

## COURT OF APPEALS

**Case number:** PAKR 46/13

**Date:** 28 March 2013

**THE COURT OF APPEALS OF KOSOVO** in the Panel composed of EULEX Judge Hajnalka Veronika Karpati as Presiding and Reporting Judge, and Judges Abdullah Ahmeti and Xhevdet Abazi as members of the Panel, with the participation of Beti Hohler, EULEX Legal Officer, acting as Recording Officer,

in the criminal proceeding against

**A. B.**, born on xxx in xxx son of B. and Rr. B., maiden name A, citizen of Kosovo, with primary school education, single, profession laborer, of average financial situation, with no previous convictions, in detention on remand since 21.10.2010;

in first instance found guilty of the criminal offence of *Murder* pursuant to Article 146 of the Criminal Code of Kosovo (CCK, in force until 01.01.2013) by Judgment no. P 87/11 dated 03.06.2011 of the District Court of Peja and sentenced to a term of imprisonment of 15 (fifteen) years and ordered to reimburse costs of the criminal proceedings in the amount of 800,00 EUR and the scheduled amount of 100,00 EUR;

***acting upon the Joint Appeal of Defence Counsel Haxhi Cekaj, Aziz Rexha and Gafur Elshani filed on 04.08.2011 against the Judgment of the District Court of Peja no. P 87/11 dated 03.06.2011,***

*having considered* the Response of the Appellate State Prosecutor of Kosovo no PPA 340/11 dated 22.09.2011, filed on 27.09.2011;

*after* having held a public session on 28.03.2013 in the presence of the accused, Defence Counsel Haxhi Cekaj, Aziz Rexha and Gafur Elshani; and State Prosecutor Haxhi Derquti;

*having deliberated and voted* on 28.03.2013,

*pursuant to* Articles 420 and the following of the Kosovo Code of Criminal Procedure (KCCP)

*renders the following*

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## JUDGMENT

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**I. Joint Appeal of Defence Counsel Haxhi Cekaj, Aziz Rexha and Gafur Elshani, filed on 04.08.2013 on behalf of defendant A. B. against the Judgment of the District Court of Peja no. P 87/11 dated 03.06.2011, is hereby partially granted.**

**II. The Judgment of the District Court of Peja no. P 87/11 dated 03.06.2011 is hereby AMENDED with regard to the sentence imposed on the accused as follows:**

**Defendant A. B. (born 24.04.1979), found guilty of *Murder* pursuant to Article 146 CCK, is sentenced to a term of imprisonment of 9 (nine) years. The time spent in detention on remand from 21.10.2010 shall be credited against the punishment.**

**III. Other grounds of Defence Appeal are hereby rejected and in the remaining part the Judgment of the District Court of Peja no. P 87/11 dated 03.06.2011 is hereby affirmed.**

## REASONING

### **I. Procedural history of the case**

1. The events giving rise to this criminal case occurred on 31.01.2005, at approximately 11.25, on the main road Peja-Decan, on TMK street, when S. M. was shot and the following day died as a result of gunshots suffered at Camp Bondsteel in Kosovo.

2. The Special Prosecution Office of the Republic of Kosovo (hereinafter: SPRK, Special Prosecutor) on 04.02.2011 filed with the (then) District Court of Peja the Indictment no. PPS 109/10 dated 25.01.2011 against **A. B.** The Indictment alleged the responsibility of the accused for the death of S. M., charging the accused with the criminal offence of *Aggravated Murder* pursuant to Article 147 Subparagraph (9) CCK.

3. The Indictment was confirmed in its entirety with the Ruling of the Confirmation Judge no. KA 40/11 dated 01.03.2011.

4. The main trial in the criminal case was held between 05.04.2011 and 03.06.2011 before the District Court of Peja.

5. On 03.06.2011 the Trial Panel issued the Judgment no. P 87/2011 through which the accused **A. B.** was found guilty of the criminal offence of *Murder* pursuant to Article 146 CCK and subsequently sentenced to 15 (fifteen) years of imprisonment. The Trial Panel ordered that the time spent in detention on remand from 21.10.2010 until 03.06.2011 was to be accredited towards the accused's punishment. The Trial Panel further ordered that the accused reimburses the costs of criminal proceedings in the amount of 800 EUR and the scheduled amount of 100

EUR. The Trial Panel upon rendering its verdict also extended detention on remand against the accused until the Judgment becomes final.

6. The Defence filed the appeal against the Judgment on 04.08.2011. The case file was soon thereafter transmitted to the Supreme Court of Kosovo as the competent court of second instance at the time. Pursuant to Article 39 Paragraph (1) of the Law on Courts, Law no. 03/L-199, the case was on 01.01.2013 transferred to the Court of Appeals as the (new) competent appellate court.

## **II. Findings of the Court of Appeals**

### **1. Competence of the Court of Appeals**

7. The Court of Appeals is the competent court to decide on the Appeal pursuant to Article 17 and Article 18 of the Law on Courts (Law no. 03/L-199).

8. The Panel of the Court of Appeals is constituted in accordance with Article 19 Paragraph (1) of the Law on Courts and Article 3 of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo (Law no 03/L-053). Pursuant to the decision of the President of the Assembly of EULEX Judges dated 18.03.2013, taken in accordance with Article 3.7. of the Law on the jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, the Panel was composed of one EULEX Judge and two Kosovo appellate judges.

### **2. Applicable procedural law - *mutatis mutandis* Kosovo Code of Criminal Procedure as in force until 31.12.2012**

9. The criminal procedural law applicable in the respective criminal case is the (old) Kosovo Code of Criminal Procedure that remained in force until 31.12.2012.<sup>1</sup> The proper interpretation of the transitory provisions of the (new) Criminal Procedure Code (CPC), in force since 01.01.2013, stipulates that in criminal proceedings initiated prior to the entering into force of the new Code, for which the trial already commenced but was not completed with a final decision, provisions of the KCCP will apply *mutatis mutandis* until the decision becomes final. Reference in this regard is made to the Legal opinion no. 56/2013 of the Supreme Court of Kosovo, adopted in its general session on 23.01.2013.

### **3. Admissibility of the Appeal**

10. The contested Judgment was announced on 03.06.2011. The written Judgment was served on the accused on 02.08.2011. The Joint Appeal of the Defence Counsel to the accused was filed on 04.08.2011. The Court of Appeals finds that the Appeal was filed by an authorized person and on time in accordance with Article 398 Paragraph (1) KCCP and Article 399 Paragraph (1) KCCP.

### **4. Findings on merits**

#### **4.1. Submissions of the Parties**

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<sup>1</sup> Kosovo Code of Criminal Procedure, in force since 06.04.2004 until 31.12.2012.

11. The Defence Counsel file their joint Appeal on all grounds pursuant to Article 402 Paragraph (1) KCCP: on the ground of substantial violation of provisions of criminal procedure, violation of criminal law, erroneous and/or incomplete determination of the factual situation and on account of the decision on the criminal sanction imposed. The Defence proposes to the Court of Appeals to modify the challenged Judgment so as to acquit the accused, or alternatively to annul the Judgment and return the case to the Court of First Instance for re-trial. The Appellate State Prosecutor moves the Court to reject the Appeal in its entirety and affirm the challenged Judgment.

#### **4.2. Allegations of substantial violations of the provisions of criminal procedure**

12. The Defence alleges violation prescribed in Article 403 Paragraph (1) Subparagraph 12) KCCP and violation of Article 391 Paragraph (1) in conjunction with Article 403 Paragraph (2) Subparagraph 1) KCCP. The Defence alleges that the enacting clause of the contested Judgment is contrary to the reasons provided in the Judgment and that the Trial Panel did not elaborate on the decisive facts in its reasoning. The Defence further alleges that the enacting clause is a simple account of the critical event and is presented as separated from relevant facts and evidence in the case. They claim the enacting clause lacks the statement of motive and premeditation for murder, which are essential elements for determining not just the factual state but also the criminal offence as such, The enacting clause, it is argued, also does not mention the involvement of B. Z. or the fact that victim S. M. was armed. According to the Defence, acting in this way, the Court of First Instance altered the factual description of the criminal offence.

13. The State Prosecutor opposes the Defence submissions on above violations.

14. The Court of Appeals finds that the enacting clause does not contradict the reasons provided in the Judgment. The enacting clause provides a clear and comprehensive description of decisive facts, including that the accused was not acting in necessary defence as defined under Article 8 CCK. There is no inconsistency between the analysis of facts and evidence in the reasoning part of the Judgment and the enacting clause. The analysis made by the Trial Panel corresponds to the conclusion in the enacting clause.

15. The Court of Appeals reiterates that the enacting clause need not contain every detail of the critical event. Article 396 Paragraph (3) KCCP sets out the content of the enacting clause, referring to Article 391 KCCP. In terms of the description of the criminal offence, what the enacting clause *must* contain are “*the facts and circumstances indicating the criminal nature of the act committed by the accused and the facts and circumstances on which the application of pertinent provisions of criminal law depends.*” In the criminal case at hand – this means the description of the actions of the accused that led the Trial Panel to conclude that the accused unlawfully deprived S. M. of his life. The specifics of the event and actions of persons involved, including presence of B. Z., the exchange of words between the victim and the accused and whether the accused acted in necessary defence are, appropriately, in detail discussed in the reasoning part of the Judgment.

16. In the reasoning part of the Judgment, the Trial Panel discusses which facts it finds proven and not proven and the grounds for such conclusions. The Trial Panel did not alter the description of the criminal offence, the latter remains the same as in the Indictment, except that it is adjusted to the findings of the evidentiary procedure during main trial.

17. It is clear from reading the reasoning part of the Judgment that the Trial Panel carefully considered the role of B. Z., the fact that S. M. was armed and other relevant circumstances. The incorporation of these facts in the enacting clause would not alter the conclusions, as mistakenly argued by the Defence. What is important is that these facts were considered by the Trial Panel and adequately addressed, as it is seen from the reasoning part of the Judgment. The Court of Appeals finds no violation of Article 391 Paragraph (1) KCCP.

18. Moreover, the Appeal's contention that the enacting clause does not record that S. M. was armed, is factually incorrect. The enacting clause namely *does* state that S. M. was "unlawfully in possession of a handgun and hand grenade."

19. With regard to the argument that the enacting clause lacks the mention of motive and premeditation of the accused for the killing of S. M., the Court of Appeals notes that for the respective criminal offence to exist, the accused does not need to act with a specific motive. The reasons (motive) *why* the accused deprived S. M. of his life do not constitute an element of the criminal offence of *Murder* pursuant to Article 146 CCK. On the other hand, the motive of the accused could have been relevant for the qualification of the offence as *Aggravated Murder* pursuant to Article 147 Item 9) CCK, but this qualification of the Prosecution was rejected by the Trial Panel. The latter provision namely requires that the perpetrator "*deprives another person of his or her life because of unscrupulous revenge or other base motives*", whereas *Murder* under Article 146 CCK is committed by "[w]hoever deprives another person of his or her life."

20. The Defence also argues that the Trial Panel manipulated with the testimony of witness B. Z. by not referencing the exculpatory parts of his statements in the Judgment. The Court of Appeals rejects this Defence contention. The Trial Panel made extensive reference to the statements of this witness given in the course of the investigation and before the Court and outlined the discrepancies between the statements as well as which account it considered most reliable. Although not reiterating *verbatim*, the Panel outlined the core of his statement given in main trial on 06.04.2011 for which the Defence in the Appeal claims it was omitted from the Judgment. It is also important to note that the Court is not obliged nor is it the purpose of a judgment to repeat full testimonies of witnesses. The obligation of the Court is to *analyse* evidence and assess what facts it considers proven and what not, and to evaluate the credibility of conflicting evidence. The Court of Appeals notes that the reasoning of the Trial Panel must be read as a whole. The Trial Panel discusses in sufficient detail the contradictions between the evidence of B. Z. during main trial when compared to his prior statements. The Trial Panel also, in full accordance with Article 496 Paragraph (7) KCCP, evaluates the credibility of conflicting evidence and reasons why it does not consider the testimony before the Trial Panel reliable when set against the witness' previous statements.

21. The Court of Appeals explicitly rejects the allegation that the reasoning of the Judgment is confusing, contradictory and contravenes the enacting clause. The Court of Appeals notes that the allegation of the Defence on this point is made in generic terms, without any specific references. This is not surprising since the Court of Appeals finds no such inconsistencies in the Judgment.

22. The Court of Appeals does however find that the Judgment lacks discussion of the subjective element of the criminal liability of the accused, namely a discussion of intent on the side of the accused. The Court of Appeals however finds that, although the intent is not specifically

discussed in the Judgment, it is clear from the factual findings of the Trial Panel and its reasoning that the Trial Panel found that the accused acted with intent and was also mentally competent. The Trial panel also referred to Article 11 CCK as the basis for its decision, thus pointing to the subjective element being established.

#### **4.3. Allegations of an erroneous and/or incomplete determination of the factual situation under Article 405 of the KCCP**

23. The Defence challenges the factual determination of the Trial Panel in relation to the involvement of B. Z. The Defence argues the latter was an active participant in the incident between the accused and S. M. The Defence further argues that S. M. punched the accused in the face prompting the incident, drew his gun against the accused and that B. Z. fired the first shot.

24. The Defence challenges the factual findings by stressing (i) that the accused and S. M. were arguing, (ii) that S. M. grabbed the accused's arm and (iii) that S. M. drew his gun against the accused. The Court of Appeals notes that the Trial Panel accepted in its factual findings that an exchange of words occurred between the accused and S. M. and that some sort of a ruffle occurred between the two. This part of the Defence challenge to the factual findings is therefore obsolete. The two relevant questions for the guilty verdict the Defence raises which must be addressed by the Court of Appeals are (i) whether S. M. started the attack and (ii) whether he indeed drew his weapon against the accused. The Court of Appeals again reiterates that the Court is obliged to establish the *relevant* facts upon which the finding of a criminal offence and the accused's responsibility is based.

25. The Defence put forward the following factual description of the incident: the accused was passing the victim and B. Z., when B. Z. heavily bumped into him. As he turned around to see who bumped into him, S. M. yelled at him saying "Stop, Stop", grabbed him and said "Your life is finished, I will fuck your mother". Then S. M. punched the accused on the left side of his face. The accused then heard a gunshot. In the fight with S. M. the latter pulled out a gun and the accused grabbed S. M. by his hand. He then heard a second gunshot. After this, he tried to get away from S. M. but was unable to do so, because S. M. grabbed him by his arm. The accused then pulled out his own gun and shot towards S. M. He did not remember how many times he shot S. M.

26. As far as the account given by witness B. Z. is concerned, the Court of Appeals notes that the Trial Panel found his testimony in main trial in several important, material respects contradictory to his prior statements. The Trial Panel reiterated the different statements of this witness and addressed the inconsistencies in them (see p. 8 et seq and again p. 27 et seq of the challenged Judgment).

27. The Trial Panel accepted on the basis of B. Z. and other witnesses that some form of words were exchanged between the accused and S. M. The Court of Appeals affirms this finding and fully concurs with the Trial Panel's evaluation of evidence in this respect.

28. The Trial Panel did not accept that S. M. assaulted the accused. The Trial Panel pointed out that witness B. Z., prior to his testimony on 06.04.2011, made no mention of S. M. slapping the accused. In his statements dated 31.01.2005, 01.02.2005, 03.02.2005, 12.02.2005 and 08.11.2010

B. Z. never mentioned that S. M. slapped the accused. In assessing the credibility of this witness, the Trial Panel accepted his previous statements as more reliable than the statement given during main trial. The Court of Appeals fully agrees with the assessment of the Trial Panel in this regard. B. Z. would have, had he indeed witnessed S. M. slapping the accused, mentioned this in his statements given immediately after the incident or indeed in any of the following statements that he gave on 01.02.2005, 03.02.2005, 12.02.2005, 08.11.2010. The Court of Appeals does not subscribe to B. Z.'s explanation that he remembered the event more clearly only during main trial. Whilst the witness may have been under stress when giving his first statement immediately after the event and it would be reasonable to conclude he may have forgotten to mention certain aspects, this was not the case later on, when he gave statements in February 2005 and even in November 2010. By the time those statements were given, the witness would have thought carefully about the event. The witness changed his account only during main trial in what the Court of Appeals considers was an attempt to assist the Defence in their case.

29. In relation to S. M.'s possession of arms, the Court of Appeals specifically notes that B. Z. never claimed that S. M. drew his gun towards the accused. He was consistent throughout his statements, including his statement in main trial, that S. M. did not have a gun in his hand.

30. It is not disputed that B. Z. fired his gun during the confrontation. The witness himself testified to this. He stated he fired three or four times, however only one shell case from his weapon (caliber 7.62 mm) was recovered at the crime scene. The Trial Panel nonetheless accepted that due to snow some shell cases may have been lost. This is a reasonable conclusion. The question is whether B. Z. fired the gun first as the Defence argues and what could be the implications of such shooting for the alleged necessary defence argument, if any.

31. The accused stated he heard gun shots – and it is established that what he referred to were shots fired by B. Z. The accused was however inconsistent in his statement on *when* he drew his gun. On one version of the accused's evidence, he drew his gun after hearing a second shot. On another version, the accused stated he pulled out his gun before he heard the second shot.<sup>2</sup> This discrepancy is indicative of the accused not giving a truthful account of the events.

32. B. Z. in statements given on 31.01.2005, 01.02.2005 and 03.02.2005 claimed that the accused after shooting at S. M. pointed the gun in his direction and shot at him. Only in his statement given in main trial did B. Z. allow that he might have fired the first shot. The Court of Appeals finds this last statement unreliable and considers his earlier statements, much like the Trial Panel did, more credible. The statements were given immediately/soon after the event and, importantly, the witness gave the same account on several occasions.

33. Further, if S. M. was the aggressor, then B. Z. would be less likely to fire his gun. It is a much more logical explanation that the aggressor was the accused and that B. Z. *after* having witnessed this, pulled his gun and fired it. Material evidence that B. Z. shot the weapon from inside his coat is an indication that he was surprised and likely acting in haste, as also noted by the Trial Panel. Haste and panic would be a normal response to his friend S. M. being attacked and himself being shot at. There is a further logical inconsistency in the accused's version of events: if S. M. really had pulled his gun at the accused first, it would be reasonable for him to also fire it instead of waiting for the accused to pull and fire *his* gun.

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<sup>2</sup> The discrepancy is also addressed by the Trial panel in the Impugned Judgment, pp. 22-23.

34. The Court of Appeals finds that above inconsistencies in the accused's recapitulation of the incident further support the conclusion of the Trial Panel not to subscribe to the accused's version of the events.

35. B. Z. consistently denied that S. M. had a weapon in his hand, whereas the Defence claimed that S. M. had pulled the weapon on the accused. Whilst it is undisputed that S. M. was armed, it has not been established that he actually pulled out his gun against the accused. Only one witness stated that he saw a gun in S. M.'s hands during the confrontation – witness I. S. The witness did not give a statement during the investigation phase, but only in main trial on 13.04.2011. I. S. stated that B. Z. fired the first shot and that the other two men - S. M. and the accused - also had weapons. He however said he saw those weapons “later”. None of the other witnesses saw a gun in S. M.'s hands. On the other hand, several witnesses testified that the weapon fell from the body of S. M. as he was being lifted in the car after the incident. Reference is made in this regard to witnesses B. T., A. G. and S. B. As correctly pointed out by the Trial Panel, the evidence of witness B. U. is particularly important on this issue. Witness B. U. namely stated that as they lifted S. M. from the ground into the vehicle, S. M.'s hands were hanging loose. S. M. therefore could not have been holding the weapon. Moreover, if S. M. would have indeed drawn his gun against the accused, the gun would have been found on the floor close to S. M. or underneath him. The weapon would not have “fallen from his body” as described by the witnesses who lifted him. It is thus a logical conclusion, as correctly concluded by the Trial Panel, that the gun was in the waist band or otherwise secreted on S. M.'s body and that it loosened and fell off as S. M. was being lifted. The Trial Panel was therefore correct not to follow the testimony of witness I. S. about S. M. holding a gun. Considering that none of the other witnesses saw S. M.'s gun and considering how it was recovered (“falling down from his body”) also the Court of Appeals is satisfied that S. M. did not pull his gun against the accused during their confrontation.

36. The Defence also challenges the finding that the accused and S. M. knew each other and that the meeting on 31.01.2005 was a chance meeting. The Court of Appeals firstly notes that whereas the relationship between the two and the nature of their meeting may have been relevant insofar the Prosecution alleged in the Indictment that the accused has acted out of vendetta when killing S. M.,<sup>3</sup> this fact has lost its importance with the Trial Panel rejecting this charge. The objective of the Defence in pursuing this line of argument is thus somewhat unclear, since the qualification of the act as *Aggravated murder* was rejected by the Trial Panel. The Court of Appeals however concurs with the finding of the Trial Panel and the reasoning presented in the Judgment that the accused and S. M. knew each other but met coincidentally on 31.01.2005. The arguments put forward by the Defence in their Appeal on this point do not undermine this finding.

37. In conclusion, the Court of Appeals finds that the Trial Panel correctly and completely established the factual situation on the basis of careful analysis of evidence. The Trial Panel considered the evidence separately and jointly and carefully assessed the discrepancies in evidence. The Court of Appeals concurs entirely with the assessment made by the Trial Panel and affirms its findings.

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<sup>3</sup> It was the Prosecution's case that the motif of the accused was “unscrupolus vendetta because S.M. was a witness against the so called Dukagjini Group [...] concerning the death of his brother S. M. for the murder of whom defendant's uncle R. A. has been found guilty along with some other persons.”

#### **4.4. Allegations of violations of criminal law under Article 404 KCCP**

38. The Defence alleges that the Trial Panel erred in the application of criminal law insofar as it rejected the necessary defence argument pursuant to Article 8 CCK. The Defence argues that the violation of criminal law is a direct consequence of erroneous determination of the factual situation.

39. The accused admitted to have killed S. M. but argued that he did so in necessary defence in a confrontation during which S. M. pulled his gun on the accused and the accused at the same time heard shots being fired.

40. The Trial Panel rejected the accused's version of events and consequently ruled that the accused was not acting in necessary defence which would render his actions lawful.

41. The Court of Appeals confirmed the factual findings of the Trial Panel (see above under heading 4.3.). The Court of Appeals also finds that the Trial Panel did not breach criminal law by rejecting the necessary defence argument of the Defence. As concluded above, S. M. did not attack the accused and did not draw a gun against him during their confrontation.

42. The CCK defines necessary defence as follows: "An act is committed in necessary defence when a person commits the act to avert an unlawful, real and imminent attack from himself, herself or another person and the nature of the act is proportionate to the degree of danger posed by the attack."<sup>4</sup>

43. The Court of Appeals finds that the requirements are not fulfilled in this case. As elaborated above, the accused was not facing a real and imminent attack and, even if this was the case, his reaction was in any event not proportionate. It was namely established that S. M. did not pull his gun and thus anything the accused might have defended against would at worst be a verbal or physical confrontation with S. M.

44. The Court of Appeals with regard to the application of criminal law also notes that on 01.01.2013 a new Criminal Code (Code no. 04/L-082) entered into force in Kosovo. In light of the principle of applying the law most favorable for the accused, enshrined in Article 2 Paragraph (2) of the old CCK as well as Article 3 Paragraph (2) of the new Code, the Court of Appeals assessed whether the new Code could be considered more favorable for the accused. In that case, the Court of Appeals would have to apply the new Code in derogation of the general rule of applying the Code applicable when the criminal offence was committed. The Court of Appeals assessed the relevant provisions in both Codes and finds that the new Criminal Code of Kosovo, in force since 01.01.2013, is *not* more favorable to the accused. Therefore the criminal law applied in this case is the Criminal Code of Kosovo as the law in force on 31.01.2005 when the criminal offence was committed.

#### **4.6. Allegations on account of decision on criminal sanction**

45. The Trial Panel sentenced the accused to a term of imprisonment of 15 (fifteen) years relying on Articles 6, 11, 15, 31, 32, 33, 34 Items 1 and 2, 38, 64 Paragraph (1), 65 Paragraph (1), 73 Paragraph (1), 99 Paragraph (1), 146 CCK.

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<sup>4</sup> Article 8 CCK.

46. The Trial Panel took into consideration the following aggravating circumstances when determining the punishment for the accused: (i) that the accused shot the victim with his gun in a public place, (ii) that the accused did not show remorse for the act, (iii) that the accused had lied when he said he acted in necessary defence. As a mitigating circumstance the Trial Panel considered that (i) the accused did not have prior criminal convictions and (ii) his behavior during the trial was exemplary.

47. The Defence correctly argues that ‘lying’ is not an aggravating circumstance. The Court of Appeals reiterates that the manner in which the accused conducts his/her defence (in this case by claiming necessary defence) cannot be considered an aggravating circumstance as this would obstruct the accused’s right to defence. Moreover, the Court of Appeals points out that contrary to witnesses, the accused is not under the obligation to tell the truth when giving a statement to the Court, thus he also cannot be sanctioned if and when the Court does not believe his account of events.

48. The Appeal further submits that the Trial Panel did not take into consideration the age of the accused and his previous life as mitigating factors. As far as past conduct of the accused is concerned, the Trial Panel did consider it by acknowledging the absence of previous criminal convictions as a mitigating circumstance. The Court of Appeals does not consider that the age of the accused should be taken as an extra mitigating circumstance as it somewhat overlaps with the fact that the accused does not have a prior criminal record. A young defendant, because of his age, is by the nature of things less likely to have had committed criminal offences than an older defendant. Therefore, usually either age or absence of criminal record will be considered as a relevant circumstance for calculating the punishment, but only in specific circumstances both.

49. The Court of Appeals does however consider that the Trial Panel, in determining the punishment, should have considered as an additional mitigating circumstance the time that had elapsed from when the criminal offence was committed. At the time of the sentencing six years had passed since the criminal offence was committed. The Court of Appeals notes that at this stage, by the completion of the appellate proceeding, over eight years had passed since the commission of the criminal offence.

50. Based on the re-assessment of aggravating and mitigating circumstances, the Court of Appeals finds the imposed punishment of 15 (fifteen) years of imprisonment excessive. Pursuant to Article 64 Paragraph (1) CCK the punishment must be proportionate to the gravity of the offence and the conduct and circumstances of the offender. Mindful that Article 146 CCK for the criminal offence of *Murder* prescribes the punishment of imprisonment of at least five years, the Court of Appeals determines that the appropriate punishment to be imposed on the accused in this case is 9 (nine) years of imprisonment. The Court of Appeals finds that this punishment will fulfill the purposes of punishment as prescribed in Article 34 CCK.

51. Accordingly, the Court of Appeals accepts the Defence Appeal insofar as the Appeal challenges the imposed punishment. The Impugned Judgment is therefore amended in the sentencing part so that the imposed punishment on the accused for committing the criminal offence of *Murder* pursuant to Article 146 CCK is nine (9) years of imprisonment. The time the accused spent in detention on remand is accredited towards his sentence.

52. The Defence Appeal is rejected on all other grounds and the Judgment of the (then) District Court of Peja no. 87/11 dated 03.06.2011 is affirmed insofar it is not amended with regard to the sentence imposed.

53. It is therefore decided as in the enacting clause.

*Prepared in English, an authorized language.*

Presiding Judge

—————  
Hajnalka Veronika Karpati

EULEX Judge

Panel member

—————  
Xhevdet Abazi

Judge

Panel member

—————  
Abdullah Ahmeti

Judge

Recording Officer

—————  
Beti Hohler

EULEX Legal Officer

**COURT OF APPEALS OF KOSOVO**  
**Pakr 46/13**  
**28 March 2013**