SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 251/2011
Prishtinë/Priština
13 December 2011

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 13 December 2011 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Anne Kerber and Kosovo Supreme Court Judges Emine Mustafa, Nesrin Llushta and Salih Toplica as panel members

And with EULEX Legal Officer Holger Engelmann as Court Recorder,

In the presence of the

International Public Prosecutor Gabriele Walentich, Office of the State Prosecutor of Kosovo (OSPK)

In the criminal case number AP-KZ 251/2011 against the defendant:

N.D. [redacted] born on [redacted] in the village of [redacted] the Municipality of [redacted] son of [redacted] and [redacted] Kosovo Albanian, place of residence [redacted] in the Municipality of Vushtrri/Vučitrn, Kosovo, married, father of one (1) child, highest school education: sixth (6th) class of primary school accomplished, car mechanic, of average financial situation, with one known previous conviction, in detention from 21 April 2009 until 23 February 2010,

In accordance with the Verdict of the 1st Instance District Court of Mitrovicë/Mitrovica in the case no. P. Nr. 41/10 dated 31 January 2011 and registered with the Registry of the District Court on the same day, **the defendant was found guilty:**

Because on 21 April 2009 at about 21:05 hours, at Stanoc I Poshtëm/Donje Stanovce in the Municipality of Vushtrri/Vučitrn, N[redacted] tried to force F.D. a sexual act (intercourse) by using a dangerous instrument. [redacted] N.D. F.D. appeared masked behind [redacted] closed her mouth and pulled her at suitable place to commit the sexual act. He pulled a knife out and said: "Shut up! Shut up! As I can stab you". [redacted] screamed loudly and protected herself. [redacted] N.D. N.D. cut her left hand [redacted] and caused some abrasions to her face. [redacted]

A.D.

By doing so, the Accused [redacted] committed the criminal act of Attempted Rape contrary to Article 193 paragraph 3 items 3 in conjunction with Article 20 of the CCK.;

And was convicted:

To a term of imprisonment of seven (7) years for the criminal act of Attempted Rape.

The time spent in detention on remand from 21 April 2009 until 23 February 2010 was credited pursuant to Article 73 paragraph 1 of the CCK.

A.D.

Moreover, the Accused [redacted] was obliged to reimburse the costs of criminal proceedings pursuant to Article 102 paragraph 1 of the KCCP with the exception of the costs of interpretation and translation.

The Defense Counsel of the accused timely filed an appeal dated 23 May 2010 against the Verdict. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual situation, violation of the criminal law and that the decision on criminal sanctions imposed upon the accused was to be challenged. It was proposed to annul the challenged Judgment acquitting the accused N[redacted]D[redacted] from the Indictment pursuant to Article 390 paragraph 3 of the KCCP, or in the least favorable event, find him guilty and convict him for the criminal offence of Light Bodily Harm under Article 153 paragraph 4 of the Criminal Code of Kosovo (CCK).

The OSPK, with a response dated 31 October 2011 and registered with the Registry of the Supreme Court of Kosovo dated 04 November 2011 objected the appeal and proposed to reject it as being unfounded, thus affirming the challenged Judgment.

Based on the written Verdict in case P, Nr. 41/10 of the District Court of Prishtinë/Priština dated 31 January 2011 (filed with the Registry of that Court on the same day), the submitted written appeal of the defendant, the relevant file records and the oral submissions of the parties during the hearing session on 13 December 2011, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 13 December 2011, hereby issues the following:

RULING

The appeal of the defense counsel on behalf of the defendant [redacted] A.D. against the judgment of the District Court of Mitrovicë/Mitrovica P. No. 41/2010, dated 31 January 2011, is granted.
The appealed judgment is annulled based on the appeal and *ex officio* and returned to the court of first instance for retrial and decision.

REASONING

Procedural History

On 21 April 2009 at about 21.05 hours, at Stanoc I Poshtëm/Donje Stanovce in the Municipality of Vushtrri/Vučitrn, got off the bus and headed home after work. It was dark and while walking in the direction of her house she was attacked from behind by a man who, wearing a mask and being entirely dressed in dark, immediately closed her mouth with one hand to prevent her from shouting. He pulled her down on her knees and she saw he was holding a knife in his other hand. He kept saying "Shut up! Shut Up, or otherwise I'll stab you!" was down on her knees and he prevented her from standing up. He kept pulling her on the ground, dragged her towards a shed close to her house and was saying "Let's fuck". tried to protect herself and attempted to take the mask off the perpetrator but did not manage to do so. Finally let go and the attacker run away. He was still wearing the mask and took the knife with him. The entire duration of the incident, from start to finish, was about 10 to 15 minutes.

Based upon the results of investigations the Public Prosecutor at the District Court of Mitrovicë/Mitrovica filed an Indictment PP. Nr. 86/2009, dated 24 June 2009, against the defendant and charged him with the criminal act of Attempted Rape contrary to Article 193 paragraph 2 items 1 and 2 in conjunction with Article 20 of the CCK.

By ruling dated 22 February 2010 the Confirmation Judge ruled the statements of as given to the police on 21 and 22 April 2009 as inadmissible due to the fact that she was not warned about her rights to remain silent. By ruling dated 23 April 2009 the Confirmation Judge dismissed the Indictment (PP. No. 86/09) dated 24 June 2009 due to the fact that it was mainly based upon the statements of which the latter had been ruled inadmissible before.

Dated 08 March 2010, filed an appeal against the ruling of the Confirmation Judge dated 25 February 2010.

The indictment was consolidated by Confirmation decision of the 1st Instance Court (KA No. 46/09) dated 13 July 2010. All evidence obtained during the investigation, apart from the minutes of interrogation of the victim dated 21 and 22 April 2009 and declared inadmissible by ruling dated 22 February 2010, was declared admissible.

Dated 26 July 2010 the defendant filed an appeal against the Confirmation Ruling dated 13 July 2010.

By ruling dated 03 November 2010 a three-judge panel of the District Court of Mitrovicë/Mitrovica rejected the appeal of the defendant as unfounded and affirmed the Confirmation Ruling dated 13 July 2010.

The main trial commenced through four sessions on 14, 15 and 16 December 2010 and 31 January 2011, when the challenged Judgment was pronounced

F.P. During the main trial, the 1st Instance Court examined the accused, [redacted] n. D. and interrogated the witness [redacted] (both on 16 December 2010). Moreover, numerous documents were read into the minutes, as there are: Initial/Incident Report dated 21 April 2009; Continuation sheet No. 1 of the Initial/Incident Report dated 21 April 2009; officer's report dated 21 April 2009, investigator's report dated 21 April 2009 (drafted by KP[redacted]; investigator's report dated 21 April 2009 (drafted by K[redacted] photographs (p.120-149 of the case file); Report of the Regional Crime Squad Mitrovicë/Mitrovica dated 21 April 2009 (p.151-152 of the case file); Forensic Identifying Report dated 21 April 2009; statements of the defendant given on 22 April 2009 and on 11 June 2009; statements of the injured party given on 21 and 22 April 2009; Prescription form from Vushtrri/Vučitrn Emergency Centre dated 21 April 2009 and Report of the Mental Health Status of N[redacted] D[redacted] ated 08 July 2009.

Based on its findings, on 31 January 2011 the District Court announced the challenged Judgment and found the accused guilty of the criminal offence listed above. Consequently, the Court imposed on the accused the punishments as also specified above.

The Defense Counsel of the accused timely filed an appeal dated 23 May 2010 against the Verdict and asserted and proposed as pointed out before.

The OSPK, with a response dated 31 October 2011 and registered with the Registry of the Supreme Court of Kosovo dated 04 November 2011 objected the appeal and proposed as pointed out before.

On 13 December 2011, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The Public Prosecutor referred to the written opinion dated 31 October 2011 and proposed as prescribed there.

FINDINGS OF THE COURT

The appeal is admissible and well founded.

It needs to be stressed in general that the whole case file contains a huge number of inconsistencies, in particular when it comes to dates of certain documents. So is, for example, an order for psychiatric examination of the defendant as issued by the Kosovo Pre-Trial Judge dated 19 January 2009 (p.170 and 171 of the case file) whilst the alleged criminal act only was committed on 21 April 2009, inside certain documents the year 2006 is mentioned and also the minutes of the main trial from the session of 16 December 2009 contain – despite the date of 16 December 2009 on the cover sheet – also the dates of 14 and 15 December 2009. However, in the following the Supreme Court will address the most eye-catching weaknesses of the challenged Judgment only.

A. Essential violation of the Criminal Procedure

The Defense Counsel in his appeal has stressed essential violation of the criminal procedure given that the challenged Judgment would lack proper reasoning and that the reasoning provided would not comply with the substantial facts of the case. Therefore, Article 403 paragraph 1 item 12 of the KCCP would be violated. Moreover, also Article 403 paragraph 1 item 8 of the KCCP as well as Article 403 paragraph 2 of the KCCP would be concerned, since the statements of the injured party given to the police on 22 April 2009 had been declared inadmissible by District Court Ruling KA.nr. 46/09, dated 22 February 2009 and the Indictment PP. No. 86/09, dated 24 June 2009 was dismissed by District Court Ruling KA.nr. 46/09, dated 23 February 2009, whereas by Confirmation Ruling dated 13 July 2010 the Indictment was confirmed. Finally, the statements of the defendant given to police and Public Prosecutor would be inadmissible, since they were given in contradiction to Articles 155 and 156 of the KCCP.

As to the alleged inconsistency of the reasoning of the challenged Judgment with the enacting clause and the established factual situation, it is at this place briefly established that the reasoning of the challenged Judgment relies upon both, the statements of the defendant [redacted] and the statements of the victim [redacted] but does not fully reflect the difference between them. Therefore, the enacting [redacted] of the challenged Judgment in the first place reflects the statements of [redacted] accomplished by some other findings which are called to be corroborative evidence. The Supreme Court will elaborate on this aspect of the challenged Judgment in more detailed manner under point C on erroneous and incomplete establishment of the factual situation. Therefore, the Supreme Court agrees that Article 403 paragraph 1 item 12 of the KCCP is violated in the case at hand.

With regards to the alleged inadmissibility of the statements of the victim [redacted] however, the Supreme Court finds that indeed the 1st Instance Court has made reference to these statements provided to the police on 21 and 22 April 2009 (p.4 through 6 of the challenged Judgment in its English version), although by District Court Ruling KA.nr. 46/09 dated 22 February 2009 they both have been declared inadmissible due to the fact that [redacted] was not warned by the police regarding her rights to remain silent. This decision was confirmed by Confirmation Ruling dated 13 July 2010 which the latter again was challenged by an appeal of the defendant [redacted] dated 24 July 2010 but nevertheless was affirmed by a three-judge panel decision of the District Court of Mitrovicë/Mitrovica dated 03 November 2010. It is beyond all doubts that the Ruling on inadmissibility of the statements of [redacted] become final, which is why the 1st Instance Court was not allowed to make reference to them as evidence anymore.

It deems worth mentioning in the context given that most likely the Confirmation Judge did a mistake when he ruled the said statements of the victim [redacted] inadmissible. According to Article 160 paragraph 1 item 2 of the KCCP as it is relevant in the case at hand, a person is exempted from the duty to testify when s/he *"is related to the defendant by blood in a direct line or in a collateral line to the third degree [...]"*.

However, in the case at hand the defendant is the son of [redacted] who the latter is a brother of the victim's father. Both of them allegedly have their father/parents in common. Therefore, from the perspective of the defendant the victim [redacted] is blood related to him through his father, grandfather and uncle, meaning to the fourth degree. As a result, [redacted] did not have the right to remain silent in front of the police, which is why she was not improperly warned about her rights.

Nevertheless, the 1st Instance Court was not entitled to just disregard the Confirmation Ruling. Pursuant to Article 154 paragraph 6 of the KCCP "[e]*vidence which has been found by a ruling to be inadmissible may be found by a ruling at a later stage in the proceedings to be admissible*".

The 1st Instance Court has not issued such a ruling in the case at hand but just used the statements of [redacted] dated 21 and 22 April 2009 as evidence, although the Confirmation Judge had declared them inadmissible. Therefore, the Supreme Court finds that Articles 403 paragraph 1 item 8 as well as paragraph 2 of the KCCP are violated.

As to an alleged violation of Articles 155 and 156 of the KCCP regarding the interrogation of the defendant it for the time being needs to be left open whether or not the defendant has been beaten up by the police during an – undocumented and therefore just alleged – first interrogation on 21 April 2009.

B. Erroneous and incomplete determination of the factual situation

The Defense Counsel in his appeal has stressed erroneous and incomplete establishment of the factual situation, thus claiming that the evidence presented against the defendant [redacted] was not sufficient to proof that the defendant was at the crime scene at all during the questionable night and that therefore it was not proven that he had committed any unlawful actions against the victim [redacted]

The Supreme Court of Kosovo indeed is not satisfied with the determination of the factual situation and the assessment of evidence as carried out by 1st Instance Court in the case at hand. Although the panel has no doubts that the victim [redacted] was attacked in the night of 21 April 2009 by a masked man from behind and that the perpetrator has forced her into the said shed and even hurt her with a knife, it must be established that the 1st Instance Court has not sufficiently found and assessed evidence regarding the identity of the defendant [redacted] as being the respective perpetrator of the attack. Instead, the Court has based its Judgment on allegations and indications, although clear evidence could have been provided easily.

The challenged 1st Instance Judgment, after listing up the statements of the victim, [redacted] the defendant, [redacted] has established the basic situation of the case as pointed out before at the beginning of the Judgment (Procedural History, p. 3 of this Judgment in its English version). The Judgment then points out that "[t]*hese facts are supported by the consistent statements of* [redacted] *when heard by the police on 22.4.2009 and in the main trial as well as the explanation she has given at the Emergency Centre at about 21.30 – shortly after the incident. Her statements are further corroborated by the photographs in the case file showing* [redacted]

muddy trousers. These facts are also compatible with the statement of [redacted] given at the police station on 22.4.2009 in which he stated that on 21.04.2009 around 20.00 hours he went to the bus station to wait for [redacted]. He was wearing a black coat and a black T-shirt which he used to cover his face since he didn't want somebody from his or[redacted] family to recognize him. He was waiting for her, because like he said, they have agreed to meet on that day to have sexual orgy. When she came from the bus, it was already dark. He approached her from behind. She recognized him but said that she was late and that her family might suspect something. He grabbed her by her hand and pulled her on the ground in order to go behind some blocks so that not to be seen by anybody. He was also having a knife with him and was holding it in his hand in order to scare her. According to his statemen[redacted] also tried to drag him further but they stopped to the blocks where they had sexual orgy for a while and then separated. The[redacted] alleged that[redacted] grabbed the knife while they were together and he took it from her but he didn't know how she cut her hand. [...]"

As to the identity of the attacker the 1st Instance Judgment then continues stating that "[a]*lthough the perpetrator was completely covered up with a mask on his face and dressed in black,* [redacted] *identified* [redacted] *as the perpetrator from the beginning of the investigations*" and that "*she was able to recognize the perpetrator due to his height and voice*". Furthermore, her statements had been corroborated by the fact that "*the black T-shirt that was used by the attacker to cover his head was found by the police inside the house of* [redacted] *and that also a T-shirt with blood stains propably from the* [redacted] *blood was discovered in the same house.* [redacted] *failed to provide a plausible explanation of its existence there*" (p.9-10 of the challenged Judgment in its English version).

The Supreme Court in the first place finds that these factual findings do not fully reflect what the defendant and the victim have stated in front of the police, the Public Prosecutor and the Court.

Regarding the diverse statements of the defendant [redacted] the case file reads as follows:

As to an alleged interrogation of the defendant by the police already on 21 April 2009, at which occasion the defendant has claimed that he was beaten up by the police and that this situation had had an impact on his statement given on 22 April 2009 in front of the police, the case file does not contain any information. Therefore, the Supreme Court cannot take a stand regarding these allegations raised by the defendant.

However, according to the Minutes of Interrogation of the Suspect dated 22 April 2009, the defendant has stated in front of the police that "[o]*n 21.04.2009 at about 20.00 hrs I went of my house [...] in Stanovc I Ulet village [...] and my intention was to wait for the bus by which in most of the cases travels* [redacted] *[...]. I was dressed by sportswear grey in color and a blouse red and black in color, black coat, one T-shirt black in color by which I covered my face, in order not to be recognized by someone of* [redacted] *family or my family as well. I was waiting [...] until* [redacted] *arrives, because I agreed with the same on last Wednesday that on Thursday I'll get and wait for her until she arrives from Prishtina in order to have a fuck [...]. I didn't put* [the T-shirt] *on my face until I saw the bus. [...] When* [redacted] *approached I told her don't scream, it is me,*

[redacted] *asked me: are you [redacted] I said yes, let's start to have sexual orgy, [redacted] told me I am late, my family might suspect anything, I grabbed her on hand, left hand I put on her back and about 5 minutes we had sexual orgy, she pushed me and I cut hand by knife, knife was mine, I had in on my hand in order to scare [redacted] when we had sexual orgy, my dick jerked up, I didn't dare to fuck [redacted] I was afraid I might leave her pregnant [...]. When we had sexual orgy, I had the knife on my right hand, when we were at blocks having sexual orgy I put the knife on ground. [redacted] grabbed the knife and called me, I was afraid that she is going to hit me, I took the knife but this happened by will, I don't know how [redacted] got cut on hand, and I don't know how I got cut on hand, when I went home I noticed blood on hand, nobody saw me, I washed my hand by water [...]".*

According to the Minutes of Interrogation of the defendant dated 11 June 2009, the defendant in the presence of his Defence Counsel has stated in front of the Public Prosecutor *"I know that I was home painting by lime, I don't know what time I left to go to Vushtrri to have a walk, and this case happened, I don't know how it did happen. [...] Regarding respective case, I don't remember that I have see [redacted] pulled her, I have pulled knife and pointed at her, nor words I have addressed to her, and also that by a knife I have cut her hand. I have given a statement at the police and I support it".*

According to the Minutes of the Main Trial dated 16 December 2010 the defendant has stated that *"I was at home at my uncle's house, whitewashing or painting the walls. It was around 6 p.m. I was at home and painting the walls with my dad, mom and everyone. While I was painting the walls and washing the doors, police came" (main trial minutes dated 16 December 2010, p.25).* After denying that he ever had used a knife against the victim [redacted] or that he ever had scratched her face, the picture of a T-shirt was shown to the defendant and he recognized it as belonging to his family. He had worn it during the painting and changed clothes when police arrived and asked him to come with them (main trial minutes dated 16 December 2010, p.29). Asked by Judge Charpentier whether he would recognize a white T-shirt, the defendant replied: *"Yes. It is cloth".* On further question of Judge Charpentier: *"Can you explain why there are some blood stains on it?"* the defendant explained: *"because when washing the doors I cut my finger. There is a wire sponge and when washing lime stains I cut my hand" (main trial minutes dated 16 December 2010, p.36).*

Regarding the statements of the victim [redacted] the case file reads as follows:

According to the Minutes of Interrogation of Victim, [redacted] as stated on 21 April 2009 in front of the police that *"I suspect on son of my uncle [redacted] based on his voice and height".*

One day later, according to the Minutes of Interrogation of Victim dated 22 April 2009 [redacted] has stated that *"I was assaulted from back by one unknown person for me [redacted] beginning. Upon this person got close to me, I noticed that he was in black; he had a black hat on head, whereas on face he had a black T-shirt. [...] this person pulled off his body a medium knife and threatened me: "Shut up as I stab you, kill you", when I heard the voice, I understood that this person i[redacted].] released me and run towards main road which leads to his [redacted]. Upon he left away, I concluded that he wa[redacted] noticed that on height of his body and also when he started to run and escape the scene. [...] Initially I didn't know that it is*

[redacted] *but when he started to threaten me by knife, I knew his voice and afterwards I concluded that when he left the scene" (case file, p. 176 through 178).*

During her interrogation in the course of the main trial on 16 December 2010 [redacted] stated as to the identity of the defendant as being the perpetrator of the alleged Attempted Rape: *"I recognized it was him (p. 4). The moment he approached me. I saw him. His height and everything (p.5)"*. Upon the question of the Defense Counsel: *"How did you come to the conclusion that this person was* [redacted] *when you say he was masked?"* the witness responded: *"Like I said before he tried to do the same things before with me. [...] I recognized him based on his height. [...] I know how tall he is but I do not know it in meters and centimeters (p.11)"*. Upon question of the Presiding Judge: *"Was there anything else that helped you to recognize him?"* she replied: *"I recognized him"*. [...] Presiding Judge: *"So did you recognize his voice?"* [redacted] *Yes"*. Presiding Judge: *"And whose voice was it?"* [redacted] *His"* (p.16-17).

The findings of the police:

Finally attention needs to be paid to the Forensics Identification Report dated 21 April 2009 and drafted by Forensics Officer [redacted] KP #0192), which states that "[a]*fter examination of the crime scene, we couldn't find any suspicious track, we continued at victim's house [where] close to house entry door, respectively on fourth stair on left side we have met a red color, which suspected to be victim's blood. [...] After completion of this evidence, we headed to the suspect's house [...]. Mentioned evidences were found at:*

- *Evidence 2 (white T-shirt on which were some red stains suspected to be blood) was found on left side of the hallway of suspect's house [...]*
- *Evidence 3 (Knife which suspected to be used in case), was found on right side also on the hallway [...]*
- *Evidence 4 (black jumper) was found in bathroom [...]" (case files, p. 153-154).*

The Supreme Court finds that the challenged Judgment has not sufficiently assessed the evidence situation.

Despite that the 1st Instance Court has made reference to the statements [redacted] dated 21 and 22 April 2009 although both of them have been ruled inadmissible evidence as pointed out before, it looks like the 1st Instance Court has based its opinion on the guilt of the defendant [redacted] mainly upon the statement of the defendant as given in front of the police on 22 April 2009. In this context the defendant indeed has told a story according to which he went out on the 21 April 2009 and met the victim [redacted] for "sexual orgy" which both of them had agreed upon before. However, despite that this statement is far from being a confession regarding the criminal offence of Attempted Rape, the 1st Instance Court has not properly analyzed this statement on the background of the later statements of the defendant in front of the Public Prosecutor on 11 June 2009 and during the main trial on 16 December 2010, within which he has revoked his previous statement.

Even leaving aside the question of inadmissibility of the statements of [redacted] at this point (which the latter the 1st Instance Court has done), the Supreme Court considers serious differences in the statements of the defendant [redacted] who in front of police on 22 April 2009 has stated that he was *"dressed by sportswear grey in color and a blouse red and black in color, black coat, one T-shirt black in color by which I covered my face"* and the witness and victim [redacted] in the course of her police interrogation on the same day had pointed out that *"I noticed that he was in black; he had a black hat on head, whereas on face he had a black T-shirt"*.

These statements – in difference to the findings of the challenged Judgment – do not corroborate with the pieces of evidence found in the house of the defendant, which in particular (besides a knife) was a *"black jumper"* and a *"white T-shirt on which were some red stains suspected to be blood"*. Despite that the item marked as evidence D4 and shown in photos #22 and #23 of the case file indeed show a black blouse or jumper, it is noteworthy that neither the defendant nor the victim ever has mentioned that the attacker of [redacted] was wearing a black jumper.

Also the finding of the 1st Instance Court that *"the black T-shirt that was used by the attacker to cover his head was found by the police inside the house of N[redacted] D[redacted]"* does not have any basis in the case file. It was never established that the black T-shirt from the house of the defendant (and there are many such T-shirts in the world), which the defendant during the main trial session on 16 December 2010 (p.29 of the English version) has identified as belonging to his family was identical to the one the attacker of [redacted] had around his head.

Last but not least, the Supreme Court is unhappy to establish that with regards to a white T-shirt from the house of the defendant, which earlier was never mentioned in the course of investigations, the 1st Instance Court was satisfied to state *"that also a white T-shirt with blood stains probably from [redacted] blood was discovered [...]"* *(p.10 of the challenged Judgment in the English version)*. Although [redacted] has never mentioned a white T-shirt of her attacker and the defendant [redacted] during the main trial session on 16 December 2010 has given an explanation for the blood stains, which the latter would be his blood, stemming from a wound he got while whitewashing the walls of his uncle's house, the 1st Instance Court instead of requesting a forensic expertise has restricted itself to the statement that *"[redacted] failed to provide a plausible explanation of its existence there"*.

It just needs to be mentioned in addition that as far as [redacted] was told that she would recognize the defendant due to his height, way of moving and voice, she was never asked to point out more details regarding eventual particularities in his way of moving, which could be [redacted] for the defendant, nor was a voice comparison made, asking the victim [redacted] to identify without any eye contact the voice of the defendant amongst a number of other (male) voices, all of them pronouncing the threats as given to [redacted] by the perpetrator.

C. Violation of the Criminal Law

The Defense Counsel has stressed in his appeal that the acts of the defendant were incorrectly legally qualified as Attempted Rape pursuant to Article 193 paragraph 3

item 3 as read with Article 20 of the CCK, but that even according to the statements of the victim [redacted] the criminal offense of Light Bodily Harm pursuant to Article 153 paragraph 4 of the CCK would be given. Moreover, the criminal liability of the defendant had not been analyzed by the 1st Instance Court.

Due to the findings as outlined before, the Supreme Court at the time being refrains from evaluating the issue of alleged incorrect legal qualification of the acts towards the victim [redacted] It can only be established that the qualification of Attempted Rape depends on a careful analysis of the subjective criteria of the Law as there is the will and wanting of the perpetrator. In the case at hand such an analysis is lacking. The latter easily could have been carried out comparing the statement of [redacted] dated 22 April 2009 and his claiming that he had agreed with [redacted] have sexual orgy" and the allegations of [redacted] diverse statements that the perpetrator wanted to rape her.

However, the Supreme Court finds that the 1st Instance Court did not make any efforts regarding the state of criminal reliability of the defendant, although the issue of alleged psychological affection of the defendant was known to the Court and discussed based on the fact that the defendant allegedly has shown some eye-catching behavior and has declared in front of the Prosecutor on 11 June 2009 that as a rule he would not be able to remember his previous statements even in cases when these statements have been given quite recently.

The Supreme Court of Kosovo finds that the appeal is grounded also in this regard. Despite that the particular question of criminal reliability of the defendant [redacted] as raised by the Defense in his appeal amongst others, but obviously was not analyzed or considered at all before, the issue falls under the scope of appellate review and thus needs to be examined by the Court even *ex officio*, pursuant to Article 404 item 2 of the KCCP.

Reference is made to Article 12 of the CCK, which stipulates as follows:

> *(1) A person who committed a criminal offence is considered mentally incompetent if, at the time of the commission of a criminal offence, he or she suffered from a permanent or temporary mental illness, mental disorder or disturbance in mental development that affected his or her mental functioning so that such person was not able to understand or control his or her actions or omissions or to understand that he or she was committing a criminal offence.*
> *(2) A person who committed a criminal offence is considered to have diminished mentall capacity if, at the time of the commission of a criminal offence, his or her to understand or control his or her actions or omissions was substantially diminished because of the conditions referred to in paragraph 1 of the present article. Such person is criminally liable but the court shall take into consideration these conditions when deciding on the duration and the type of sanction or measure of mandatory treatment it imposes.*

In this regard in needs to be underlined that the Public Prosecutor has filed a motion for a psychiatric expertise already at a time when the case was still pending with the Public Prosecutor. The expertise issue was also discussed during the main trial. The latter can be understood from the main trial minutes dated 16 December 2009, (p.21 of the

English version). Although beyond all doubts the expertise was ordered accordingly by the Pre-Trial Judge pursuant to the document at p. 170/171 of the case file (which provides the date of 19 January 2009), the Public Prosecutor was unable to provide the expertise during the main trial session on 16 December 2010. Nevertheless, it can be understood from the respective minutes that the 1st Instance Court was in possession of the expertise dated 08 July 2009, which the latter was discussed during the main trial session on 16 December 2010 as follows:

"Presiding Judge: And this expertise from the University Clinical Centre in Pristine, from the department of psychiatry? This expertise has no numbers on its pages, [...].

Public Prosecutor: It was issued by the court on proposal of the prosecution. But I am afraid we do not have that piece of evidence. [...]

[redacted]*ave you seen this expertise?*

[redacted]*: No, we made enquires but we did not receive it.*

Presiding Judge: Since the parties have not seen the expertise dated 08 July 2009, I suggest we take a 20-minute brake so copies can be made [...] and served to the parties [...].

In the meantime, the parties have been served with the expertise report. I suggest that we have a break for 15 minutes to enable to read it. Then we will comment on if it should be included in the material evidence or not. [...] Mr. Public Prosecutor, after getting acquainted with the expertise would you like it to be included as material evidence?

Public Prosecutor: Yes.

[redacted]*We would like to have this included as evidence.*

[redacted]*e have no objection to this evidence. [...]*

Presiding Judge: The Court finds that all evidence proposed by the Public Prosecutor is admissible and are hereby accepted as material evidence. [...] The Court accepts as evidence all the materials listed by the Public Prosecutor including the expertise of the University Clinical Centre of Kosovo dated 08 07. 2009. Now my question to the parties is if you would like all this evidence read or can we consider items as read?

Public Prosecutor: We can consider them as read.

[redacted]*e support the proposal of the Public Prosecutor.*

[redacted]*Only for the sake of explanation – [...] In the case file which I received earlier the page numbers do not match to the ones proposed by the Public Prosecutor now.*

Presiding Judge: If this is the case I will ask the Public Prosecutor to give us the page numbers and give a brief description of the evidence.

Public Prosecutor: [...] Finally the University Clinical Center in Kosovo report without a number in the Public Prosecutor's file. [...]

Presiding Judge: With the agreement of all the parties all the documents are considered as read" (main trial minutes dated 16 December 2010, p. 20 through 24).

The medical expertise dated 08 July 2009 as it is relevant in the context given reads as follows:

"The Psychiatric Expertise [...] was done based on the order [...] of the District Court [...] in order to determine whether [redacted] as in a state of mental disability at the time of the commission of the criminal offence or if he has any mental disorder. [...]

The patient has a low level mental capacity, the level of obtuseness, IQ ca. 75. There is no presence of psychopathologic mirror in the mental composition [...and no...] *indicative elements of emotional lability* [considered as meaning: 'instability']. *The emotional profile PIE presents him as an individual who is dominated by the orientation of lust without any deep emotional investment. [...] The results of the psychological evaluation do not indicate the inadequate cognitive and psychological functioning i.e. there are no elements of disassociation or psychological disorganization. [...]*

Regarding the criminal offence he is charged with the capacity of understanding or control of his actions was diminished but not essentially".

The Supreme Court at first finds that the information as provided by the respective medical expertise is not really rich when it comes to the [redacted]ion of a diminished or non-existing criminal liability of the defendant [redacted] which both require a reduced ability of the respective perpetrator to both, understand and control his actions at the time of commission of a criminal offence. The expertise makes clear reference to these requirements only through one sentence, which is the last one of the quotation above. The expertise, by saying that the defendant's *"capacity of understanding or control of his actions was diminished but not essentially"* obviously tries to follow the requirements of Article 12 paragraph 2 of the CCK as quoted before in this Ruling, but does not link this result to a logically understandable reasoning.

However, the question of criminal liability of the defendant needs to be considered by the trial panel *ex officio* and therefore must be addressed adequately in a court decision, whenever indication for possible concern in this regard is given. In the case at hand, although the respective medical report is also listed as piece of evidence under no. 15 in the challenged Judgment (p.4 of the English version), the 1st Instance Court has not spend a word with regards to the meaning of the report or to the state of criminal liability of the defendant, which the latter could have suggested itself considering the stating of the respective medical report as outlined before.

D. Decision on the punishment

The Defense Counsel finally has stressed that the punishment of seven (7) years of imprisonment would be too strict due to the fact that the defendant, according to medical report of the Psychiatric Clinic would suffer stagnation in mental-intellectual development so that his comprehensive and control of actions ability has been reduced.

Also in this regard, the Supreme Court refrains from the evaluation of the punishment findings of the 1st Instance, considering the findings as outlined before. Despite the question of possible re-evaluation of the criminal offence as Light Bodily Harm instead of Attempted Rape as pointed out before, reference is made to what was stated under point C. of this Ruling.

Even if the Court would come to the result that the defendant was criminally liable at the time of the commission of the criminal offence, there is need to discuss eventual impact of his *"low level mental capacity"* as it was established by the medical expertise onto the punishment pursuant to Article 12 paragraph 2 of the KCCP.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Members of the panel:

Anne Kerber
EULEX Judge

Nesrin Lushta
Supreme Court Judge

Emine Mustafa
Supreme Court Judge

Salih Toplica
Supreme Court Judge

Presiding Judge:

Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk

Holger Engelmann
EULEX Legal Officer