SUPREME COURT OF KOSOVO
PAIL.-KŽIL. No. 5/2015
26 October 2015
Pristina

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a Panel composed of EULEX Judge Elka Filcheva-Ermenkova, Presiding Judge, EULEX Judge Anna Adamska-Gallant and Supreme Court Judge Gyltene Sylejmani as panel members, assisted by EULEX Legal Officer Holger Engelmann as recording clerk, in the criminal case against:

A[redacted] C[redacted] male, father's name [redacted] mother's name [redacted], born on [redacted] in [redacted] Municipality of [redacted] Kosovo, last place of residence in the same place, Kosovo Albanian, married, two children, finished secondary school, tradesman by profession, of poor financial situation, no previous convictions known,
In detention on remand since 22 May 2009;

Charged by the Indictment PP. No. 465-6/2009, dated 13 August 2009, and filed with the registry of the Basic Court of Pristina, confirmed by Ruling KA. No. 348/09, dated 5 October 2009, with the criminal offences of:

1. **Aggravated Murder** in violation of Article 147 paragraph 1 item 9 of the Criminal Code of Kosovo[1] (hereinafter CCK) and

2. **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 2 of the CCK;

By the first instance Judgment P.-Kr. No. 383/2009 of the Basic Court of Prishtinë/Priština, dated 9 September 2014, the defendant was found **guilty of** having committed the criminal offences of **Aggravated Murder** under Article 147 item 9 of the CCK and **Unauthorized Possession of Weapons** under Article 374 paragraph 1 of the Criminal Code of the Republic of Kosovo[2] (hereinafter CCRK). For the first offence he was **sentenced to** a period of **twenty-five (25) years of long-term imprisonment** and for the second offence to **two (2) years of imprisonment** with an **aggregate punishment of twenty-five (25) years of imprisonment**.

Upon an appeal filed by the State Prosecutor on 24 October 2014 and an appeal filed on 27 October 2014 by the Defence Counsel Destan Rukiqi on behalf of the defendant A[redacted] C[redacted], the **Court of Appeals** by Judgment PAKR. No. 547/2014, dated 12 June 2015, **rejected the appeals as unfounded and affirmed the judgment** of court of first instance.

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[1] Issued as 'Provisional Criminal Code of Kosovo', promulgated as UNMIK Regulation 2003/25, dated 6 July 2003, renamed and amended by the Law No. 03/L-002, in force until 31 December 2012
[2] Law No. 04/L-082, dated 20 April 2012, Official Gazette of the Republic of Kosovo No. 19, 13 July 2012, in force since 1 January 2013.

Deciding upon the Appeal filed on 4 September 2015 by the Defence Counsel D[redacted] R[redacted] on behalf of the defendant A[redacted] C[redacted] against the aforementioned Judgment of the Court of Appeals while taking into consideration the Motion on the Appeal filed on 28 September 2015 by the Office of the Chief State Prosecutor (OSPK),

Following the deliberation and voting conducted on 23 and 26 October 2015, pursuant to Article 430 paragraph 1 subparagraph 1 of the Kosovo Code of Criminal Procedure[1] (henceforth: KCCP) *mutatis mutandis*, in conjunction with Article 407 paragraph 2, 403 subparagraph 1.2 of the CPC, the panel renders the following:

J U D G M E N T

The Appeal filed on 4 September 2015 by the defence counsel on behalf of the defendant A[redacted] C[redacted] against the Judgment PAKR. No. 547/2014 of the Court of Appeals, dated 12 June 2015, is hereby partially granted. The Supreme Court of Kosovo modifies the judgment P-Kr. No. 383/2009, dated 9 September 2014 with regard to A[redacted] C[redacted] as follows:

1. **A[redacted] C[redacted] is guilty because on 22 May 2009 at about 13:40 hours, in the village of Zabel i Ulët/Donji Zabelj in the Municipality of Gllogoc/Glogovac near the mosque, acting out of revenge for the purported harm done to him by the late R[redacted] A[redacted] namely that R[redacted] A[redacted] allegedly was the cause of the dissolution of defendant's family; with an automatic firearm type AK-47, calibre 7.62 mm with serial no. 09809-84; he, the defendant A[redacted] C[redacted] intentionally deprived R[redacted] A[redacted] of his life by firing four shots at the vital parts of his body and this action is classified as Murder under Article 146 of the CCK, and for this criminal offence pursuant to Article 146 of the CCK he is sentenced to seventeen (17) years of imprisonment;**

2. **Pursuant to Article 3 subparagraphs 1.1.10 and 1.2.5, of the Law on Amnesty of 11 July 2013 (Law NO. 04/L-209) the charge against A[redacted] C[redacted] for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons, under Article 328 paragraph 2 of the CCK (count 2), is dismissed;**

3. **Pursuant to the Article 73 Paragraph 1 of the CCK the time served by A[redacted] C[redacted] in detention on remand shall be included in the punishment of imprisonment imposed against him.**

For the REMAINING PARTS the impugned Judgment is AFFIRMED.

[1] Issued as 'Provisional Criminal Procedure Code of Kosovo', promulgated as UNMIK Regulation 2003/26, dated 6 July 2003, renamed and amended by the Law No. 03/L-003, in force until 31 December 2012

REASONING

I. Procedural background

On 22 May 2009 in the village Zabel i Ulët/Donji Zabeli in the Municipality of Gllogoc/Glogovac, in front of the village mosque, R[redacted] A[redacted] the father-in-law of the defendant A[redacted] C[redacted] was shot four times from an assault rifle AK-47, mortally injuring him. He died on the spot. Upon a search of the residence of the defendant later that day an assault rifle type AK-47 was found, for which he had no authorization.

On the same day the defendants A[redacted] C[redacted] and R[redacted] O[redacted] were arrested; detention on remand was ordered against them. Defendant C[redacted] has been in detention ever since; his detention was last extended upon the announcement of the first instance judgment on 9 September 2014 by ruling of the Basic Court of Prishtinë/Priština until the judgment becomes final. (R[redacted] O[redacted] was released on 14 June 2014.)

On 24 May 2009 the police filed criminal report no. 2009-AG-0424 with the Prishtinë/Priština District Prosecution Office.

The ruling to initiate investigations against both defendants PP. 465-6/2009 is dated 26 May 2009.

On 13 August 2009 the prosecution filed Indictment PP. No. 465-6/2009, charging A[redacted] C[redacted] with the criminal offences as described above and R[redacted] O[redacted] with giving assistance to commission of the criminal offence of Aggravated Murder.

On 5 October 2009 the District Court Prishtinë/Priština confirmed the Indictment. In 2011 the main trial started before a panel composed of local judges.

However, due to fact that the case did not progress satisfactorily, on 8 October 2013, upon the request of the family of at that time defendant O[redacted] with decision 2013.OPEJ.0198-002 the case was assigned to EULEX judges.

The main trial before a panel of the Basic Court of Prishtinë/Priština composed of two EULEX judges and one local judge was held on 15, 18 November 2013, 11 December 2013, 17, 21, 23 January, 13 February, 7 March, 11 April, 2 July and 5 September 2014. The judgment was announced on 9 September 2014.

By judgment P.-Kr. No. 383/2009, dated 9 September 2014, the defendant A[redacted] C[redacted] was found guilty of having committed the criminal offences of Aggravated Murder under Article 147 item 9 of the CCK and Unauthorized Possession of Weapons under Article 374 paragraph 1 of the CCRK. For the erstwhile offence he was sentenced to a period of twenty-five (25) years of long-term imprisonment and for the second offence to two (2) years of imprisonment with an aggregate punishment of twenty-five (25) years of imprisonment.

Defendant R[redacted] O[redacted] was acquitted.

The court also ordered the confiscation and destruction of the automatic firearm type AK-47, with the serial no. 09809-84 and the crediting of the period of detention on remand from 22 May 2009 to 9 September 2014 for A[redacted] C[redacted]

Defendant [redacted] was ordered to bear the costs of the proceedings in an amount of 100 Euro.

Upon appeals filed on 27 October 2014 by Defence Counsel D[redacted]n behalf of the defendant A[redacted] C[redacted] and on 24 October 2014 by the prosecution the Court of Appeals held a session on 10 June 2015 and deliberated and voted on the 12 June 2015. In its Judgment PAKR. No. 547/2014, dated 12 June 2015, the appeals were rejected as unfounded and the contested judgment of the Basic Court of Prishtinë/Priština was affirmed.

On 4 September 2015 Defence Counsel Destan Rukiqi on behalf of the defendant A[redacted] C[redacted] filed an appeal against the aforementioned judgment of the Court of Appeals.

On 28 September 2015 the Office of the Chief State Prosecutor filed its Motion on the Appeal, proposing to reject it as unfounded.

II. Motions of the Parties

1. The Appeal filed by the defence counsel on behalf of the defendant A[redacted] C[redacted]

The Defence Counsel challenges the Judgment of the Court of Appeals, which affirmed the Judgment of the Basic Court of Prishtinë/Priština P.-Kr. 383/2009 of 9 September 2014, on the grounds of substantial violations of the provisions of criminal procedure, erroneous and incomplete determination of the factual situation, violations of the criminal law and of a wrongful decision on criminal sanctions.

In particular the Appeal claims that the judgment exceeds the scope of the charges where it qualifies the defendant's motives for killing the victim as unscrupulous revenge and other base motives. The late victim had been hostile to the defendant, his sisters and other family members for a long time. He had interfered in his marital and family life.
The Indictment had only charged the defendant C[redacted] with depriving R[redacted] A[redacted] ut of unscrupulous revenge. By adding other base motives the contested Judgment exceeded the scope of the indictment.

The Judgment was not drawn up in accordance with Article 370 of the CPC. It is lacking the date of its drafting; the enacting clause is lacking the description of the motives why A[redacted] C[redacted] deprived the victim of his life and also the description of the objective and subjective elements of the offence of Unauthorized Ownership, Control or Possession of Weapons in violation of Article 374 paragraph 1 of the CCRK.

The Judgment lacks justification for the individual sanctions imposed for each of the criminal offences and for the determination of the aggregate punishment. It did not evaluate all aggravating and mitigating circumstances. In particular it failed to consider the emotional state of the defendant according to the psychiatric expert report, his family status, the recent death of his mother and father, his under-aged children, the long time spent in detention and the significant delay in the progress of the criminal proceedings.

The Judgment is unclear, the enacting clause is contradictory in itself and with the reasoning. The enacting clause mentions that A[redacted] C[redacted] committed the described offences in co-perpetration while nothing is said anywhere about the alleged co-perpetrators.

The enacting clause only describes objective elements of the criminal offence of Murder while there is no mention made about the subjective elements required by Article 147 item 9 of the CCK. In the reasoning, however, the Judgment concludes that the act was committed out of unscrupulous revenge and other base motives.

The Appeal claims that the factual findings of the court only support a conviction for Murder pursuant to Article 146 of the CCK.

The Defence Counsel claims that the long lasting interference of the late R[redacted] A[redacted] in the family life of the defendant C[redacted] his pressure on him and on his wife, his constant disputes with him and his lasting hostile relations to the defendant provided the basis for the defendant's emotional instability and his reduced tolerance that led to the murder.

In case the court finds that the victim was deprived of his life for revenge over the bad relations between the defendant and the late victim, this at least does not fulfil the criterion of "unscrupulousness".

The court was not authorized to determine "*an aggregate punishment of 25 (twenty-five) years of imprisonment*" since Article 71 paragraph 2 subparagraph 1 of the CCK imposes as rule that "*If the court has pronounced a punishment of long-term imprisonment for one of the criminal offences, it shall impose this punishment only*".

In addition, pursuant to Article 38 paragraph 1 of the CCK, an imprisonment sentence cannot be imposed for a period shorter than fifteen days and longer than twenty years.

In relation to the conviction for the criminal offence of Unauthorized Ownership, Control or Possession of Weapons in violation of Article 374 paragraph 1 of the CCRK, the defence submits that this offence is included in the Law on Amnesty and that the respective charge should be dismissed.

The Appeal proposes to modify the challenged Judgment, requalify the criminal act as Murder pursuant to Article 146 of the CCK and impose a more lenient punishment in relation to the criminal act, to dismiss the charge for the offence of Unauthorized Ownership, Control or Possession of Weapons in violation of Article 374 paragraph 1 of the CCRK, or, alternatively, annul the challenged judgments and return the case for retrial and decision.

2. The Response of the Chief State Prosecutor

The OSPK considers the Appeal of the Defence Counsel as unfounded. There are no violations of the provisions of criminal procedure or violations of the criminal law; the factual situation was fully and properly established. The punishment imposed reflects the gravity of the criminal offence, intensity, danger and personal characteristics of the accused, the circumstances and manner of commission of the criminal offence as well as aggravating and mitigating circumstances.

The enacting clause and the entire judgment are internally consistent and do not exceed the charges in the indictment.

The OSPK proposes to reject the Appeal as unfounded.

III. Findings of the Supreme Court

The Appeal is timely filed, admissible and partially well-founded.

1. Admissibility

Based on the *mutatis mutandis* application of Article 430 paragraph 1 subparagraph 1 of the KCCP, the Panel finds the defendant's Appeal admissible.

The court of first instance in its judgment P.-Kr. No. 383/2009, dated 9 September 2014, had sentenced the defendant A[redacted]C[redacted]o long-term imprisonment for a period of 25 (twenty five) years for the criminal offence of Aggravated Murder and the Court of Appeals in the appealed Judgement PAKR. No. 547/2014, dated 12 June 2015, had affirmed this judgment, by which long-term imprisonment was imposed.

The court of first instance with the long-term imprisonment imposed for the criminal offence of Aggravated Murder a type of punishment that does not exist anymore in the new criminal code, the CCRK. The old criminal procedure code, the KCCP, provided in Article 430 paragraph 1 subparagraph 1 of the KCCP for the case that this type of punishment was imposed or affirmed by a court of second instance the procedural guarantee of an additional regular legal remedy instance - the possibility to lodge an appeal against the judgment of the court of second instance.

The new CPC in Article 407 paragraph 1 of the CPC permits appeals against a judgment of the Court of Appeals only in the cases

> *"...if the Court of Appeals has modified a judgment of acquittal by the Basic Court and rendered instead a judgment of conviction or when the judgment of the Basic Court or Court of Appeals has imposed a sentence of life-long imprisonment."*

Both previous instances correctly applied the new procedural code, the CPC, which does not contain a provision explicitly permitting an appeal against a judgment of a court of second instance for the case that a sentence of long-term imprisonment was imposed or affirmed.

Based on the Right to Legal Remedies and the Principle of Legality, as contained in Articles 32 and 33 paragraph 4 of the Constitution of Kosovo as well as Article 7 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth ECHR), the Panel finds that an *ex post facto* change in the procedural law, which happened after the commission of the criminal offence, cannot deprive the defendant of a procedural guarantee contained in the procedural law in force at the time of the commission of the criminal offence.

The KCCP was drafted to perfectly correspond with the CCK in force at the same time. The application of the transitional provisions in the new procedural code, which prescribe the application of the CPC for cases when an offence was committed before the new CCRK came into force and had to be punished according to the old material law (CCK), can lead to situations where the correspondence of the procedural with the material law is imperfect like in the current case. The new material criminal law that came into force at the same time as the new procedural law does not recognise the type of punishment of long-term imprisonment anymore. (It introduced the new category of life-long imprisonment as the most severe form of punishment instead.) The new procedural law does not have provisions related to the category of long-term imprisonment anymore. It permits appeals against a judgment of the Court of Appeals only in the circumstances described in Article 407 paragraph 1 of the CPC, as quoted above.

Since a strict literal application of the new procedural code provisions would lead to a retroactive deprivation of the procedural guarantee of an additional review instance that were provided by the law at the time of the commission of the criminal offence, the Supreme Court of Kosovo determines that in order to avoid such an *ex post facto* change of the law to the disadvantage of the defendant the respective provision of Article 430 paragraph 1 subparagraph 1 of the KCCP has to be applied *mutatis mutandis* for cases in which long-term imprisonment was imposed or affirmed by the court of second instance.

2. The Merits of the Appeal

Pursuant to Article 394 paragraph 1 of the CPC the Supreme Court had to review the parts of the contested judgment that were challenged by the Appeal and to determine if any violations enumerated in subparagraphs 1.1. to 1.4. existed.

a. Erroneous or incomplete determination of the factual situation

The Panel finds that the contested Judgment failed to determine that the defendant deprived the victim R[redacted] A[redacted] out of unscrupulous revenge or other base motives. Without determining that that these elements of *mens rea existed,* the act of killing the victim cannot be qualified as Aggravated Murder pursuant to Article 147 paragraph 1 item 9 of the CCK. The trial panel's findings are sufficient to classify the committed criminal offence as Murder in violation of Article 146 of the CCK[4]. The Supreme Court, pursuant to Article 403 paragraph 1 of the CPC, has rectified the shortcoming and modified the challenged Judgment accordingly.

The Appeal claims that the late victim had been hostile towards the defendant, that he had constantly interfered in the relation to his wife and his family life and that he had been the main reason for the separation from the defendant's wife – a claim that the defendant had already made in his previous statements during the investigation and the main trial.

The Supreme Court notes that the contested Judgment of the Basic Court in the enacting clause makes no mention of any motives or qualified subjective elements of the accused. It

[4] Partially Dissenting Opinion of Judge Elka Filcheva-Ermenkova on that subject matter attached to this judgment.

only formulates that the defendant "intentionally used the AK-47" and that he deprived the victim of his life "with a direct intent".

The contested Judgment in the reasoning concluded that the defendant's motive for the killing had been unscrupulous revenge and low motives (para.86, page 37). It argued that:

> *"The defendant killed the father of his wife because the victim was supporting his daughter. In the mind of the defendant the victim was the main cause he was separated from his wife. In the other hand, the evidence of the case show clearly that the victim had never done any harm whatsoever to the defendant. The low motive of the defendant is showed clearly in the SMS text message that he sent to his wife immediately after the murder."*

The Court of Appeals in its judgment affirmed these findings by elaborating (bottom paragraph on page 11):

> *"The Panel observes, from the own admission of the defence counsel in his appeal, that Afrim CURRI deprived the victim R[redacted] A[redacted] of his life "for revenge" because of their hostile relations and because he was holding his father-in-law responsible for ruining his relationship with his wife. The Appellate Court concurs with the trial panel's opinion that depriving the victim of his life for these reasons constitutes an extreme, widely disproportionate and irreversible reaction, characterizing the unscrupulousness of the crime. This is further confirmed by the demeaning cold blooded SMS A[redacted] C[redacted] sent to Q[redacted] A[redacted] immediately after the crime."*

In order to qualify the act of killing the victim as Aggravated Murder pursuant to Article 147 paragraph 1 item 9 of the CCK it was required to identify the qualifying subjective elements of unscrupulous revenge and/or other low motives.

It is in general accepted in commentaries on provisions in other criminal laws with identical formulations as Article 147 paragraph 1 item 9 of the CCK that revenge itself, namely harming back for harm inflicted, i.e. inflicting harm because of the suffered harm, as motive for murder does not suffice in order for the criminal act to assume the qualified form. Only a murder committed out of unscrupulous revenge is an aggravated murder.

In order for the murder to be committed out of unscrupulous revenge, there needs to be a significant disproportion between the murder and the harm, which by murder is being avenged. A suitable motive for revenge, and for unscrupulous revenge by murder, may not only be a previously committed criminal act or a real harm done but can also be an action merely perceived as harmful by the perpetrator[5].

The burden of proof for the qualifying subjective elements lies with the prosecution.

The defendant had claimed already during the main trial that R[redacted] A[redacted]had been actively hostile, had constantly interfered in his family life and that he had been responsible for the failure of the defendant's marriage – a claim that is repeated in the Appeal.

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[5] Compare: Paragraph 7 of the Commentary on Article 47 of the Criminal Code of Serbia, SRZENTIC, Nikola,STAJIC, dr. Aleksandar, KRAUS dr. BOZIDAR, LAZAREVIC, dr. Ljubisa, DJORDJEVIC, dr. Miroslav, 1981 "SAVREMENA ADMINISTRACIJA", Belgrade

The Basic Court found the statement of A[redacted] C[redacted] "*generally credible*", with the exception of the part of his statement "*...when he attempts to depict the victim as the source of his problems and the divorce with his wife. This is contradicted by the statements of Q[redacted] and the statement of the imam O[redacted]*"

The reasoning of Basic Court Judgment does not evaluate the motives for the killing in any more detail.

The Panel finds that Appeal Court in the contested Judgment has failed to present and justify the facts which would indicate beyond reasonable doubt that there was a significant disproportion between the murder and the harm done to the defendant or perceived to be done to him by the late victim. The defendant A[redacted] C[redacted] clearly perceived the late R[redacted] A[redacted] as the main cause for his dysfunctional marriage. He felt that over a long period of time the late R[redacted] A[redacted] was in a hostile way interfering in his family and the relation to his wife. His perception was that the victim had convinced his daughter to leave defendant and the children and not to return to him, even after he asked her to do so.

Irrespective from the question if the late R[redacted] A[redacted] had indeed actively caused the harm, it is clear that the defendant perceived him to have done so. This was not contradicted by any evidence. The witness O[redacted] M[redacted] only testified that both, the accused and the late victim, R[redacted] had contributed to the reconciliation attempts. The conclusion drawn by the Basic Court, and accepted by the Court of Appeals, that (para. 46, page 24): "*This testimony shows that the victim R[redacted] A[redacted] was not an obstacle to (a) stable relationship between Q[redacted] and A[redacted]*" goes beyond the content of the witnesses' testimony. The witness did not make a statement concerning any influence the late victim could have had on the relationship between defendant and his former wife.

The defendant's perception that the late victim by influencing his daughter to break the marriage and leave her husband and children had done a severe and irreparable harm to him is therefore – in lack of any contrary convincing evidence - to be accepted.

According to the Commentary on Article 47 of the Criminal Code of Serbia[6], base motives as qualifying subjective elements for Aggravated Murder are those that are ethically unworthy, in severe contradiction to socially accepted moral views and deserving particular condemnation.
Although the challenged Judgment in para. 86 on page 37 mentions a "low motive" it fails to elaborate on that.

The defendant undisputedly killed the victim for revenge. However, he did so in reaction to a perceived great harm inflicted on him and his family by the late victim. The findings of the trial court do not support the existence of the motive of unscrupulous revenge or other base motives. Consequently, in absence of the qualifying subjective elements, the criminal offence of killing the victim had to be classified as Murder in violation of Article 146 of the CCK.

[6] Ibid.

b. Substantial violations of the provisions of criminal procedure

The Supreme Court finds that the contested Judgment does not contain any substantial violations of the provisions of criminal procedure.

The Appeal claims that the challenged Judgment exceeded the scope of the Indictment in relation to the conviction for committing Aggravated Murder out of base motives.
As result of the legal qualification of the criminal offence these allegations have become obsolete.

The same applies for the claim that the enacting clause lacks a factual description of the defendant's motives.

In regard to the argument that the Judgment was not drawn up in accordance with Article 370 of the CPC because it is lacking the date of its drafting, the Panel fully concurs with the reasoning of the Appellate Court. The absence of the date of drawing it up is a very minor deficiency in the form of the written judgment pursuant to Article 371 paragraph 1 of the CPC. It is not suited to cause any disadvantage to the defendant.

The defence also repeats the argument already raised in the appeal against the first instance judgment that the enacting clause wrongfully mentions offences perpetrated "in co-perpetration". Also here the Supreme Court in absence of any such statement in the enacting clause fully follows the reasoning of the Court of Appeals. The enacting clause mentions that the defendant committed the two offences "in concurrence." The Panel refers to Article 71 of the CCK and 80 of the CCRK.

c. Violations of the criminal law

In relation to the conviction for the criminal offence of Unauthorized Ownership, Control or Possession of Weapons in violation of Article 374 paragraph 1 of the CCRK, the defence submits that this offence is included in the Law on Amnesty and that the respective charge should be dismissed.

The Panel follows the argument of the defence and pursuant to Article 402 paragraph 2 in conjunction with Article 358 subparagraph 1.3. of the CPC has dismissed the charge.

Although the Indictment charged the defendant with the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons in violation of Article 328 paragraph 2 of the CCK, the Basic Court classified the offence as Unauthorized Possession of Weapons under Article 374 paragraph 1 of the CCRK without explaining the *ratio* in the reasoning.

The LAW NO. 04/L-209 ON AMNESTY lists both offences in Article 3 (Subparagraphs 1.1.10. and 1.2.5.) as exempted from criminal prosecution and execution of punishment.

Article 4 subparagraph 1.3. of the Law on Amnesty stipulates that:

> *"Amnesty from (for) any criminal offence within this law will not apply for ... criminal offense that resulted in grievous bodily injury or death."*

In order to determine if an offence "resulted" in any of the described severe results, the Panel had to apply a simple causal criterion: Was the action of the perpetrator *conditio sine qua non* for the result – the death of the victim?

The initial legal qualification in the Indictment included amongst others the factual alternative of "Use" of the weapon while the legal classification applied by the trial court does not incorporate this factual alternative. The contested Judgment, although in the factual description of the enacting clause it describes that defendant "*...intentionally used the AK-47* ..." it later clearly qualifies the offence as "Unauthorized Possession" only.

The Court of Appeals, upon appeals filed by the Stat Prosecutor and by the defence, failed to change the legal qualification of the respective criminal offence.

At the current procedural stage the Panel, in application of the restriction of *reformatio in peius* (Article 407 paragraph 2 in conjunction with Article 395 *mutatis mutandis* of the CPC), is bound by the aforementioned legal qualification.

The mere action of possessing the weapon has not caused the death of the victim R[redacted]. Therefore, the criminal offence in question is covered by Article 3 subparagraphs 1.1.10. of the Law on Amnesty. The exemption of Article 4 subparagraph 1.3. of the Law on Amnesty does not apply.

d. <u>The decision on criminal sanctions</u>

In determining the criminal sanctions for the offence of Murder in violation of Article 146 of the CCK the Court took into consideration the following aggravating circumstances:

The killing was committed at the middle of the day, in a public square in front of the village mosque and in front of many other persons. Also the text message written in a very derogatory language sent to the daughter of the late victim the defendant's former wife was considered.

In favour of the accused the Court took into consideration that he had reported to the police short after the commission of the offence and that he had cooperated with the prosecution and the court during the proceedings. The Court also found mitigating factors in the personal situation of the defendant. He is the father minor-aged children who were under his custody since the moment when his wife decided to live separately. He had to take care not only about them, but also for his paralysed father who required permanent care of a third person. These elements indicate positive elements of his personality which cannot be ignored while deciding upon punishment.

Starting from the punishment frame between five (5) and twenty (20) years of imprisonment determined by Article 146 in conjunction with Article 38 paragraph 1 of the CCK, the Panel determined that a punishment of seventeen (17) years is proportionate to the gravity of the criminal offence, the aggravating and mitigating circumstances, the defendant's behaviour after committing the offence and to his personal conditions.

Pursuant to the Article 73 paragraph 1 of the CCK the time served by A[redacted] C[redacted] in detention on remand has to be included into the punishment of imprisonment imposed against him.

Based on the aforementioned reasons, pursuant to Article 430 paragraph 1 subparagraph 1 of the KCCP *mutatis mutandis*, in conjunction with Article 407 paragraph 2, 403 subparagraph 1.2 of the CPC, the Supreme Court of Kosovo decided as in the enacting clause.

Drawn up on 9 December 2015 in English.

Members of the panel:

Gyltene Sylejmani
Supreme Court Judge

Anna Adamska-Gallant
EULEX Judge

Presiding Judge

Elka Filcheva-Ermenkova
EULEX Judge
(partially dissenting opinion, attached to this judgement)

Recording Officer

Holger Engelmann
EULEX Legal Officer

SUPREME COURT OF KOSOVO
PAII.-KŽII. No. 5/2015
26 October 2015
Pristina

Partially dissenting opinion of Judge Elka Filcheva-Ermenkova, presiding and reporting, with regard to the requalification of the crime of aggravated murder out of unscrupulous revenge into a murder:

1. I disagree with the opinion of the majority of the Panel that the crime had to be requalified from aggravated murder executed out of unscrupulous revenge under art. 147 (1.9) into a murder out of revenge under article 146.
2. The starting point to explain the divergent views on how the crime had to be qualified must be the description of the different factual circumstances of the two different crimes, both of them murders.
3. The basic qualification of a murder is given by the lawmaker in art. 146 CCK (the material criminal code). There is no need of describing what are the objective and subjective elements of that one. There is no need either to explain that a murder because of revenge may be qualified under the basic hypothesis of art. 146. The qualified murder under article 147 (1.9) the law maker defined as murder executed out of unscrupulous revenge. It is basic principle that the words used by the law have to be understood by their usual meaning unless there is a specific meaning given by the law itself. In the material criminal law the word "unscrupulous" bears the same meaning as in everyday life, it is an adjective meaning having or showing no moral principles, not honest or fair. Some synonyms of the adjective unscrupulous would be immoral, unethical, shameless, etc. The list can be very long. In that linguistic context it turns useful to find an explanation to the question when revenge would not be unscrupulous, or immoral, or unethical, or shameless. The logical answer would be when the revenger had a good reason to retaliate, to hit back. For example when the victim of the murder was the one who first threatened the physical integrity of the murderer or his/her closed ones or for a very long time harassed or tortured the murderer to be or created impossible living conditions for the latter. In the case at hand the defense claims that the victim, the father of the defendant's ex-wife constantly interfered in the life of the married couple and was the sole reason for the ex-wife not to come back to her husband and this is presented as good enough reason to qualify the murder of the victim as a revenge which is by no means executed out of unscrupulous reason.
4. For that reason it was important to assess first, whether or not the victim was in any way exercising any kind of harassment or torture (of any nature- physical or psychological towards the defendant or any of his close ones – such as his sisters and parents); second, whether the victim was the one preventing his daughter from having a normal marital life with her husband (the defendant) and third, whether either the first or the second would justify a just revenge in the form of a murder. Otherwise, if they would not, than the murder would be easily qualified as one executed out of unscrupulous revenge. Meaning that the defendant could not in any way accept the fact that his wife does not want to live with him anymore and in order to "punish" her and/or her father he decided to kill the latter and this is obviously immoral, unethical, shameless or unscrupulous.

5. In that regard we need to go back to the facts of the case, which were established as following:

6. The relations between the defendant Mr A[redacted] C[redacted] and his father-in-law, the late R[redacted] A[redacted] were tainted by genuine hostility, resulting from the poor state of the defendant's marital life with the daughter of the victim, namely Ms Q[redacted] A[redacted] It is not disputed that Q[redacted] A[redacted] and her husband, the defendant C[redacted] were in a state of affairs remotely from healthy and happy marriage. On the contrary, their marital life was tarnished by constant disputes and sporadically physical violence, exercised from the husband onto his wife. For that the defendant gives his own account. In his own words, he was detained, because of "his wife" and this was unjust because she did not get hurt because of the "two slaps" he gave her, but because she jumped out of a window. The history of the couple splitting in the past and then reuniting and then splitting again is not disputed either. It is known that Q[redacted] A[redacted] left her husband once, after a while she reunited with him under the roof of his family home and later on she left again.

7. In this state of affairs, the late R[redacted] A[redacted] supported the decision taken by his daughter and did not compel her to reunite with her husband unless she decided this herself. In addition to that on some occasions R[redacted] A[redacted] demonstrated unfriendliness close to pure hostility towards the family of the defendant. For example the sisters of the defendant, namely A[redacted] and M[redacted] C[redacted] both testify that on different occasions the late A[redacted] did not behave in a nice and dignified manner with either of them. He would come at their family home (C[redacted] family home) and would use derogatory language, implying to one or the other sister that either should leave this home and thus make more space for the wife of A[redacted] his own daughter. However it was never established that the hostility went beyond words spoken on some rare occasions.

8. It is known that the disputes between A[redacted] and Q[redacted] which grew into a dispute between the extended families of A[redacted] and C[redacted] compelled the defendant to seek assistance from a mediator, a local imam, who testified in front of the Basic Court. The witness claimed that a reconciliation was achieved at certain moment, but obviously after that the families as a reflection of the disputes between their married adult children fell apart again. The mediator testified that neither the late A[redacted] nor the defendant were dangerous persons. The clarification was requested following a claim made by the defendant that he was wearing an AK 47 when he went to meet B[redacted] because the latter was a "dangerous person", who was always wearing a gun. The claim remained completely unsubstantiated. It was never established that the late A[redacted] was wearing a gun on any occasion.

9. To give a full picture of the malevolent attitudes in place the Court points out that the two minor children of the couple remained with their father, the defendant C[redacted] and are taken care of by their aunts (the sisters of the defendant). It is established that Q[redacted] A[redacted] did not ask for the custody of the children. In her account, she did so because she had no opportunity to take care of the children and in the account of the defendant, she did so because she was a bad mother. Those particular words were never explicitly used, but the concept was undoubtedly implied by the defendant and

his sisters, who testified in the process. However, the real reason for Q[redacted] A[redacted] not to request the custody over the children does not in any way reflect the nature of the crime and it is only mentioned because the defense was very particular in both instances of the court proceedings to underline the motherly qualities or the absence of these in the ex-wife of the defendant. Whatever qualities she has or does not have none of this changes the fact that the defendant killed her father and none of this justifies revenge, because whether she was a good or a bad mother could not be a "just" reason to retaliate against the life of her father.

10. It is not questionable that as a result of this hostile atmosphere of mutual distrust, anger and resentment the defendant felt angry, overly nervous, frustrated, in general overwhelmed by negative emotions. For some reason he believed, or at least he alleges he believed, that if not for his father in law, his wife Q[redacted] would come back to him and they would happily live together. He was convinced that it is the late R[redacted] A[redacted] who is the only cause for their unhappy marriage. He reiterated on several occasions that his wife was under the total influence of her father and had no free will on her own on this account. In addition the defendant is sincere in his belief that he never did any harm to his wife. He also claimed in front of the Basic Court (in his defense) that his late father-in-law wanted to marry his daughter to a richer man in order to pay off his debt. This claim was never supported by any evidence.
11. As mentioned above there is no evidence in the file that the late R[redacted] A[redacted] ever assaulted physically either the defendant or any of his extended family members. Apart from the account given by the C[redacted] sisters that he "invited" them to leave more space for his daughter in the house, there is no evidence that he was overly offensive, intrusive or aggressive in that matter (see para 7 *supra*).
12. In this factual state of affairs, the defendant on his account in bright daylight, took his AK-47 and went in the middle of the day, in front of the mosque and shot his father in-law. It is a mere coincidence that no one else got hurt, just because other people have not yet come out of the mosque.
13. It turns out that the defendant in response to the harm he believed (or at least he claimed he believed) his father-in-law caused him by supporting his own daughter; the defendant retaliated (to his ex-wife and/or her father) by shooting to kill.
14. And here we come back to the point of comparing a murder of revenge and a murder out of unscrupulous revenge, the second being an aggravated murder, thus qualified hypothesis which would be more severely punished.
15. As mentioned already (paragraph 3), every time when the retaliations is caused by a real harm done (or a realistic perception of a real harm done) to the perpetrator and he retaliates in revenge, the element of unscrupulousness, immorality, etc. would not be present. For example: the victims tries to kill the accused/defendant, does not succeed, the second retaliates later and kills instead (later on, because if it is right on the spot and in the heat of the moment it may be a self-defense for example). Or, the victim kills or tries to kill or inflicts serious bodily harm or attempts to do so onto someone close to the accused and the latter retaliates. These are only examples; life has numerous possibilities which cannot be exhausted in an opinion of the court.

16. In the case at hand the defendant, perceiving a harm done to him by his farther in law (or claimed he believed a harm was done to him), retaliated by killing him.
17. First of all there is no evidence the father in law was the reason for the dissolution of the family of the defendant and second of all even if he would be overly supportive in the decision of his daughter not to come back to her husband, thus motivating her additionally, beyond her own will not to go back, this would not be a justifiable reason for a lethal retaliation.
18. In connection to that I need to point out that the understanding of the panel that there is no evidence for the "unscrupulous" revenge is a fallacy. Whether revenge is unscrupulous is a qualification which is made on the establishment or non-establishment of the positive fact of the harm inflicted by the victim on the defendant, which he on his account revenged.
19. **In the case at hand there is no evidence for the purported harm done by R[redacted] A[redacted] but the majority of the Panel considered as relevant that there was no evidence for the absence of that harm. The latter is a logical fallacy, because no one can present evidence for the absence of something.** With an indictment for aggravated murder for unscrupulous revenge the claim of the prosecution implies that there was no justifiable reason for revenge and that is why the murder is not simply a murder out of revenge but a murder out of unscrupulous revenge, which is a base motive (*per argumentum* by art 147(1.9). In the course of the proceedings there was no reason to believe that the prosecution is hiding some evidence that would lead to the conclusion that the late R[redacted] A[redacted] did cause a harm to his son in law, namely that he was the reason for the dissolution of the marriage and he was the reason for the poisoning of his family life in general. The prosecution did not present any such evidence because there was no such evidence in my opinion. On the other hand the defendant was represented by a highly qualified defense counsel who could request the collection of additional evidence which would prove the allegation for the intrusiveness and aggression of the late A[redacted] Instead, he claimed that there is no evidence for unscrupulous revenge, which implies there is evidence for the harm done by the victim, but this harm was never established.
20. In addition, even if purely hypothetically we accept that by supporting his daughter R[redacted] A[redacted] was the primary cause for the marital misfortune of the defendant this would not be a justifiable reason to kill (It is common knowledge that very often in-laws and sons and daughters-in-law do not get alone very well but they usually do not kill each other). Q[redacted] A[redacted] was not a minor and until proven otherwise, she was taking her own decisions and even when supported by her parents, it was still her decision to leave. So the revenge in the form of a killing the allegedly intrusive father-in-law is obviously highly disproportionate revenge. And this huge disproportionality alone gives enough reason to qualify the murder as unscrupulous (in addition to the fact that every unjust in moral sense revenge could be qualified as unscrupulous – see para 3 *supra*). The defendant obviously believes that his ex-wife is incapable of making her own decisions and she needs always to be guided by someone else, preferably her husband. He obviously does not accept the possibility that she may take her own decisions. The latter is not directly related to the criminal offence at hand but

demonstrates what the physiatrist and the psychologist in front of the Basic Court said, that he is egocentric person, which implies that he does not appreciate others' peoples wills and desires, but only his own, a behavior utterly unacceptable in a modern society.

For the above arguments I consider that the first and the second instance courts have given a proper qualification and the decision even though not elaborately reasoned had to be upheld entirely in the part where the crime was qualified as a murder out of unscrupulous revenge. As long as the qualification was changed in more lenient one it would be irrelevant to assess whether the punishment, imposed by the Basic Court on the basis of the premise that the murder was qualified, was properly determined.

Judge Elka Filcheva-Ermenkova

27 October 2015