SUPREME COURT of KOSOVO

Ap – Kž – 108/2010
25 November 2010
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, with EULEX Judges Gerrit-Marc Sprenger and Lars Dahlstedt and Supreme Court Judges Marije Ademi and Nesrin Lushta as panel members, assisted by EULEX Legal Officer Sampsa Hakala as the recording clerk,

In the criminal case against defendant I.G. Kosovo Albanian, date of birth XX place of birth XX name of father XX name of mother and maiden name of mother XXX last residence in XXX financial consultant, currently held in detention on remand,

Convicted by the District Court of Pejë/Peć for the criminal offence of **War Crimes against the Civilian Population,** contrary to Article 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, Articles 3 and 147 of the 4th Geneva Convention and Article 4 of the II additional Protocol of the Geneva Conventions as to the murder of S.B. committed in Lugu I Isufit, in the vicinity of the village of Vranoc, Pejë/Peć municipality, on 12 August 1998,

Acting upon the appeal of the defendant filed through his Defence Counsel M. H. on 16 February 2010 against the judgment of the District Court of Pejë/Peć in case no. P.nr. 329/2009, dated 19 November 2009, whereby the court found the defendant guilty and sentenced him to 14 years of imprisonment.

After having held a session on 23 November 2010 open to public, in the presence of the State Prosecutor represented by EULEX Prosecutor Jakob Willaredt, Defence Counsel M.H. and the defendant himself, and after a deliberation and voting held on the same day 23 November 2010,

On 25 November 2010, pursuant to Article 392 of the Kosovo Code of Criminal Procedure (KCCP), pronounces in public and in the presence of the Defence Counsel Betim Shala and the EULEX prosecutor, the following

JUDGMENT

The appeal filed on behalf of the defendant I.G. against the Judgment of the District Court of Pejë/Peć in case P.nr. 329/2009, dated 19 November 2009, is hereby REJECTED as unfounded. The Judgment of the District Court of Pejë/Peć is affirmed.

REASONING

I PROCEDURAL HISTORY

A criminal investigation against I.G. for the killing of S.B. was initiated on 30 September 2005.

On 8 February 2007 the International Public Prosecutor filed an indictment against I. G. for the criminal offence of War Crimes against the Civilian Population contrary to article 142 of the Criminal Code of the SFRY. This count of the indictment was confirmed by the District Court of Pejë/Peć on 23 March 2007. The filed indictment also included one count of Aggravated Murder, which count was dismissed by the district court.

The first main trial was held during May and June of 2007 at the District Court of Pejë/Peć. With a judgment announced on 22 June 2007 the District Court of Pejë/Peć found the defendant I. G. guilty and sentenced him to 15 years of imprisonment. The verdict was appealed by the defendant and upon deciding on the appeal the Supreme Court of Kosovo found that the court of first instance had violated the rules of criminal procedure by accepting the testimony of witness A. K. without following the legal formalities set forth for a so called co-operative witness. As a result the Supreme Court returned the case back to the court of first instance for a retrial. The said ruling of the Supreme Court was issued on 2 June 2009.

On 15 October 2009 EULEX Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) decided to terminate criminal investigations against the above-mentioned person by the name of A. K. who had been heard as a witness during the first main trial.

The retrial was held at the District Court of Pejë/Peć during October and November 2009 in the presence of the defendant, his Defence Counsel, the Special Prosecutor and one of the injured parties. On 19 November 2009 the District Court of Pejë/Peć announced its verdict finding the defendant guilty of War Crimes against the Civilian Population and sentencing him to 14 years of imprisonment.

The judgment was served to the defendant I. G. personally on 1 February 2010.

On 16 February 2010 the Defence Counsel M. H. filed an appeal on behalf of the defendant against the verdict of the District Court of Pejë/Peć.

On 9 March 2010 the SPRK Prosecutor filed a response to the defendant's appeal and the opinion and motion of the Office of the State Prosecutor of the Republic of Kosovo (OSPK), represented by a EULEX Prosecutor, was received by the Supreme Court on 25 May 2010.

II THE APPEAL OF THE DEFENCE AND THE RESPONSE OF THE PROSECUTION

The appeal of Lawyer [M. H.] challenges the first instance judgment on a number of grounds. The Defence Counsel proposes that the charges against the defendant should be dismissed and that the defendant should be acquitted and released from detention. Alternatively the defence counsel proposes that the first instance verdict should be annulled and the case returned to the court of first instance for retrial.

The presented grounds for the appeal are summarized as follows:

- First: the appealed judgment was based on inadmissible evidence with regard to the statement provided by witness [A.K.] which according to the appeal would constitute a violation of the provisions of criminal procedure as foreseen in Article 403 paragraph 1 point 8 of the KCCP.
- Second: the enacting clause of the judgment of the first instance court does not contain a precise determination of the criminal act and that the reasoning of that verdict is unclear and contradictory with regard to the credibility of witnesses' statements contrary to Article 403 paragraph 1 point 12 of the KCCP.
- Additionally the appeal claims that the first and second ground for the appeal as mentioned above are inconsistent with the ruling of the Supreme Court of Kosovo, dated 2 June 2009, by which the Supreme Court had returned the case to the first instance court for the purpose of a retrial.
- Thirdly: the appeal maintains that the factual situation was determined by the court of first instance in an incomplete and erroneous way. The appeal persists that [I.G.] is not guilty of the murder of [S.B.] The appeal argues that the court of first instance erred in the way it evaluated and asserted the contents of witness statements. In particular the appeal challenges the credibility of the statement of witness
- As the fourth and final ground for appeal the defence alleges a violation of the criminal law as provided in Article 404 of the KCCP in the first instance judgment. However, the defence has not elaborated on this ground.

The SPRK Prosecutor with his response states that the appeal is unfounded and should be rejected. The prosecution argues that the verdict of the first instance court does not contain any violation of the provisions of criminal procedure. The enacting clause and the reasoning in support thereof fulfill all legal requirements. Moreover there exists no inconsistency between the appealed judgment and the ruling of the Supreme Court of Kosovo, dated 2 June 2009, which instructed the retrial. The prosecutor maintains that there was sufficient evidence to support the conviction and that the factual determinations were clearly explained and supported from the evidence and that reasonable credibility assessments were made by the court of first instance.

The State Prosecutor in his opinion and motion argues that the appeal of the defendant is ungrounded, thus moving the Supreme Court to reject it and to affirm the judgment of the first instance court. The State Prosecutor finds that the district court's verdict contains

none of the violations alleged in the appeal. In the opinion of the State Prosecutor the enacting clause clearly states the legal qualification and the act of which the defendant is found guilty. Moreover, the enacting clause is fully supported by the factual findings and assessment of the evidence as described in the reasoning part of the judgment. The State Prosecutor further finds that the factual findings of the first instance court were based on a thorough examination and assessment of the evidence.

III COURT FINDINGS

A. Admissibility of the appeal

The Supreme Court finds that the appeal filed on behalf of the defendant is timely filed and admissible. The appealed verdict was served to the defendant on 1 February 2010 and the appeal of the defence was filed with the District Court of Pejë/Peć on 16 February 2010, thus within the limit of 15 days as prescribed in Article 398 of the KCCP. The appeal was filed by the Defence Counsel, an authorized person.

The Supreme Court finds, however that the appeal is not founded. The Panel will now assess each of the arguments raised in the appeal of the defence.

B. The use of (A. K.) statements as evidence

The first ground for the appeal is that the appealed judgment was based on inadmissible evidence as to the statement provided by witness A. K. This, according to the appeal, would constitute a violation of the provisions of criminal procedure. The Supreme Court does not, however, find that any of the statements presented before the first instance court as evidence should have be deemed inadmissible according to the provisions of the KCCP.

The argument of the defence that some of the witness statements of (A. K.) were presented or secured contrary to the previous Supreme Court ruling of 2 June 2009 is completely without merit. The Panel found that on page 6 of the English version of the that ruling the Supreme Court explicitly states that it did not render the statement of (A. K.) inadmissible: *"The Code [of Criminal Procedure] doesn't prescribe the sanction of inadmissibility for the violation of the rules on cooperative witnesses. Therefore the testimony is admissible and the statements of witness . may be used as evidence."*

Instead the mentioned Supreme Court Ruling (on pages 6-7 of the English version) established that the statement of (A. K.) should have been considered as a statement given in the capacity of a co-operative witness and taking into account the legal effects this procedural status has on the evidence of such testimony: *"The Supreme Court considers that the testimony given by somebody (suspect or defendant) who should have been heard under the formalities provided for the cooperative witness (and was not in violation of the Code) cannot have more probative value than the testimony given by*

somebody (suspect or defendant) declared cooperative witness by the court (article 298 [of the KCCP] and followings)."

On the status of A. K. during the retrial, the Supreme Court notes that all criminal investigations against him with regard to the killing of S. B. were terminated prior to the retrial. Therefore the procedural role of A. K. was correctly determined by the retrial panel – as a witness.

In the appeal the defence further argues that during the examination of A. K. in front of the retrial panel numerous references were made to K. previous statements which, according to the defence, were pronounced as inadmissible evidence by the same panel.

The examination of A. K. during the retrial was conducted on 12 November 2009. Prior to that examination the first instance court had ruled that two statements given by A. K. were inadmissible as evidence, namely the statements dated 17 December 2002 and 11 August 2005. However, the Supreme Court notes that the official record of the proceedings shows that no reference was allowed to either of the above mentioned statements during the examination of A. K. as alleged by the defence.[1] Indeed, the inadmissible statements were properly sealed in an envelope before enclosing them to the case file. For these reasons this ground for appeal is considered unfounded.

C. Whether the legal conditions for the enacting clause are fulfilled

As the second ground for appeal the defence argued that the enacting clause of the judgment of the first instance court does not contain a precise determination of the criminal act and that the reasoning of that verdict is unclear and contradictory with regard to the credibility of witnesses' statements contrary to the provisions of the criminal procedure.

On this point the Supreme Court could not establish any substantial deficiency with regards to the enacting clause of the appealed judgment.

According to the combined reading of Articles 396 paragraph 4 and 391 paragraph 1 of the KCCP in case of a conviction the enacting clause of the judgment must contain all "necessary data", among others, the act of which the defendant has been found guilty together with facts and circumstances indicating the criminal nature of the act committed and facts and circumstances on which the application of pertinent provisions of criminal law depends. The Panel recalls that the legal requirements of the enacting clause have been evaluated a number of times by the Supreme Court of Kosovo[2]. In previous

[1] During the proceedings on 12 November 2009 the only reference to the inadmissible statements was done by the Defence Counsel (on page 33 of the English version of the main trial record) before being interrupted by the presiding judge.

[2] See i.e. Supreme Court of Kosovo judgment of 21 July 2009 Ap-Kz 481/2008 O. Zyberaj et al. and 2 July 2009 Ap.-Kz 394/2007 N. Gashi et al.

judgments the Supreme Court has stressed that the enacting clause is a fundamental part of the judgment. Accordingly, the above mentioned elements, including the role of the defendant, his material conduct and his subjective intention, shall be expressed in a very clear way and without ambiguity so that the defendant and all interested persons can understand the charge of which the defendant is found guilty. Moreover the enacting clause should be precise and clear as to the time, the material elements of the crime and the circumstances in which these crimes were perpetrated.

The introduction and enacting clause of the appealed judgment contains the following facts and legal qualifications pertinent to the conviction:

On first page of the appealed verdict (English version) it is written: "... "[I.G.] *charged ... with the criminal offence of War Crimes against the Civilian Population contrary to Article 142 of the SFRY Criminal Code because on the morning of 12 August 1998,* [S.B.] *a Kosovo-Albanian woman, was questioned by members of the Kosovo Liberation Army (KLA) controlling the Baran Village area. She was then taken by* [I.G.] *and* [A.K.] *to a wooden area known locally as "Lugu I Isufit" where* [I.G.] *then shot her to death. In Lugu I Isufit , in the vicinity of the Village of Vranoc, Peja/Pec Municipality, on 12 August 1998."*

On second page of the appealed verdict (English version) it is written: "[I.G.] is found guilty of War *Crimes against the Civilian Population contrary to Article 142 of the SFRY Criminal Code, Articles 3 and 147 of the 4th Geneva Convention and Article 4 of the II Additional Protocol of the Geneva Convention, as to the murder of* [S.B.] *committed in Lugu I Isufit, in the vicinity of the Village of Vranoc, Peja/Pec Municipality, on 12 August 1998."*

The Panel finds that in this case the enacting clause is sufficiently clear as to stating the act of which the defendant was found guilty and its legal qualification as well as the provisions on which the conviction was based upon. Hence no substantial violation of the criminal procedure was found in the appealed judgment in this regard. A substantially more detailed description of the events and circumstances that relate to the criminal offence can be found in the reasoning part of the first instance judgment. The Supreme Court particularly refers, without repeating, to section F. of the first instance verdict where the legal qualification of the criminal offence as a war crime is described in a more detailed way.

D. Appropriate determination of the factual situation based on evidence presented

As the third point, the appeal maintained that the factual situation was determined by the first instance court in an incomplete and erroneous way. In particular, the appeal challenged the credibility of the statement of witness [A.K.]

As to this ground for appeal the Supreme Court does not agree with the assessment made by the defence. On the contrary, the Supreme Court notes that an extensive part of the

appealed judgment was devoted to the assessment of the evidence presented during the retrial (see pages 6 – 34 of the English version).

After carefully assessing the reasoning of the first instance judgment the Supreme Court has come to the conclusion that the court of first instance has performed a fully reasonable assessment of evidence and that the court of first instance did particularly carefully weigh the evidence provided by the testimony of witness A.N.

On page 29 of the English version of the first instance verdict the court pointed out the two main discrepancies which were found in A.N. statement(s):
"...the testimony of A.N. is not reliable as to the part where he described the interview of the victim in Baran. His statement is blatantly contradicted by the version given by C.N. which must be considered as reliable and more trustworthy due to his neutral role in the events".
Later on page 29 it is written: *"..the testimony of A.N. is not reliable when he reports the events in Lugu I Isufit while the victim was still alive...This part of testimony is blatantly contradicted by the testimony of D.H. who is very clear... in saying that the people who escorted the victim in the forest were two."*

The court of first instance then goes on to evaluate the credibility of the statement(s) of A.K. as a whole arriving at the conclusion that, although some parts of his testimony are not reliable, this does not entail that his entire testimony has to be disregarded. The court of first instance then assessed that the part of A.K. testimony identifying I.G. as the person who shot S.B. were clear, internally coherent and also corroborated by other evidence (the confession of I.G. at the time of the victim's first burial).

The Supreme Court finds that in establishing the guilt of I.G. beyond reasonable doubt the court of first instance has properly taken into account the cumulative effect of different pieces of evidence. The conviction was not solely or even to a decisive part based on the testimony of A.N.

The court of first instance relied on the testimonies of A.U. ; H.U. A.K. as evidence indicating that the defendant had confessed to the killing of Sanije Bālaj at Lugu I Isufit at time of the initial burial of the victim. In concluding that the defendant had actually killed the victim S.B. the first instance court found the three corroborating elements to this confession (pages 27 – 28 of the English version of the first instance verdict) as follows:

- First: the evidence from the statements of A.U. H.U. and A.K. suggesting that the victim's notebook (containing some names of Serbian people) was in the possession of the defendant at the time of the victim's first burial;
- Second: the undisputed fact that S.B. was escorted from the KLA compound in Baran by the defendant and A.K. this being also the last

time [redacted] was seen alive by any of the witnesses before she was taken to Lugu I Isufit where she was executed); and

- Third: the other undisputed fact that [redacted] was present – heavily armed and issuing orders for those approaching the site – in Lugu I Isufit at the time the bodily remains of [redacted] were buried for the first time.

As to the last point it is apparent to the Supreme Court that the initial burial of [redacted] was conducted in such a hastily manner only for the purpose of concealing the murder, which explains not only the presence but also the active role of the defendant at the scene of the burial.

The provisions of the criminal procedure prescribe that the court shall state clearly and exhaustively which fact it considers proven or not proven, as well as the grounds for this. The court shall also, in particular, make an evaluation of the credibility of conflicting evidence. The Supreme Court finds that the assessment of evidence was done by the court of first instance in accordance with the legal requirements and in a careful, transparent and convincing manner. In conclusion, the Supreme Court finds no erroneous or incomplete determination of the factual situation in the appealed judgment.

E. Applicable law, legal qualification and sentencing

On the point of alleged violation of Criminal Law the Supreme Court will assess the legal qualification of the act for which [redacted] has been convicted of as well as the decision on punishment.

According to Article 2 of the Criminal Code of Kosovo (CCK) the law in effect at the time a criminal offence was committed shall be applied to the perpetrator. In the event of a change in the applicable law prior to a final decision, the law more favorable to the perpetrator shall apply.

On 12 August 1998, when the criminal offence was committed, the Criminal Code of the Socialist Federal Republic of Yugoslavia (the SFRY Criminal Code) was in effect. The CCK entered into force on 6 April 2004, thus after the commission of the criminal offence and prior to a final decision.

The Supreme Court finds that the conduct for which the defendant has been convicted would currently fall under Article 118 of the CCK entitled "War Crimes in Grave Breach of the Geneva Convention". For this criminal offence the law provides for a punishment of imprisonment of at least ten (10) years or by long-term imprisonment.

On the other hand Article 142 as read together with Article 38 of the SFRY Criminal Code provides a punishment of at least five (5) years or of imprisonment for a term of 20 years for the criminal offence of War Crime against the Civilian Population. Based on this comparison the SFRY Criminal Code is more favorable to the defendant and was therefore correctly applied by the court of first instance.

After a thorough assessment of the appealed judgment and other materials in the case file the Supreme Court is fully satisfied that the legal conditions for qualifying the killing of S. B. is a War Crime are fulfilled.

The preliminary conditions for a criminal offence to be qualified as War crime under Article 142 of the SFRY Criminal Code is that there is a violation of the rules of international law in the time of an armed conflict. In this context the applicable rules of international law refer to the binding rules of international humanitarian law set forth in the 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, Articles 3, 147 and 4 respectfully.

As to the concept of an internal armed conflict the Supreme Court refers to the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the so called *Tadić*[3] case whereby the ICTY Appeals Chamber held that "*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*" The Appeals Chamber further stated that international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory under the control of a party, whether or not actual combat takes place there.

The Supreme Court refers to a consolidated jurisprudence – of international as well as domestic tribunals – that has established that an armed conflict in fact did exist between an organized armed group called the KLA and the Federal Republic of Yugoslavia/Serbian forces in Kosovo during the commission of this criminal act.[4]

Moreover the Supreme Court notes that the question as to whether the victim
was a member of the civilian population and as such a protected person according to the above mentioned rules of international humanitarian law has not been contested during the proceedings. Nor has it ever been contested whether the defendant, at that time, was a member of the KLA.

The final requirement of the application of the rules of international humanitarian law is an existing *nexus* between the crime and the armed conflict. The alleged crime need not have occurred at a time and place in which there was actual combat, so long as the acts of the perpetrator were *closely related* to hostilities occurring in territories controlled by parties to the conflict. The existence of this close relationship between the crime and the armed conflict will be established where it can be shown that the conflict played a

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[3] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 70.

[4] See for example Prosecutor v. Milutinovic et al, Case IT-05-87-T, Judgment of the Trial Chamber, 26 February 2009, paragraph 841 and the Supreme Court of Kosovo, judgment of 10 April 2009 Ap. – Kz. 371/2008 Selim Krasniqi et al.

substantial part in the perpetrator's ability to commit the crime, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed. The Supreme Court finds that the first instance court has correctly noted on page 36 of the English version of the appealed judgment that: *"The armed conflict played a fundamental role in the ability of the defendant to commit the crime. The decision of I. G. to murder S. B. was clearly linked to the conflict. In fact the purported reason for the action against the victim was because of her supposed corroboration with the Serbs..."*

Finally, as to sentencing, the Supreme Court asserts that the term of imprisonment imposed by the court of first instance is appropriate taking into account the pertinent circumstances relating to the criminal offence and to the defendant. In conclusion, no violation of the Criminal Law can be established in the first instance judgment.

IV CONCLUSION

Since the Supreme Court did not recognize *ex officio* any violations of law (as per Article 415 paragraph 1 of the KCCP) which were not the subject of appeal by the defence, and based on all of the above stated reasons it is decided as in the enacting clause.

Dated this 25 November 2010.
Ap.-Kž. No. 108/2010

Prepared in English, an authorized language.

Presiding Judge	**Recording clerk**
Martti Harsia	Sampsa Hakala
Member of the Panel	**Member of the Panel**
Gerrit-Marc Sprenger	Lars Dahlstedt
Member of the Panel	**Member of the Panel**
Marije Ademi	Nesrin Lushta