

SUPREME COURT OF KOSOVO

PML 02/2014

Date: 6 March 2014

THE SUPREME COURT OF KOSOVO, in the panel composed by EULEX Judge Bertil Ahnborg as Presiding Judge and Kosovo Judges Emine Mustafa and Valdete Daka as members of the panel, in the presence of Natalie Dawson EULEX Legal Officer, acting in capacity of a recording clerk, in the case against the defendant:

H.G. [redacted] son of [redacted] and [redacted] born on [redacted] [redacted] of Albanian ethnicity, single, living with parents, highest education secondary school, unemployed, of poor economic situation, currently serving a sentence in detention.

In relation to the Judgment of the District Court of Mitrovicë/Mitrovica of 10 June 2010, P.nr. 24/09; amended by the Judgment of the Supreme Court of Kosovo as the Second Instance on 7 February 2012, Ap-Kz 373/10, modified by the Supreme Court of Kosovo in the Judgment of 23 April 2013, Api-Kzi 7/2012, convicted for the following criminal offences:

1. Murder contrary to Article 146 of the Criminal Code of Kosovo (CCK)
2. Attempted Murder contrary to Article 146 as read in conjunction with Article 20 of the CCK
3. Unauthorised Ownership, Control, Possession and Use of Weapons contrary to Article 328 paragraph 2 of the CCK,

Because he, on 20 September 2008, in the neighbourhood "Gashi", Kryshevc village, Municipality of Skenderaj, with an automatic rifle AK 47, fired 10 shots in the direction of [redacted] and [redacted] hitting and causing the immediate death of [redacted] and causing seriously bodily injury to [redacted] K.G. A.G. and K.G.

H.G. Deciding upon the Request for Protection of Legality filed by X [redacted] H [redacted] Lawyer, on behalf of the Defendant [redacted] and after taking into account the Opinion of the State Prosecutor, KMLP II. Nr 2/2014 dated 10 January 2014,

Following the deliberation and voting, in accordance with Article 435 of the Criminal Procedure Code of Kosovo (CPCK), the Supreme Court issues the following:

JUDGMENT

H.G. The Request for Protection of Legality of the defendant [redacted] dated 17 December 2013 and filed by on his behalf by defence lawyer [redacted], is REJECTED AS UNFOUNDED. X.H.



REASONING

I. Procedural History:

The indictment in these proceedings was filed by the Prosecutor on 10 March 2009. It was confirmed on 11 January 2010 in relation to Murder and Attempted Murder. It was amended by the Prosecutor on 27 April 2010, adding Unauthorised Ownership, Control, Possession of Use of Weapons. The defendant was found guilty at the District Court of Mitrovicë/Mitrovica of the Weapons offence but acquitted of the other charges on 10 June 2010 by judgment P. nr. 24/09. An appeal was filed by the defence to the Supreme Court of Kosovo on 25 August 2010, and by the Prosecutor on 10 August 2010.

On 7 February 2012 the Supreme Court, as court of second instance, handed down its judgment Ap – Kz 373/10 which amended the first instance judgment. The Supreme Court found the defendant also guilty of Murder contrary to Article 146 of the CCK and Attempted Murder contrary to 146 read in conjunction with Article 20 of the CCK and sentenced him to 15 years imprisonment, pursuant to Article 147 item 11 of the CCK. The term of imprisonment for the weapons offence was modified to 1 year and 6 months. An aggregate sentence of 16 years imprisonment was imposed.

On 30 March 2012 the defence filed an appeal. On 23 April 2013 the Supreme Court, as court of third instance, issued judgment Api – Kzi. 7/2012, which modified its previous judgment regarding the sentence only. The Supreme Court clarified that when the defendant is charged with and convicted for the criminal offences of murder and attempted murder contrary to Article 146 of the CCK, Article 147 is not applicable when deciding the punishment. The aggregate sentence imposed was instead 15 years and 6 months, with individual sentences of:

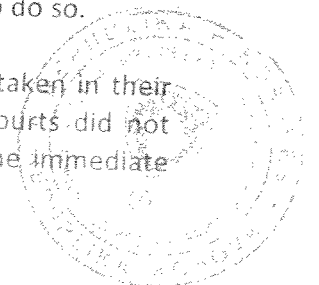
- Murder – 12 years
- Attempted Murder – 3 years
- Unauthorised Ownership, Control, Possession of Use of Weapons – 1 year and 6 months

On 25 August 2013 the defendant filed a request for protection of legality. Defence Counsel was appointed on 5 November 2013 and submitted a supplement to the request on 20 December 2013, having been given leave to do so by the Basic Court of Mitrovicë/Mitrovica. On 10 January 2014 the Prosecution responded proposing that the Supreme Court reject the defendant's request for Protection of Legality.

II. Findings of the Court:

The request for Protection of Legality is timely filed by persons authorised to do so.

The request is made on the basis that the previous courts have been mistaken in their assessments of the case. The defence lawyer states that the previous courts did not consider whether a putative defence was made out, this being that, in the immediate



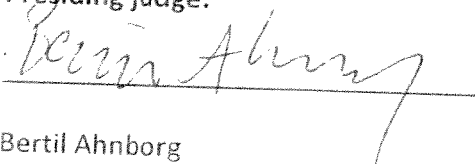
situation, [REDACTED] genuinely believed himself to be in danger but was mistaken. The defence lawyer asks the Supreme Court to find that this defence should have led to the defendant's acquittal.

The Supreme Court underlines that a request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation of the case, as per Article 432, paragraph 2 of the CPCK. In dealing with such a request the Supreme Court should therefore not go into the merits of the case and the evidence. To consider the putative defence now proposed by the defence lawyer, would require such an investigation into the evidence and findings by the Supreme Court and indicates erroneous assessments by the previous courts.

Furthermore, and in any event, the Supreme Court notes the findings of the Supreme Court as second instance court on 7 February 2013. At page 13 of the English judgment, the panel finds *'The criminal liability of [REDACTED] is not excluded according to Article 8 H.G. of the CCK, because the defendant might have mistakenly assumed he was in a life-threatening situation and his chosen defence was necessary. As argued, he was aware of the lacking imminent and persisting threatening and the disproportion of his means of defence, as well as the extent of the aggression.'* This being the case it is clear to this panel that the previous panel did consider the putative defence. The previous panel assessed the evidence and concluded that [REDACTED] could not have made such a H.G. mistake of fact in all the circumstances since the situation had already come to an end.

Having concluded that the previous panel did consider the possibility that such a putative defence existed, and rejected that defence based upon the evidence and factual findings, the Supreme Court must find that no violation of the criminal law has taken place, and it must therefore reject this request for Protection of Legality as unfounded.

Presiding judge:



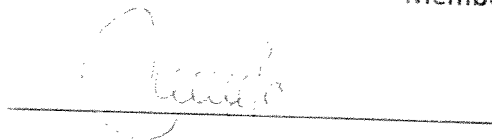
Bertil Ahnborg
EULEX Judge

Recording officer:

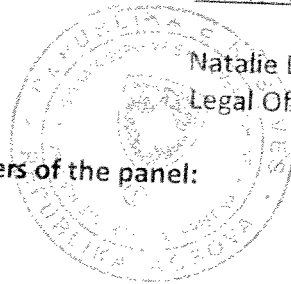


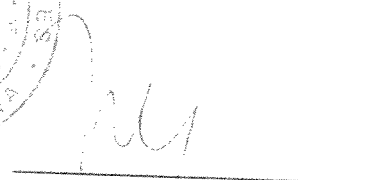
Natalie Dawson
Legal Officer

Members of the panel:



Emine Mustafa, Supreme Court
Judge





Valdete Daka, Supreme Court
Judge