SUPREME COURT OF KOSOVO
PKI-Kzz- 152/2012
Date: 23 July 2013

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in the panel composed by EULEX Judge Bertil Ahnborg as Presiding, Kosovo Judges Marije Ademi and Salih Toplica as members of the panel, in the presence of Adnan Isufi EULEX Legal Advisor, acting in capacity of a recording clerk, in the criminal case P.nr 01/2010 of the former District Court of Peje/Pec against the defendant:

B.K , father's name
, Municipality of Peje/Pec, Kosovo Albanian,

Indicted by the Indictment PP nr 185/2004 dated 15 September of the District Public Prosecutor's Office for having committed the criminal offences of *Murder* in violation of Article 30 par 2 and 3 of in violation of Article 30 par 2 and 3 of the Criminal Code of the Socialist Autonomous Province of Kosovo (hereafter "CC SAPK"), respectively Article 147 in conjunction with Article 23 of the Provisions Criminal Code of Kosovo (hereafter "PCCK"), *Attempted Murder*, in violation of Article 30 (2) of the CC SAPK and Article 19 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereafter "CC SFRY") , respectively Article 147 in conjunction with Articles 20 and 23 of the PCCK, *Creating General Danger*, in violation of Article 157 (1) of the CC SAPK, respectively Article 291 in conjunction with Article 23 of the PCCK, *Use of Unauthorised Weapons*, in violation of Regulation of United Nations Interim Administration Mission in Kosovo (UNMIK)2001/07, respectively Article 328 in conjunction with Article 23 of the PCCK, *Unauthorised Possession of Weapons*, in violation of Article 328 (1) and (3) of the PCCK,

Convicted on 19 September 2007 by the District Court of Peje/Pec (P nr 412/2006) as partly modified by Judgment of the Supreme Court of Kosovo on 12 January 2010 (Ap-Kz nr 153/2008) which was confirmed by Judgment of the Supreme Court of Kosovo (Api-Kzi nr 02/2010) dated 08 June 2012 for commission of the criminal offences of **Murder** in violation of Article 30 par 2 and 3 of the CC SAPK, **Attempted Murder** in violation of Article 30 par 2 of the CC SAPK, as read in conjunction with Article 19 of the CC SFRY, **Unlawful Possession of Weapons** in violation of UNMIK Reg 2001/07 and **Unlawful Possession of Weapons** in violation of Article 328 par 2 of the PCCK, and sentenced to twenty-seven (27) years of imprisonment,

Deciding upon the Request for Protection of Legality filed by Defence Counsel M.H. li, on behalf of the defendant B.K against the above mentioned Judgments,

After a session held on 23 July 2013, pursuant to Articles 451 and 454 and 455 of the Kosovo Criminal Code of Procedure (*hereafter "KCCP"*) issues the following:

JUDGMENT

The Request for Protection of Legality, filed by the Defence Counsel M H on behalf of the defendant B K against the Judgment of the District Court of Peje/Pec (P nr 412/2006) dated 19 September 2007, Judgment of the Supreme Court of Kosovo on 12 January 2010 (Ap-Kz nr 153/2008) and Judgment of the Supreme Court of Kosovo (Api-Kzi nr 02/2010) dated 08 June 2012, is rejected as **ungrounded.**

REASONING

I. Procedural background

On 24 November 2003, at around 08:00 hrs. a Kosovo Police Unit, composed of the three Officers S.T , I.H j and H.L was subject of an attack on a public road along the Decane/Decani-Peje/Pec highway.

One or more individuals who drove up beside them fired several rounds of ammunition into the vehicle of the victims and then speeded away. As a result, two police officers S.T and I.H were shot dead, whilst Kosovo Police Officer H.L sustained serious bodily injuries, but fortunately survived the attack.

On 6 April 2004, the investigations was formally initiated and conducted by the Office of International Public Prosecutors against several individuals in relation to this criminal incident.

On 21 September 2006, the indictment, dated the 15 September, was filed against B.K charging him for having allegedly committed in co-perpetration the criminal offences of Murder in violation of Article 30 par 2 and 3 of the CC SAPK; Attempted Murder, committed in co-perpetration, in violation of Article 30 par 2 of the CC SAPK, as read in conjunction with Article 19 of the CC SFRY; Creating General Danger, committed in complicity, in violation of Article 157 par 1 of the CC SAPK; Use of Unauthorised Weapons, in violation of UNMIK Reg 2001/07, committed in complicity, and Unlawful Possession of Weapons, in violation of UNMIK Reg 2001/07.

The main public trial started on 15 May 2007 and continued until 19 September 2007.

On 19 September 2007, upon conclusion of the main trial, the District Court of Peje/Pec by Judgment P nr 412/06 found the defendant I B.K guilty of of *Murder* of Kosovo Police Officers I.H and I H.L , in violation of Article 30 par 2 and 3 of the CC SAPK, *Attempted Murder* of Kosovo Police Officer H.L j in violation of Article 30 par 2 of the CC SAPK as read in conjunction with Article 19 of the CC SFRY, *Causing General Danger* in violation of Article 157 par 1 of the CC SFRY, *Use of Unauthorized Weapons* in violation of UNMIK Reg

2001/07, and *Unlawful Possession of Weapons* in violation of UNMIK Reg 2001/7, whereby convicting him to a term of imprisonment of 27 (twenty seven) years.

By Judgment Ap-Kz nr 153/08 of the Supreme Court of Kosovo dated 12 January 2010, the Count of Use of Unauthorized Weapons was modified into Unlawful Possession of Weapons; and the Count 3 was declared absorbed by Count 1, whereas the appealed judgment was confirmed in the remaining parts.

The said Judgment of the Supreme Court of Kosovo was appealed in third instance by the Defence Counsel of the defendant on 22 March 2010.

On 6 June 2012, the Supreme Court of Kosovo issued the Judgment Api-Kzz 2/2010 rejecting the appeal as unfounded.

On 28 September 2012, the Defence Counsel Mahmut Halimi filed a Request for Protection of Legality against the above mentioned judgments.

The Office of State Prosecutor (OSPK) in its opinion KLMP II nr 159/2012, dated 25 January 2013, referring to its previous opinion dated 31 March 2011 to be considered as an integral part of the current opinion, proposed the Supreme Court to reject the request as ungrounded and to affirm the appealed Judgments of the Supreme Court of Kosovo.

II. Supreme Court findings

In assessing the Request for Protection of Legality, the Supreme Court established the following:

a. The Request is admissible as it has been filed with the competent Court pursuant to Article 452 par 1 and within the deadline pursuant to Article 452 par 3 of the KCCP.

b. The Supreme Court decided after a session on deliberation and voting as prescribed by Article 454 of the KCCP. The parties' notification of this session was not required.

c. The Request for Protection of Legality is **ungrounded.**

The Judgments in this case have been challenged on the alleged ground of Essential Violation of the Provisions of the Criminal Procedure.

The Defence Counsel alleges a number of violations, most of them previously raised during the course of appellate proceedings with some slight modifications adopted against the Judgment rendered by the Supreme Court in the second instance.

The Supreme Court reviewed the challenged judgments pursuant to provisions of the KCCP and in line with legal opinion 23rd January 2013 of the General Session of the Supreme Court of the Republic of Kosovo held on 23 January 2013.

The Supreme Court of Kosovo finds that the appealed judgments rendered in previous instances do not warrant any *ex officio* intervention. Pursuant to Article 455 of KCCP, the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his Request for Protection of legality, accordingly.

III. Grounds of the request for protection of legality

1. The Defence Counsel argues of violation of the provisions of Articles 403 par 1, point 8 of the KCCP, because according to defense the challenged judgments are based on inadmissible evidence. The Defence Counsel submits that all the evidence collected by Police without an order from either the prosecutor or the investigating judge since the moment the crime occurred and until the Ruling on Initiation of Investigations against the suspect was issued, are inadmissible and in violation of the Article 151 par 1 and 3 and Article 162 par 4 of the Law on Criminal Procedure that was in force and applicable during the material time.

In evaluation of the issue, the Supreme Court of Kosovo respectfully disagrees with the Defence Counsel regarding the competence of the police authorities to conduct investigations and regarding the legality of the result deriving of the investigations.

In Kosovo, as in any other country, the Police uncontestably is a legitimate authority to respond whenever there is information that a crime has occurred. For that purpose, the Procedure Code in force at the material time, as well the KCCP which was applied at later stages of the procedure, set forth the rules that the police must observe when conducting the investigations in order to fulfill the aim of the investigation. That is, on one hand, to gather all the information which might be of use to effectively conduct the criminal proceedings, and in the other hand, to prevent any eventual abuse of the rights of the participants in the proceedings and/or to prevent possible misuse of the police authority.

Neither KCCP nor the Procedure Law in force at material time set any legal constraints to any of the parties to procedure to present evidence at any stage of the procedure provided that the evidence is relevant and introduced in compliance with rules governing administration of evidence.

In order to have the evidence admitted in a proceeding, the Court needs to consider the legal requirements for using the evidence. That is, if the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant; if the evidence is obtained and presented in compliance with the law; and whether the evidence presented is relevant.

In the case at hand, the Defence Counsel argues that simply because the police did not obtain an order from prosecutor or investigating judge the evidence collected by the police are *en block* inadmissible. There is no indication, and it

is not even argued by the Defence Counsel that the police has in any way misused its authority or has infringed the rights of the defendant during the course of the investigation.

In evaluation of the allegation, the panel finds that the police has appropriately carried out the duties and complied with provisions of the Procedure Code when collecting the evidence pertaining to this criminal incident.

Moreover, irrespective of the police conduct regarding the collation of evidence, it is important to stress that the Court did not base its judgment on the evidence that were collected by the police.

Evidently the judgment has been based on the evidence that have been appropriately administered and thoroughly assessed during the main trial.

On this specific issue, Article 157 (1) of KCCP provides:

" The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings".

It is clear that the provision of the law requires that the Defence Counsel and the defendant are given the opportunity to challenge such evidence during some stage of the criminal proceedings.

The inspection of the case file allows finding out that in the case at hand, the Defence Counsel and the defendant have been given ample of opportunities to challenge the evidence presented by the prosecution in the main trial proceedings.

Moreover, as matter of fact, same objections about admissibility were raised earlier by the Defence Counsel in the course of second and third instance proceedings. No new argument presented in the request for protection of legality could be found but those that have been previously been raised and appropriately addressed by the Court. The Defence Counsel basically confines in his argument to some merely technical aspects without any substantial argumentation. The Defence Counsel has not even tried to show in which way the investigation possibly could have affected the rights of the participants in the procedure.

Based on the case file documentation, no infringement of the defence rights guaranteed to the defendant under the applicable law could be detected in this case. Consequently, this panel finds the argument of the Defence Counsel without merit.

2. The Defence Counsel inclines that since there was no formal investigation initiated until entry into force of new Procedure Code, several witnesses'

statements[1] and other evidence - such as the Crime Scene Report dated 13 December 2003, the Autopsy Report dated 29 November 2003, DNA expert analysis dated 6 December 2003 and the Report on Surveillance dated 2 December 2003, that were secured by the Police during this period - are inadmissible. Further, the Defence Counsel argues that the Expert Report on Fingerprints dated 30 November 2003 should have been separated from the case file and a new fingerprints collection should have be ordered by the pre-trial judge.

The collection of evidence cannot be limited to the time when investigation is formally initiated against specific individual. While the procedure for collection of evidence usually starts - and must start - immediately after the incident and/or as soon as authorities have knowledge of the crime, the investigation against an individual can formally be initiated by the competent authority only when there is a "reasonable suspicion" that the person has committed a criminal offence which is prosecuted *ex officio*.

Even when there has not yet been a ruling to initiate an investigation, the evidence obtained by the Police can in principle be used, if it is relevant and secured in accordance with rules governing the evidence. The evidence may be excluded only when it was secured by force or coercion, or pressure, or intimidation etc. in violation of the law (*absolute impediments*), and when its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the Court, or by considerations of undue delay, or needless presentation of cumulative evidence as the fact to be proven is irrelevant or is proved by another evidence etc. that need to be assessed on case by case basis by the court (*relative impediments*). No such excluding circumstances exist in this case.

In the case at hand, the Supreme Court does not find any deficiency in the challenged judgment regarding the evaluation of the statements that would render the evidence - whose inadmissibility is sought - inadmissible. The Supreme Court therefore maintains that the statements of the witnesses as well as the other challenged evidences are admissible.

Irrespective that the argument is meritless, the fact that the Courts did not in fact even base the judgments on the evidence secured by the Police makes the defence's allegation purposeless. The Supreme Court is satisfied that the previous instance Courts have clearly and exhaustively stated the facts they considered proven or not proven, as well the grounds for this, and specifically

---

[1] Statements of I[redacted] B[redacted] dated 25 November 2003, J[redacted] F[redacted] dated 26 November 2003 and 10 December 2003, R[redacted] B[redacted] dated 26 November 2003, N[redacted] A[redacted] dated 29 November 2003, B[redacted] P[redacted] dated 23 November 2003 and 10 February 2004, H[redacted] A[redacted] dated 24 November 2003 and 13 January 2004, I[redacted] J[redacted] dated 26 November 2003, S[redacted] Z[redacted] ted 6 February 2004, R[redacted] S[redacted] (witness "B") dated 4 December 2003 and 14 January 2004, Anonymous Witness "A" Statements, dated 20 November 2003, 4 December 2003 and 19 December 2003, S[redacted] F[redacted] statements dated 3 December 2003, 11 December 2003, 22 December 2003 and 9 December 2004, A[redacted] H[redacted] dated 24 November 2003, V[redacted] H[redacted] dated 24 November 2003, N[redacted] L[redacted] dated 17 December 2003, [redacted] B[redacted] dated 19 December 2003, A[redacted] K[redacted] dated 25 November 2003 and 22 December 2003.

indicated the evidence relied upon by the courts when rendering the judgments. Any addition to that reasoning is simply superfluous.

With specific reference to Autopsy Report - contrary to what asserted by the Defence Counsel - the Autopsy was in fact ordered by the investigating judge Osman Cucoviq. Concerning the defence's allegation for new fingerprints collection, given that the Expert Report on Fingerprints dated 30 November 2003 would have been inadmissible, the panel considers the argument ungrounded. The Defence Counsel does not argue of any deficiency in the expert report nor gives explanation why a new fingerprints collection was necessary.

This panel finds that- contrary to what the Defence Counsel inserted- when an expert report is clear, and does not substantially contradict with other evidence and provides sufficiently explanation on core issues, any contestation is not only erroneous but also futile because it risks causing more confusion than clarity.

Therefore, the Supreme Court finds that the argument of the Defence Counsel regarding new fingerprints collection is ungrounded.

3. The Defence Counsel claims that the statement of witness "A" which the court has relied upon is secured in violation of Article 156 par 2 of the KCCP and that the Court has wrongly established as if the Defence Counsel had given the consent that the statement of witness "A" is read in as evidence. The Defence Counsel argues that the consent of the Defence Counsel (who was acting during the main trial) is irrelevant when the evidence was secured in violation of the procedure rules. Otherwise, the Defence Counsel argues, in such occasion, the actions of the lawyer that clearly violate the rights of the defendant whom he represents, fulfill the criteria for disqualification by application of Article 75 par 4 of the KCCP.

In evaluation of this point, this panel respectfully concedes with previous instance's Courts that the provisions of the Procedure Code allow for the Court to decide not to examine the witnesses if the parties so agree.

If the parties agree that the direct examination is not necessary, irrespective of the reasons the parties to the procedure might have, the Court may decide to read in the records as evidence the statement of previous examination.

It does not however prevent parties from submitting proposals etc. The parties to the procedure may during whole time of the procedure submit any motions or proposals that are relevant for supplementing the evidentiary proceedings.

Exceptionally, also the Court may *ex officio* propose for collection of certain evidence if it is deemed appropriate and necessary. If no motions for supplementing the evidentiary proceedings are made or if such motion has been made and denied, and the Court finds that the case has been clarified,

The Presiding Judge shall announce that the evidentiary proceedings are concluded in accordance to Article 374 of KCCP.

In the case at hand, the parties agreed to have the statement of witness "A" read in as evidence. Consequently the Court refrained from the examination of witness "A" based on the fact that the parties had no objections and agreed to have it read. In the case file, there is no evidence what so over that the Defence Counsel or the defendant had any objections against this at any stage of the main trial. In addition, there is no evidence to be found in the case file, and it is not even argued by any of the parties, that the evidence was secured by force or coercion, or pressure, or intimidation etc. in violation of the law (*absolute impediments*).

The Defence Counsel attributes the failure to have witness "A" heard at the Court, merely to the lack of professionalism of the previously assigned defense counsel who, according to the Defence Council, did not effectively provide legal assistance for the defendant.

Addressing the alleged infringement of the right to an effective legal assistance, due to the fact that the (former) Defence Council consented to read in as evidence the statement of witness "A", this panel finds it crucial to stress that it is not up to the Court to examine or evaluate the strategy, either of the defense or the prosecution.

The court is required to ensure that a party is effectively represented and is given the possibility to appoint a Defence Counsel of his own choice that can represent him/her with skill and expertise that satisfies the objective standard of reasonably effective assistance of a Defence Counsel. Only on exceptional circumstances a Defence Counsel may be disqualified.

In this particular case, the specific circumstances required for the disqualification of a Defence Counsel are obviously not present. Therefore, no infringement of the defence rights guaranteed to the defendant under the applicable law could be detected in this case.

4. The Defence Counsel claims that there has been a violation of Article 154 par 4 of the KCCP. It is pointed out in the request that Confirmation Judge on 15 December 2006 declared inadmissible certain evidence. A three judge panel of the District Court rejected the appeal against the ruling issued by the Confirmation Judge and granted a right of appeal to the Supreme Court of Kosovo. On 5 November 2007, the Supreme Court deciding on the appeal against the ruling of the three judge panel, rejected the appeal of the prosecutor and upheld the ruling of the Confirmation Judge. The Defence Counsel now points out that this ruling of the Supreme Court was rendered *after* the Judgment of the District Court of Peje/Pec, which is issued on 19 September 2007. The Defence Counsel claims that this is in violation of Article 387 par 1 of the KCCP which stipulates that the Court shall base its judgment only in facts and evidence administered during the main trial.

In addressing this point, this panel finds it crucial citing Article 431 of the KCCP, which stipulates the following:

(1) An appeal against a ruling of a pre-trial judge and against other rulings rendered in first instance may be filed by the parties and persons whose rights have been violated, unless an appeal is explicitly prohibited by the provisions of the present Code.
(2) No appeal shall be permitted against a ruling rendered by the three-judge panel in the pre-trial stage of the proceedings, unless otherwise provided for by the present Code.
(3) A ruling rendered in connection with the preparation of the main trial and judgment may only be challenged in an appeal against the judgment, unless otherwise provided for by the present Code.
(4) No appeal shall be permitted against a ruling rendered by the Supreme Court of Kosovo.

In the case at hand, based on this cited Article, the three judge panel ruling allowing an appeal against its ruling to the Supreme Court is not permitted under the law. However, granting the right to appeal in this case, simple represents an error in the procedure committed by the Court which does not amount to a substantial violation of the provisions of the Procedure Code. It is therefore not necessary to quash the Judgment and return the case to the first instance Court for re-consideration.

Furthermore, the review of the case file allows finding out that evidently it did not retroactively change the legal consequences (or status) of proceedings that existed before the enactment of the right to appeal. As matter of fact, the results of the Ruling of the Supreme Court confirmed the previous rulings of confirmation and of a three judges' panel.

Therefore, the flow of the procedure was not affected in any way to the detriment of the defendant.

5. The Defence Counsel argues violation of the provisions of the Criminal Procedure, respectively of the Article 154 par 4 of KCCP. According to the defence, the Court ruled that certain evidence, in particular the DNA Expertise, was admissible although such evidence was previously declared inadmissible by the Confirmation Judge.

In addressing this point, at outset it is worth stating that Article 154 par 6 of the KCCP provides that "*evidence which has been found by a ruling to be inadmissible may be found by a ruling at a later stage in the procedure to be admissible*".

This indicates that evidence may be subject of review of the Courts in different stages of the procedure. By same token, the ruling of the Confirmation Judge which pertain to the evidence may be subject of review by the trial panel and then in the appellate procedure. The fact that the judicial system is organized and functions according to the hierarchy principle, it goes without saying that

conclusion of the courts may differ. In circumstance of different outcomes, as is the case here, the ruling of the court higher in the hierarchy of the judicial system prevails.

The evidences that are ruled by a final judgment, in principle may not be subject of review to the detriment of the defendant. That is to ensure judicial certainty for the parties and for the purpose to avoid breach of double jeopardy principle that may be applicable also for appraisal of evidence.

However, this is not the case here due to the fact that the decision of the confirmation judge was not final for the proceedings as a whole. Therefore, the allegation of the Defence Counsel is ungrounded.

VI. Conclusion of the Supreme Court of Kosovo

For the reasons above, pursuant to Article 456 of KCCP, the Supreme Court of Kosovo decided as in the enacting clause.

SUPREME COURT OF KOSOVO
Pkl-Kzz 152/2012, 23 July 2013

Presiding Judge:

Bertil Ahnborg
EULEX Judge

Recording clerk:

Adnan Isufi
Legal Advisor

Members of the panel:

Marije Ademi,
Supreme Court Judge

Salih Toplica
Supreme Court Judge