictment, dated 22 October 2004, the District Public Prosecutor in Peja/Peć charged the defendant with Murder of the Moment (provoked homicide) in violation of Article 33 of the CLK and alternatively with Murder committed in a State of Mental Distress in violation of Article 148 of the Provisional Criminal Code of Kosovo (PCCK). The indictment was confirmed by the District Court of Peja/Peć with Ruling, dated 22 November 2004.

The main trial before a panel composed in accordance with UNMIK-Regulation 2000/64 (as amended) of two (2) international Judges and (1) local Judge was held between 12 April 2006 and 12 June 2006. During the course of the main trial the Prosecution on 11 May 2006 filed an amended indictment, charging the defendant with several Murders contrary to Article 30 Paragraphs 1, 2 and 3 of the CLK. The panel on 12 June 2006 found the defendant guilty of two (2) criminal offences of Murder (intentionally taking the life of victims S[redacted] Z[redacted] and S[redacted] Z[redacted] contrary to Article 30 Paragraph 1, 2 and 3 of the CLK, and imposed single sentences of thirteen (13) years of imprisonment for each case of Murder onto him, resulting in an aggregated sentence of fifteen (15) years imprisonment. The claim of the defendant that the victims had first verbally and then physically attacked him and in the end he had killed them due to fear for his life was rejected by the court of first instance.

On 22 November 2006 Defence Counsel F[redacted] B[redacted] on behalf of the defendant filed an appeal against the Verdict on the grounds of essential violations of the provisions of criminal procedure, erroneous and incomplete establishment of the state of facts, violations of the criminal law to the detriment of the defendant and with respect to the decision on criminal sanctions. Defence Counsel Z[redacted] B[redacted] on behalf of the defendant filed on 29 November 2006 an appeal against the Verdict on similar grounds.

The Office of the Public Prosecutor with opinion, dated 14 November 2007, discussed possible violations of the criminal law to the detriment of the accused and alleged that the court of first instance had failed to determine the punishment correctly.

In particular the Prosecution opined that the court of first instance should have imposed a single sentence upon the defendant instead of an aggregated sentence composed of two (2) separate sentences. Furthermore the Prosecution submitted that the more favorable

Article 8 of the PCCK should have been applied and that the claim of the defendant that he acted in necessary self defence should not have been excluded.

The Supreme Court of Kosovo in a panel composed of three (3) International Judges partially approved the appeals. With Judgment, dated 5 August 2008, the defendant was found guilty of two (2) murders for which he was imposed a single punishment of fifteen (15) years of imprisonment. The rest of the appeals was rejected as unfounded and the Judgment of first instance affirmed.

The Judgment of the Supreme Court was served upon Defence Counsel F[redacted] B[redacted] on 4 September 2008[1].

On 13 November 2008 Defence Counsel F[redacted] B[redacted] on behalf of the defendant filed a request for protection of legality, dated 11 November 2008, against the Judgments of the District Court Peja/Peć and the Supreme Court of Kosovo.

II. Issues raised in the request for protection of legality

Defence Counsel F[redacted] B[redacted] proposes to render a Judgment annulling the Judgments of the District Court of Peja/Peć and of the Supreme Court and to return the case to the court of first instance for retrial.

He claims essential breach of the provisions of the criminal procedure and the criminal code.

In detail Defence Counsel F[redacted] B[redacted] contends:

1. Violations of the provisions of criminal procedure:

    a. The Judgments of the District Court and the Supreme Court are in essential breach of Article 403 Paragraph 1 and Article 391 Paragraph 1 of the PCPCK, because the first instance Judgment does not contain any enacting clause and is intrinsically incomprehensible and contradictory. The justification itself fails to provide reasons regarding the final facts and is completely unclear and contradictory. In addition the provisions of two (2) different laws – Law on Criminal Proceedings (LCP) and PCPCK -

[1] This can be established although according to the delivery slip on that day a "Ruling", dated 5 August 2008, was delivered. On 5 August 2008, however, the Supreme Court of Kosovo issued only the Judgment in the case in question, not a Ruling.

were applied what is prohibited because the criminal procedure is unique.

b. The enacting clause of Judgment of the Supreme Court does not introduce the facts and circumstances that constitute the nature of the criminal offence, i.e. it does not contain a factual description of these offences, namely the motive behind the commission or the course of the event.

c. The amended indictment should not have been accepted since the factual situation had not changed.

d. The court of first instance ignored the fact that the defendant was under serious threat during the time before the crime occurred, and was escorted by police to his job and back home. In this context the Court of first instance also failed to take into consideration that at the time of the crime within a period of three and a half months three policemen were ambushed and killed in the Gjakovë.

e. The Court of first instance in denying necessary self defence erroneously referred to the obligation of the defendant to run away from the attackers and that way to escape.

f. From the circumstances and established facts it is clear that the brawl was initiated by the victims.

g. In both Judgments the subjective elements of the criminal actions are not explained and no clear reasoning is given to explain the type of intent with which the defendant allegedly acted. The short distance between the defendant and the victims when the shots were fired cannot be seen as proof for at least eventual intent to murder the victims. It rather proofs the situation of necessary defence.

h. The appeals court, misjudging the fact that the defendant was slightly injured during the brawl, came to the wrong conclusion that the life of the defendant was never at risk.

i. Both courts based their findings on the statement of witness B[redacted] B[redacted] although he is allegedly a member of an organized crime gang and although he was sitting in a car which in complete darkness passed by the crime scene with a speed of 100 km/h what made it impossible for him to get a detailed picture of the events.

j. The Judgment of second instance described witness B[redacted] B[redacted] statement as "matching other available evidence", although his statement does not even match the statements of the witnesses who were with him in the same car.

2. Violations of the criminal code

   a. The finding of the first instance court as to "who started the brawl cannot be ascertained" is ambiguous and incorrect, because it is clear from the background of the case and the bodily injuries the defendant received that the attack was started by the late victims.

   b. The conclusion of both courts that the life of the defendant was not in danger, not even if assumed that the victims started the brawl, is highly relative, general and consequently ambiguous.

   c. The conclusion of the court of second instance that "it is not reasonably believed that the late S[redacted] Z[redacted] was acting illegally" is erroneous.

   d. The conclusion of the court of second instance that the defendant could have run away cannot be accepted in the light of Article 8 Paragraph 1 and 2 of the PCCK.

The Office of the State Prosecutor of Kosovo (OSPK) with opinion, dated 19 May 2009, submits that at least for the killing of the late S[redacted] Z[redacted] the correct application of the law in the light of the jurisprudence of the European Court of Human Rights should bring the Supreme Court to believe that there is a reasonable doubt as to the existence of a state of self-defence and, eventually, to an excess of self defence.

This submission is based upon the opinion that the defendant by setting out a series of facts that legally could amount in self defence did not have to prove, fully, that he was acting in self-defence. It should have been the Prosecutor to prove beyond reasonable doubt the absence of self defence due to the fact that the factual situation had not been clear. This interpretation would be more in line with the *favor rei* principle and with what is outlined in the case law of the European Court of Human Rights (ECHR).

As to the killing of the late S[redacted] Z[redacted] the OSPK opines that the application of the aforementioned standard would not suffice to shield the defendant of his criminal liability. According to the established facts a current attack of the late S[redacted] Z[redacted] against the defendant did not exist. Only a different determination of the factual situation might eventually have such result.

For these reasons the OSPK submits the motion to find the request for protection of legality partially founded and

a. Pursuant to Article 457 Paragraph 1 of the Kosovo Code of Criminal Procedure (KCCP), modify the final decision in the part related to the killing of S[redacted] Z[redacted] confirm the presumption of a state of self-defence, ascertain the existence of an excess of self-defence, and consequently apply Article 9 Paragraph 3 of the Criminal Law of the Socialist Federal Republic of Yugoslavia (CLSFRY);

b. Pursuant to Article 456 of the KCCP, reject the other requests submitted by the defence counsel F[redacted] B[redacted]

III. Findings of the Supreme Court

1.

The request for protection of legality is timely filed and admissible.

Applicable law in the case in question is the Kosovo Code on Criminal Procedure (KCCP).

Pursuant to Article 550 of the KCCP criminal proceedings at first instance, in which the indictment was filed before the date of entry into force of the KCCP (formerly: Provisional Criminal Procedure Code of Kosovo, PCPCK) but which not have been completed by this date, shall be continued according to the provisions of the previous applicable law until the criminal proceedings are dismissed in a final form by a Ruling or until the Judgment rendered at the main trial becomes final.

The indictment against the accused was filed on 22 October 2004 and hence after the PCPCK entered into force on 6 April 2004.

Pursuant to Article 452 Paragraph 3 of the KCCP a request for protection of legality has to be filed within three (3) months of the service of the final judicial decision on the defendant.

The Verdict of the Supreme Court of Kosovo was served upon Defence Counsels F[redacted] B[redacted] on 4 September 2008. The request for protection of legality was filed on 13 November 2088 and thus within the period of three months.

2.

The request is also grounded. Both Verdicts are based upon substantial violations of the provisions of criminal procedure pursuant to Article 451 Paragraph 1 item 2 as read with Article 403 Paragraph 1 item 12 of the KCCP, and violations of the criminal law pursuant to Article 451 Paragraph 1 item 1 as read with Article 404 Paragraph 2 of the KCCP.

a. the Verdict of the court of first instance

The panel of the Supreme Court finds that the first instance Verdict is based upon substantial violations of the provisions of criminal procedure pursuant to Article 451 Paragraph 1 item 2 as read with Article 403 Paragraph 1 item 12 of the KCCP, and violations of the criminal law pursuant to Article 451 Paragraph 1 item 1 as read with Article 404 Paragraph 2 of the KCCP.

aa.

In rejecting the claim of the defendant, that he had acted in necessary self defence, the Verdict constitutes a violation of the principle *in dubio pro reo* by shifting the burden of proof on to the defendant. This is a violation of one of the most fundamental rights of the defendant, the *presumption of innocence*, as stipulated in Article 6 Paragraph 2 of the European Convention of Human Rights and adopted in the domestic legislation in Article 3 Paragraph 1 of the – at the time of the main trial at first instance applicable – PCPCK.

It is not arguable that the defendant shot at the victims and killed them. However, the defendant in his statement, as referred to in the first instance Verdict, explained the events as follows:

> "When exiting the shop, the two men, whom he knew as S[redacted] Z[redacted] and S[redacted] Z[redacted] approached him. They threatened him, verbally, yelling: 'We trusted you and you betrayed us'. Then the two men attacked the accused hitting him with his fists and arms, pushing, grabbing and holding him.
>
> .....
>
> The still good relations between S[redacted] and the accused (had) deteriorated after the murder of KPS officer H[redacted] A[redacted] on 6 September 2003. During the police investigations, which never led to the identification of a suspect, the accused to the investigators revealed some information on S[redacted] and his pals. In this context he uttered concern about his life and safety, fearing revenge from S[redacted] and his

companions. About one month previous to 8 November 2003 the accused reported being followed and watched. UNMIK police therefore provided him an escort home. The accused then allegedly was stalked two or three days previous to the prescribed incident.

As the accused stated, starting the fight, that followed the verbal attack, S[redacted] shouting ordered S[redacted]: 'S[redacted], come help me take his gun, so we can kill him'. S[redacted] then attacked him from behind, striking him blows at his neck and head. In the sequence S[redacted] grabbed at the accused's pistol. While S[redacted] and V[redacted] were struggling over the weapon, at some point Sadik got hold of the pistol. He aimed it to V[redacted] stomach pulling the trigger. However, no bullet being in the chamber, no shot was fired. Then the accused managed to disarm S[redacted]..

According to the accused, when S[redacted] and S[redacted] were attacking him, he landed on his knees hunching over to protect his weapon from being grabbed. He put a bullet into the chamber warning them: 'I am a police officer and I am going to shoot on you'.

...

The accused, not expecting that his two attackers would stop fighting, feared for his life, at the same time conceding that S[redacted] and S[redacted] visibly were unarmed, never having referred to the possession of any weapons.

The accused fired his gun twice over his shoulder, aiming up in the air. S[redacted], who was on top of V[redacted], was struck by the bullets on his face and left arm. The accused stated that at that time he was unaware of having shot S[redacted]

The accused remembered that, immediately after he had shot S[redacted] twice, S[redacted] was touching his hand and pulling his forearm, attempting to grab him by the hand. V[redacted] was fearing for his life, because S[redacted] throughout the attack, kept his hand on or near his belt in such manner that the accused believed he had a gun. He claimed that he 'suspected 100% that he had a weapon'. The accused admitted that he then fired a third shot within a second of the other two shots. The reasons given by the accused in front of the investigating judge were that: 'I was expecting him (S[redacted] to shoot at me ... I thought he would shoot me', 'I intended to shoot at his body because that was my last attempt to break away'..... The accused claimed in front of the investigating judge that,

as he shot for the third time, he lost his vision and 'blacked out' and that he remembered only vaguely his fourth shot (the second shot at S[redacted].

After he had stopped shooting the accused left the scene towards his house, and called Gjakovë Police Station on his portable radio."

It is noteworthy that the statement of the defendant is partially corroborated by other evidence referred to in the first instance Verdict. There is no doubt that a fight was ongoing between the defendant and the two victims and that injuries were inflicted upon the defendant, who sustained lacerations and minor cuts and red marks on his neck, back, shoulders and both knees.

Also the behavior of the defendant after the shots, as described by other witnesses, corroborates his statement.

The defendant was seen by witnesses F[redacted] R[redacted] and witness Y[redacted] Y[redacted] running away after the shots while screaming – so witness Y[redacted] Y[redacted] – or even screaming "I killed two people" – so witness F[redacted] R[redacted]

Also witness R[redacted] J[redacted] saw the accused immediately after the event saying "Oh my god. They beat me up. I don't know whether I killed them". In particular the statement of this witness is, what the court of first instance failed to take into consideration, of particular importance, because his testimony refers to the first and spontaneously given account of the defendant regarding his deeds, without any time to consider a defence, let alone prior legal advice. This as well as the fact that the defendant himself called the police after he arrived at home cannot be ignored as indication for serious mental distress of the defendant which corroborates his description of the events.

From the Verdict further evidence corroborating the statement of the defendant can be seen in the history of the case.

Based upon the testimony of witnesses S[redacted] F[redacted] H[redacted] S[redacted] Xh[redacted] Z[redacted] M[redacted] Z[redacted] and S[redacted] S[redacted] the first instance court concluded that an initially good relationship between the defendant and the victims had deteriorated after one of the defendant's colleagues had been killed two months ago and after the defendant had provided the police with some information regarding S[redacted] Z[redacted]

Basic knowledge of local customs is sufficient to understand that this exposed the defendant to a high risk to be seen as traitor, the more if it is true that he during the armed conflict in 1998/1999 had found shelter in S[redacted] house for some weeks. This corroborates the statement of the defendant at least insofar as his narration of an attack against him cannot be dismissed as far-fetched.

In conclusion, even in the Verdict of the court of first instance – which to this regard, as will be explained later, cannot be seen as raw model of completeness - some circumstantial evidence is listed corroborating the statement of the defendant. The only fact which according to the first instance Verdict cannot be established is the question by whom the fight was started.

In this situation the court of first instance assigned the burden of proof to the defendant. The relevant part of the Verdict reads as follows:

> "The panel however in favour of the accused could neither obtain the requirements by law for Necessary Self Defence. Nor Extreme Necessity nor Provoked Homicide as defined in .....
>
> Hereby the Court in obtaining the facts could not grant the accused the benefit of doubts regarding the existence of facts relevant to the case as stipulated in Article 3 Paragraph 2 of the PCPCK."

In doing so the court of first instance disregarded the presumption of innocence laid down in Article 3 Paragraph 1 of the CCK in accordance with Article 6 Paragraph 2 of the European Convention of Human Rights. Pursuant to this principle the burden of proof stayed with the prosecution.

The defendant submitted an exculpatory explanation for the event. In such situation the presumption of innocence requires that the court has to be convinced beyond reasonable doubt that the narration given by the defendant is not true. Hence the burden of proof regarding the untruthfulness of the defendants claim fell on the prosecution. To shift the burden of proof from the prosecution on to the defendant, as done by the court of first instance, created the obligation for the defendant to proof his innocence beyond reasonable doubt, thus violating one of his most essential procedural rights enshrined in Article 6 Paragraph of the European Convention of Human Rights.

bb.

Furthermore, the court of first instance violated the provisions of criminal law in denying the defendant's claim of necessary self defence by concluding that the defendant's life was never at stake, even if the late victims had started the fight. This mistakes the preconditions of necessary self defence which is legally defined in Article 8 Paragraph 2 of the CCK (identical with the at the time of the main trail applicable PCCK) as

> "an act to avert an unlawful, real and imminent attack".

The law does not require that the attack must be life threatening. The gravity of the attack is only of interest in context with the question if the act committed in defence is

proportionate to the degree of danger posed by the attack. Hence the court of first instance raised the threshold for an attack too high and in doing so violated Article 8 of the CCK.

cc.

The court of first instance with reference mainly to the statement of witness B[redacted] B[redacted] excluded that the defendant during the fight lost control. The way in which this assessment is laid out in the Verdict of first instance raises serious doubts as to the accuracy of the factual determination and hence has to be addressed by this panel of the Supreme Court in accordance with Article 458 of the KCCP which reads:

> *"If in proceedings on a request for protection of legality considerable doubt arises as to the accuracy of the factual determination in a decision challenged by the request, the Supreme Court of Kosovo shall in its Judgment on the request for protection of legality annul that decision and order a new main trial to be held before the same or another competent court of first instance."*

The observations of witness B[redacted] B[redacted] are described in the Verdict as follows:

> "At a distance to the fighters of 5 to 10 meters, and at a speed of 60 to 80 km/h the car passed by, while B[redacted] followed the actions of the parties in turning his head to have his view fixed on the scene through the rear window. He insisted that he never lost sight of the action, his window being open.
> .....
> Passing by ata close distance B[redacted] realized that there were persons fighting, 4 persons in two groups. He requested the driver to stop. H[redacted] H[redacted] to do so had to drive on to a turning point at the small mosque some distance away, u-turned and stopped about 5 meters away from the scene.
> .....
> While fighting, the parties moved out of a narrow lane to the middle of the road, so that the passing car had to move to the other side of the road to avoid them. The persons were fighting, punching and kicking each other. At some point S[redacted] grabbed V[redacted] and knocked him to the ground, and this was, as B[redacted] testified, the moment when V[redacted] stood up, took his gun from the side of his body and shot at Sadik. The fighters while hitting were moving close to each other, yet were not entangled.
> .....

> B[redacted] B[redacted] further testified that when S[redacted] was hit by the shots, the second group stopped fighting. S[redacted] started screaming 'you have killed my ... (grandfather uncle or something like that)', and stood as frozen. V[redacted] shot at him and S[redacted] fell to the ground. The court person grabbed V[redacted] saying 'lets escape'and left the scene in the direction of V[redacted] house; then V[redacted] started screaming to his brother, who was in the shop: 'I killed two persons'. ...
>
> Bl[redacted] B[redacted] insisted that he saw V[redacted] insert the first bullet into the chamber of his gun, because he was close to the scene.
>
> .....
>
> He saw the accused falling on his knee with S[redacted] above him, then watched him standing up and using his gun.
>
> The Glock pistol 9 mm cannot be fired without cocking the gun, before pushing back the trigger safety, as described by B[redacted] .....
>
> B[redacted] stated that at some point during the fight the accused drew the gun which previously during the fight was not visible."

The court of first instance classified this testimony correctly as very detailed on the different stages of the fight.

However, the court of first instance never assessed or even discussed the credibility of this witness, notwithstanding obvious question marks regarding his testimony. Out of four persons who were passengers in the car he was the only one who gave a statement in such detail. This would have required a profound evaluation and discussion why especially this witness was able to observe the events so closely. This assessment would immediately have brought up the question whether the circumstances of the case allowed witness B[redacted] to observe the event in such detail.

According to the Verdict

> "it was dark, the only light was the light diffusing out of the nearby shops and the headlights of the car".

The court of first instance did not establish the distance between these shops and the street in order to get a precise picture of the visibility. However, from the Verdict itself it results that the visibility was in any case very poor. In this condition witness B[redacted] made his observations as a passenger in a car which according to the Verdict passed by the scene with a speed of 60 to 80 km/h, went on until the driver found a turning point and returned to the crime scene where it stopped.

Against the background of poor visibility the crucial question is whether witness B[redacted] observed those events which happened prior to the shots from the passing by car or from the car after it had returned and stopped. This question is precisely answered by the first instance Verdict, which insofar reads as follows:

> "The panel followed first of all the testimony of the core eyewitness B[redacted] B[redacted]
> His credibility is beyond any doubt. He was not wrong when he said to the driver **to go back to the scene of the incident because he saw shots and two people falling down."** (not highlighted in the original).

This leaves no doubt that the crucial events happened before the car turned around and returned to the crime scene. Hence it is clear that witness B[redacted] must have made his observations while the car was approaching, passing by and leaving the crime scene with a speed of at least 60 to 80 km/h.

In this context it cannot be ignored that the court of first instance relied simply upon the speed indication given by witness B[redacted] B[redacted] in doing so omitting reference to – and assessment of - the witness statements of the other passengers in the car who testified that the speed was even much higher, up to 110 kilometers per hour[2], what was stated in particular by witness H[redacted] H[redacted] who was the driver of the car.

Given the poor visibility it is arguable whether accurate observations over a distance of more than 30 to 50 meters were physically possible, in particular after the car passed by and there was no illumination by the headlights any more. Hence witness B[redacted] in any event had only very few seconds for his observations what renders it highly doubtful that he had been able to observe all the details described by him. This applies even more to his recollection of the alleged exchange of words between the victims and the defendant during the brawl.

Last but not least, as indicated above it emerges from the Verdict that the other three witnesses who were sitting in the car observed much less details of the event.

Witness H[redacted] H[redacted] is referred to in the Verdict only regarding his observation after the shooting, that two persons left the scene.

Witness H[redacted] R[redacted] saw three or four persons struggling and pushing each other and two persons leaving the scene.

Witness B[redacted] R[redacted] only saw three or four persons scrambling.

All these peculiarities would have required a thorough scrutiny of witness B[redacted]'s testimony which after all was not of minor but highest importance, because his testimony was for the court of first instance the main piece of evidence to reject the defendant's claim of self defence.

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[2] See Verdict of the Supreme Court, page 21 (English version)

Such assessment, however, cannot be found in the Verdict of first instance. Thus this panel of the Supreme Court finds that there is considerable doubt as to the accuracy of the factual determination in the Verdict of first instance.

dd.

Further doubts regarding the accuracy of the factual determination have to be addressed as far as the mental state of the defendant while killing the victims is concerned.

As mentioned above, in the Verdict of first instance reference can be found to some witnesses whose testimony can be seen as indication for mental distress of the accused. In addition it emerges from the Verdict of second instance[3] that there was much more evidence to this regard which had not been taken into account by the court of first instance.

Indeed a summary of all evidence and available facts which might be considered when determining the mental state of the defendant while killing the victims shows a large amount of substantial material.

There is, first of all, the history of the case, the intimidation the defendant felt towards him. A colleague of the defendant had been killed approximately two months ago, and the defendant believed S[redacted] Z[redacted] being involved in this crime. The defendant felt under particular intimidation after he reported Z[redacted]'s name to the police. The relationship between his family and the Z[redacted] family deteriorated. The father of the defendant was publicly denounced as Serbian collaborator what exposed the members of the M[redacted] family to a serious risk of revenge.

Against this background in the critical evening the defendant, at the time just twenty-three (23) years old, got involved into a brawl with S[redacted] and S[redacted] Z[redacted]. He got injured, even if only slightly, and it is even clear that during this brawl a situation evolved in which the defendant was knocked to the ground and hence was in a quite poor position.

Secondly, the amount of shots fired by the defendant might also be seen as a sign of mental distress in the concrete situation. The defendant fired not less than seven (7) shots at the victims.

Thirdly, the description of the events by the defendant himself, as referred to in the first instance Verdict, shows partial blackouts what might be seen as a sign of extreme distress. In this context it has to be noted that the defendant did not, as other cases, use the blackouts in order to excuse himself what might increase his credibility.

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[3] See number 4.3.1.6. of the Verdict of the Supreme Court

Fourthly, the comportment of the accused[4] after the events shows a number of peculiarities which have to be considered when assessing his mental state. All witnesses who saw or heard the defendant after the attack describe him unisonous as acting somehow in a strange way.

Witness Y[redacted] Y[redacted] saw the defendant saying "oh ku ku[5] I killed uncle S[redacted]" and saw him running away, holding the gun in his hand.

Witness R[redacted] J[redacted] saw the defendant right after the shots and was told by the defendant "Ku ku, I killed two persons, they beat me up and I killed them". The defendant was yelling and appeared to the witness very stressed.

Witness M[redacted] M[redacted] met the defendant right after the events on the street and was told by the defendant that "S[redacted] and S[redacted] beat him first, wanted to take his pistol and then he shot them". According to the statement of this witness the defendant was speaking loudly, he was confused, walking in a strange way and saying "Ku ku" often. The witness described how the defendant went to his house, but left it after some minutes and went through the river brook in the direction of the soccer field. He was described by witness M[redacted] M[redacted] as "out of control". In this context it has to be noted that this behaviour of the defendant can in any case not be seen as an attempt to escape since it was the defendant himself who called the police and who was in telephone contact with the police.

Witness A[redacted] K[redacted], a police officer who received the defendant's call, described the defendant's voice as "not as usual, he was like crying".

Likewise witness G[redacted] R[redacted], a police officer who heard the defendant talking over his police radio, described the voice of the defendant as "high-pitched" when telling over the radio that he had killed someone who tried to grab his gun.

Similarly witness G[redacted] K[redacted], a police officer who heard the defendant talking on the radio, testified that the defendant sounded "quite upset when he mentioned someone who tried to grab his weapon and he had shot".

Police Officer F[redacted] A[redacted] in his witness statement described the defendant as crying all the time, being cooperative and handing over voluntarily his gun and ammunition. In addition the defendant could not be interrogated by police on the same day. The prosecutor advised the investigators not to take the defendant's statement until the next day "because of the emotional situation of the suspect"[6].

As a result it cannot be ignored that there is solid evidence in the history of the incident, the incident itself and the comportment of the defendant after the crime that his mental state was somehow affected when killing the victims. All the described peculiarities are

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[4] See Supreme Court Verdict under 4.3.1.6.
[5] Ku ku is the Albanian expression for "oh my god", used in context with events which went terribly wrong
[6] See Supreme Court Verdict, page 27 under 4.3.2.1

valid material for an assessment of a possible state of serious mental exasperation. The required scrutiny of this material calls for an expertise by a panel of forensic psychiatrists. Accordingly the Prosecution during the first instance trial had requested a psychological examination of the defendant. The court of first instance rejected this request with the following reasoning:

> "In the course of the trial, no facts have been obtained which could back an expert analysis meaning any elements which could be the basis for an expert analysis on the disturbance of mind and mental condition of the accused, before the incident, during the incident and afterwards."

This panel of the Supreme Court in the light of the afore mentioned facts and evidence disagrees with this conclusion and finds that the first instance court was obliged to grant the motion of the prosecution regarding a psychiatric expertise of the defendant in order to establish the facts completely and accurately.

b. The Verdict of the Supreme Court of Kosovo

The Verdict of the Supreme Court of Kosovo, dated 5 August 2008, violates the criminal law pursuant to Article 451 Paragraph 1 item 1 as read with Article 404 Paragraph 2 of the KCCP in a similar way.

aa.

The Verdict of the Supreme Court addresses the question of necessary defence only under the headline as to the start of the attack. Apart from the fact that this approach appears far too narrow, the Supreme Court agrees with the District Court Verdict regarding the total lack of evidence insofar and concludes:

> "The principle *in dubio pro reo*, does not require a different result. For doubts to result in an interpretation in favour of the defendant (Art. 3.2 PCPCK), there must be conflicting evidence of the same value between which no choice is possible. In such a case there is doubt. There would be doubt if one witness saw S[redacted]Z[redacted] starting the fight, while another one contested this. In the present situation however, nobody saw the beginning of the fight and there is no other evidence available to decide on the matter. There is thus no doubt on the matter. It is simply not possible to decide who started the fight."

This panel of the Supreme Court, with full respect, finds that this conclusion disregards the presumption of innocence. There is no rule in the domestic law or in the European Convention of Human Rights that doubt is only possible in case of conflicting evidence. Of course doubt regarding a fact can arise from the simple absence of any evidence. To use this total absence of evidence against a defendant, as done in the Verdict of second instance, can evidently lead to absurd consequences. If there is no evidence whatsoever that a suspect committed a crime, does it mean there is no doubt that he committed it indeed and is guilty? From the legal point of view this would again be a shift of the burden of proof from the prosecution on to the defendant, who has to prove his innocence, and consequently a violation of one of the most basic Human Rights of any suspect.

This violation of the law is sustained in the part of the Verdict where the Supreme Court assesses the necessity of the self-defence[7]. The Verdict denies the precondition of an "unlawful" attack against the defendant by the lack of evidence as to the question by whom the fight was started. It has again to be stressed that at least in a case where the fight itself is out of question it has, based upon the principle of presumption of innocence, to be the prosecution which has to prove that the attack was lawful. Otherwise the defendant would be forced to prove his innocence.

bb.

Secondly, the Verdict of the Supreme Court violates the provisions of criminal law when applying Article 9 Paragraph 2 of the CLSFRY instead of Article 8 of the CCK (PCCK).

Article 8 of the CCK should have been applied because it is more favorable. Since the event happened before the entry of the PCCK into force, the more favorable law has to be applied pursuant to Article 2 Paragraph 2 of the PCCK (CCK). Article 8 of the CCK is more favorable, because it refers in Paragraph 2 to an act committed to avert an unlawful, real and imminent attack, whereas Article 9 Paragraph 2 of the CLSFRY limits the right to the defendant to an act which is *absolutely* necessary to avert an immediate and unlawful attack. Evidently the Verdict of the Supreme Court is in fact based upon the more strict provision of the old law as it can be seen from the following reasoning:

> "V[redacted] M[redacted]'s use of his weapon was not absolutely necessary. V[redacted] M[redacted] could have escaped by running away"[8].

This is moreover a clear misinterpretation of the law. The right to run away always exists and does not require a specific legal permission. Article 8 of the CCK specifically allows averting the attack, what means that the defender is permitted to terminate the attack with immediate effect. In addition, and only for the sake of completion, the idea that the defendant could have run away is highly hypothetical and would have required a

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[7] See number 4.3.5.1. of the Verdict
[8] See page 32 of the Verdict (English version)

thorough overall assessment of all circumstances through his eyes in the concrete situation.

cc.

Thirdly, the Verdict of the Supreme Court violated the provisions of criminal and criminal procedure law in excluding provoked homicide pursuant to Article 33 of the KCL.

This panel of the Supreme Court fully agrees with the opinion of the previous panel that a state of serious exasperation refers to a condition which is an exceptional mental state that substantially diminishes the capacity of a person to think and react in a normal way[9]. This panel of the Supreme Court, however, respectfully disagrees with the opinion of the previous panel that it can be excluded that the defendant acted in such a mental state.

There is, as described above in detail, ample evidence indicating that the defendant acted in a state of serious exasperation. Most of this evidence is listed in the Verdict of the Supreme Court but rejected as irrelevant, because it refers to the state of the defendant *after* the killings.

This falls too short.

Firstly, in dismissing this evidence as irrelevant the Court failed to regard the evidence in its entirety, including, for example, the history of the case.

Secondly, it is undisputed in the Forensic Psychiatry that peculiarities in the behaviour of the perpetrator directly after the crime are valuable facts for the assessment of the perpetrator's mental state while committing the crime. Consequently the questions whether the behaviour shown by the defendant after the incident is sufficient to draw conclusions as to his mental state while killing the victims, and which conclusions possibly can be drawn, have to be answered by a psychiatric expert, not by the Court.

Thirdly, the Court of second instance deemed a psychiatric expertise not necessary, because

> "appointing a psychiatrist three years after the shooting would not have provided any meaningful, helpful insight regarding V[redacted] M[redacted]'s mental state at the time of the killings".

This appears to be a misunderstanding of the preconditions for a medical assessment, because usually the state of serious exasperation fades away within hours anyway, what means that even a prompt examination could not have been based upon better material.

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[9] See number 4.3.5.3. of the Verdict

Besides, it is again not in the competence of the Court to decide if an expert will be able to evaluate the available material. This decision has to be made by the expert.

Even more disturbing, the opinion of the court of second instance has to be regarded as a violation of the principle of a fair trial as enshrined in Article 6 of the European Convention of Human Rights. The defendant was denied his right to an expertise in his possible favor based upon the elapse of time for which he is not responsible.

Lastly, the opinion of the court of second instance also violates the principle *in dubio pro reo*. Since the defendant claims that he acted in a state of serious exasperation and since there is even some corroborating evidence the court under the principle of *in dubio pro reo* has to exclude beyond reasonable doubt that the mental state of the defendant was notably affected. Any uncertainty regarding this exclusion would have to be interpreted in favor of the defendant, not against him.

c.

As a result this panel of the Supreme Court finds that both Verdicts constitute a violation of the provisions of criminal law.

The described inaccuracies in the determination of the facts require that pursuant to Article 458 of the KCCP the Verdicts of the District Court and the Supreme Court are annulled and the case is sent back for a new main trial before the District Court of Peja/Peć.

Since the facts are not clear yet it is not possible for this panel of the Supreme Court to establish the legal qualification of the case. Both victims were killed within a short period of time during one turbulent event what interrelates both killings. Consequently an accurate determination of facts can have an influence upon the legal qualification of each of the killings.

For the retrial the Supreme Court of Kosovo alerts the court of first instance pursuant to Article 459 Paragraph 2 of the KCCP that it is important to scrutinize in particular the testimony of witness B[redacted]B[redacted] in the light of the peculiar circumstances as described above. A reconstruction of the events under similar light conditions might be useful in this context.

Furthermore during the retrial a psychiatric expertise of a panel of experts should be granted in order to evaluate the mental state of the defendant while killing the victims, unless the court finds the defendant not guilty due to necessary self defence. In order to facilitate the determination of his mental state the experts will have to be provided with all relevant information. Based upon a complete and accurate determination of the factual situation the court of first instance will have to determine the legal qualification of the acts committed by the defendant with full respect for basic principles such as *presumption of innocence* and *in dubio pro reo.*

Finally, for the retrial proceedings the court of first instance will have to respect the provision of Article 459 of the KCCP, in particular the prohibition of *reformation in peius*, as stipulated in Article 459 Paragraph 4 of the KCCP.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA
PKL.-Kzz. No. 23/2009

Presiding Judge

Norbert Koster

Panel Member

Guy Van Craen

Panel Member

Gerrit-Marc Sprenger

Panel Member

Fejzullah Hasani

Panel Member

Miftar Jasiqi