Supreme Court of Kosovo
Ap.-Kž. No. 165/2007
19 May 2009
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted in compliance with Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure ("KCCP"), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo ("Law on Jurisdiction");

Composed of Guy Van Craen, EULEX Judge, as presiding and reporting judge, Norbert Koster, EULEX Judge, Fejzullah Hasani, Miftar Jasiqi and Agim Krasniqi, Supreme Court Judges, as panel members;

Assisted by Judit Eva Tatrai, EULEX Legal Officer, as recording officer, Valentina Gashi and Patricia Faltusova, EULEX court recorders, Shqipe Cavdarbasha, Edmond Laska, Leke Nimani, Mentor Abdullahu, Dominique Vorkapic-Kolic and Biljana Maric EULEX Interpreters;

In the presence of the Public Prosecutors, Anette Milk EULEX Prosecutor, Theo Jacobs, Chief EULEX Prosecutor and Zyhra Ademi, Public Prosecutor, Defence Counsel A[redacted] T[redacted]; Defendant M[redacted] M[redacted] and the Injured Party R[redacted] T[redacted]

In the sessions held on 21 April and 19 May 2009, following the deliberation of the panel concluded on 19 May 2009;

In the criminal case against:
M[redacted] M[redacted] nickname M[redacted], Kosovo-Albanian, father's name: [redacted] mother's maiden name: [redacted] a car wash employee, residing at Street [redacted], born on [redacted] in [redacted], single, not having done military service, average economic status, can read but cannot write, has been in detention since 19 April 2004, currently at Dubrava Prison;

Found guilty by the verdict of the District Court of Prishtinë/Priština, dated 22 July 2005, P. No. 493/2004 for the criminal offence of:
Attempted Murder, contrary to Article 30 paragraph (2) items 1) and 5) of the Criminal Law of Kosovo (CLK), read with Article 22 of the Criminal Law of the Socialist Federal Republic of Yugoslavia, (CC SFRY), as read with Article 147 paragraphs (5) and (6) of the Criminal Code of Kosovo (CCK), and Article 2 paragraph (1) and Article 23 of the CCK;

Found not guilty in and acquitted for the criminal offence of **Participation in a Group that Commits a Criminal Act**, in violation of Article 200 of the CLK, read with Article 320 of the CCK;

And sentenced by the first instance verdict to a term of eighteen (18) years of imprisonment, with credit for the time served in detention on remand since 19 April 2004, pending the date when the verdict becomes final;

Deciding on the appeal of the Defence Counsel A[redacted] T[redacted] filed in favour of the defendant M[redacted]t M[redacted], on 16 October 2006;

Deciding also on the appeal of the Public Prosecutor on the detriment of the accused, on 19 October 2006, against the verdict of the District Court of Prishtinë/Priština, dated 22 July 2005, P. No. 493/2004;

Having reviewed the court records, heard the arguments of the Defence Counsel and that of the Public Prosecutor, and having analysed the relevant laws;

Pursuant to Article 426 paragraph (1) of the KCCP, the Supreme Court of Kosovo renders the following

JUDGMENT

The appeal of the Public Prosecutor filed on the detriment of the defendant M[redacted] M[redacted] on 19 October 2006 is **REJECTED**;

The appeal of the Defence Counsel A[redacted] T[redacted] filed in favour of the defendant M[redacted] M[redacted] on 16 October 2006, is **PARTLY GRANTED**;

The verdict of the District Court of Prishtinë/Priština, dated 22 July 2005, P. No. 493/2004, is **MODIFIED** as to the qualification of the criminal offence for which M[redacted] M[redacted] is found guilty is **Attempted Aggravated Murder in complicity with other persons, as defined by Article 30 paragraph (2) item 3) of the CLK in connection with Articles 19 and 22 of the CC SFRY**;

The defendant M[redacted]t M[redacted] is sentenced for this criminal offence to a term of **twelve (12) years of imprisonment** in which the time spent in detention on remand since 19 April 2004 is credited;

The remaining part of the verdict of the District Court of Prishtinë/Priština, dated 22 July 2005, P. No. 493/2004 is affirmed;

The defendant shall pay the costs of the criminal proceedings.

REASONING

I. Procedure

- The appeals filed timely by the defendant and the Public Prosecutor, against the verdict of the District Court of Prishtinë/Priština dated 22 July 2005, are admissible.
- The first instance criminal panel of the District Court of Prishtinë/Priština was legally composed by UNMIK Judges according to UNMIK Regulation No. 2000/64 (extended on until 15/12/05 in conformity with Article 554 paragraph 1 of the KCCP by the consequent UNMIK Regulations 2001/34, 2002/20, 2003/36 and 2004/54).
- The Supreme Court of Kosovo, composed as mentioned above, is competent to adjudicate the appeals from the Public Prosecutor and the defendant M M
- The Supreme Court considers that the first instance court determined properly the material facts in their judgement but a different judgement should have been passed according to the correct application of the law in particular with reference to the measurement of the penalty (Article 426 of the KCCP).

II. Grounds : the Supreme Court Panel considers that:

- The first instance judges have properly determined in their judgement the material facts which are at the basis of the prosecution and the indictment.
Indeed based upon the regular statement of the PW1, supported by the factual circumstances as stated by witness R. W and resulting from the not contested police reports, upon the ocular inspection by the Court and the sketches drawn in the Court, and upon the observations made by witness A. N , the consisted statement of the injured party R T (widow of the victim Z T) and considering the medico-legal report of the pathologist in connection with the statement of the pathologist stated during the investigation, the first instance judges could legally establish that:

- the accused M M , properly identified, together with other aggressive persons, struck the victim with a metal bar – "with two hands, as one would use an axe to split wood" – and they all, wounded deadly the victim Z T ;
- the intention of the accused and the members of this aggressive group who struck the helpless victim is to be characterised as an intention to kill the victim, based upon the means (bars/sticks) used, the way how they were used and not at least based upon their active obstruction directed in particular against medical help to be given to this victim who was laying helpless, covered with blood, in the ditch;
- the accused was not involved in the burning of the dying victim (later that afternoon) but solely in the beating with a bar of the victim, acting in complicity with others; no serious timeframe was established determining the exact moment when the victim was set on fire;
- although the death was described in the medico-legal report as resulting from "the trauma on the head AND hypoxia" the pathologist underlined that the victim was

still alive when he was set on fire. This means first, that the DIRECT cause of death was "the hypoxia tisularis due to the lack of oxygen and the presence of carbon monoxide during a fire" and secondly that therefore the blow inflicted by the accused has no DIRECT casual link with the death of the victim Z[redacted] T[redacted], even though the victim was dying when set on fire and the accused was (additionally) directly responsible for the fact the victim did not get the urgent needed medical attention;
- the accused was well aware that by carrying out his action of striking the victim with this bar in complicity with others, he surely endangered the life of the victim and thus acted premeditated as prescribed by the criminal act of murder.

III Qualification: the Supreme Court considers that:

- The first instance judges correctly qualified, based on the facts, the criminal behaviour of the accused as attempted aggravated murder of Z[redacted] T[redacted] but instead of item 3 of paragraph 2 of Article 30 of the CLK, the first instance judges made reference to items 1 and 5 of paragraph 2 of Article 30 of the CLK, although the latter items (1 and 5) describing objective and subjective circumstances of the murder (e.g. cruel, violent, brutal, insidious manner) are, considering the above mentioned and established facts, *in casu* not applicable. Instead the "basic motives" of the accused and of his accomplices, which are the underlying reasons of the criminal behaviour aiming at taking the victim's life, although recognized as well by the first instance judges (Article 30, paragraph 2 item 3 of the CLK), should have be foreseen;

- Indeed the legal elements and in particular the absence of the direct casual link between the strokes with the bars and the death of the victim, leads the Supreme Court to the conclusion that the criminal behaviour is to be qualified as an attempted aggravated murder and not as (an accomplished) aggravated murder. In this context this Court considers that the Office of the Prosecutor, which did not appeal from the confirmation of the indictment, has no legal ground to request today to change the qualification into aggravated murder. Since the confirmation of the indictment no (new or other) factual or legal element grounds such a change of qualification .
- The first instances panel made the correct application of the provisions of Article 2 paragraph 2 of the CCK, in other words the law applicable at the moment of the facts is to be applied.

IV Penalty: the Supreme Court takes into account in measuring the penalty:

- The brutality and the basic motives, which have fed the criminal responsible accused in committing those inhuman actions against the innocent and defenceless victim, are aggravating circumstances;
- The first instance Court and the Prosecutor's Office did not respect the diligence needed to serve Justice in time. The reasonable time (Article 6 of the European Convention on

Human Rights) was not respected and this circumstance should be counted to the benefit of the accused. Also the absence of a criminal record and the family circumstances are to be considered as mitigating circumstances.

- Conclusively, the Supreme Court, imposes the above mentioned penalty, twelve years of imprisonment which is proportionate to the danger of the crime and the shown criminal behaviour of the accused, hoping as well that the accused will realise finally the extreme gravity, in particular taking into account the dramatic consequences for the victim's family, of his totally anti-social and utmost criminal behaviour.

THEREFORE, in conformity with Article 426 of the KCCP, the Supreme Court decided as in the enacting clause of this judgment.

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19 May 2009
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Members of the panel:

Norbert Koster
EULEX Judge

Fejzullah Hasani
Supreme Court Judge

Miftar Jasiqi
Supreme Court Judge

Agim Krasniqi
Supreme Court Judge

Presiding Judge:

Guy Van Craen
EULEX Judge

Recording officer:

Judit Eva Tatrai
EULEX Legal Officer

Partially dissenting opinion of Judge Norbert Koster pursuant to Article 420 Paragraph 3 of the KCCP

The case in question raises difficult issues concerning individual criminal liability. The accused together with others as unidentified co-perpetrators beats up the victim so badly that the victim, already lethally injured, comes to lie helpless in a ditch. After a while another unidentified perpetrator pours petrol over the still alive victim and sets him on fire. The victim dies as a result of both the beating and the torching. Each action – beating and torching – would by itself have been sufficient to cause the death of the victim.

I fully agree with my colleagues that the accused acted with the intent to deprive the victim of his life when maltreating him together with his co-perpetrators. I also fully agree that the accused cannot be held accountable for the some time later committed act of torching. Since it is not clear if he knew about the torching, let alone if he wanted it as a joint action, the elements of co-perpetration with this perpetrator could not be established.

However, I respectfully disagree with the decision of the majority of my colleagues regarding the classification of the criminal act committed by the accused. In my opinion the crime committed by him is not just attempt of (aggravated) murder. It is completed murder.

Article 19 of the CCSFRY – the applicable law at the time the crime occurred – defines attempt of a criminal offence as follows:

> "Anybody who with intent commenced the execution of a criminal act but has not completed it, shall be punished for the attempt of only those criminal acts ....."

A careful assessment of the events and the deed of the accused in the light of this provision show that the crime committed by him was more than just an attempt of murder.

The accused, in complicity with others, beat up and inflicted serious injuries upon the victim who died within a few hours. The autopsy report and the testimony of the forensic expert prove that the beating by the accused and his co-perpetrators caused several large skull fractures which were not only serious enough to cause the death of the victim but were in fact one of the reasons why the victim died. It is noteworthy that according to the forensic expert each single skull fracture would have been fatal and that the victim died "as a result of neurogenic shock due to encephalic contusions, due to blunt force trauma to the head, and hypoxia due to the lack of oxygen and presence of carbon monoxide during the fire". Against this background it is for me evident that Article 19 of the

CCSFRY cannot be applied because the criminal act - intentionally depriving the victim of his life - was completed through the actions the accused is accountable for.

It might only be questionable whether the second reason for the death of the victim – his injuries caused by the later committed torching – has an influence upon the individual criminal liability of the accused.

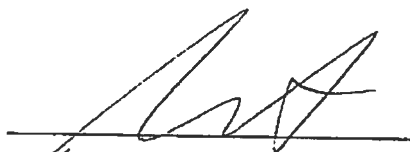
This has to be discussed on the basis of the causal chain which is the necessary link between the action of the accused (beating of the victim) and the result (death of the victim). Only if this causal chain was interrupted by the act of the second perpetrator the accused would not be liable for completed murder. Such interruption of the causal chain would require that the beating executed by the accused could not have shown effect because it was terminated by a new event which started a new causal chain. A simple example would be perpetrator A planting a bomb in the car of the victim and perpetrator B – independently from A – shooting the victim dead before the victim enters the car. In this case A would be liable only for attempt of murder because the causal chain triggered by his act was terminated by the shooting before it could show any effect.

Our case, however, is significantly different. The victim died as a result of both the beating and the torching. Hence the causal chain which had been triggered by the actions of the accused was not interrupted or terminated by the new event of torching. On the contrary from the moment of torching both causal chains were running in a parallel way, in the end causing the death of the victim altogether. I am of the opinion that in such situation the application of Article 19 of the CCSFRY is barred for both perpetrators by the fact that the victim died as a result of each of their actions with the consequence that each of them is liable for the completed murder of the victim.

Any other result would lead to solutions which appear highly arbitrary. If the crime of the accused was to be classified as mere attempt, what should be the classification for the crime committed by the other perpetrator, i.e. the torching? Would it also be mere attempt of murder? This would not be acceptable as it would clearly violate principles of logic having only perpetrators of attempted murder although the victim died as a result of their maltreatment. Would it be completed murder? At a first glance this seems to be more logical, but immediately other questions would arise. Why should the second perpetrator be liable for completed murder whereas the first one is liable only for attempt of murder? Why not the other way round, i.e. the first perpetrator, who set the first and irrevocable reason for the death of the victim, is liable for completed murder and the second one is liable only for attempted murder?

In other words: if, as it happened in our case, the victim dies as a result of both beating and torching, why should the accused benefit from the torching or the arsonist from the beating? There are no criteria which would allow establishing such different levels of criminal liability in a reasonable manner. Both perpetrators committed the same grave acts and both are to be blamed for the death of the victim. As a consequence both are guilty of completed murder.

Hence I am of the opinion that the verdict of first instance should have been modified in classifying the crime of the accused as completed murder. I am also of the opinion that thanks to the appeal of the Prosecution the panel pursuant to Articles 426 Paragraph 1 and 386 Paragraph 1 and 2 of the KCCP would have been in the position to modify the verdict accordingly even if the Prosecution had failed to amend the indictment.



Norbert Koster

EULEX judge