

The time spent in detention from 22.4.2006 is to be credited.

In relation to the other parts the appeal is rejected.

REASONING

I. PROCEDURAL HISTORY

HG On 10 January 2007 the Public Prosecutor filed an Indictment against [REDACTED] and [REDACTED]. On 6 March 2007 the Confirmation Judge confirmed the Indictment against both of the defendants. FG

On 12 December 2008 the President of the EULEX Judges assembly issued a Ruling assigning the case to the EULEX Judges.

On 11 February 2009 the main trial commenced. The Judgment was announced on 27 March 2009. FG [REDACTED] was found guilty of Aggravated Murder and Unauthorized Ownership, Control, Possession or Use of Weapons and sentenced to an aggregate sentence of 25 years and 6 months of imprisonment. HG [REDACTED] was found guilty of Incitement to Aggravated Murder and sentenced to a sentence of 20 years of imprisonment. The defendants appealed this Judgment. The injured parties [REDACTED] EF and [REDACTED] also appealed this judgment. GB

HG On 19 April 2011 the Supreme Court of Kosovo issued a Judgment rejecting the appeals of the defendants. The appeals of the injured parties were also rejected in relation to the defendant [REDACTED]. The appeals of the injured parties were granted in relation to [REDACTED] FG and the sentence was modified to 29 years of imprisonment for the criminal act of Aggravated Murder and to 2 years of imprisonment for the criminal act of Unauthorized Ownership, Control, Possession or Use of Weapons. The aggregate sentence was 30 years of imprisonment.

The Judgment of the Supreme Court was served to the defendant [REDACTED] FG personally on 14 July 2011. The appeal of the defence was filed with the District Court of Prishtinë/Priština on 13 July 2011.

II. THE APPEAL OF [REDACTED] FG

The Defence Counsel requests that the Judgment is annulled and the case sent back for re-trial. Failing that, the Judgment should be modified so as to find the accused guilty of the criminal offence of Aggravated Murder exceeding the limits of necessary defence.

pursuant to Article 147 paragraph 1 subparagraph 4 and 11 of the CCK as read with Article 8 paragraph 3 of the CCK. In the most unfavorable case the defendant should be found guilty of the criminal offence of Murder committed in the state of mental distress pursuant to Article 148 of the CCK. The sentence should be modified accordingly also taking into account the mitigating circumstances, in particular health of the defendant.

The appeal of Defence Counsel of [redacted] FG challenges the Supreme Court judgment on several grounds. He claims that the Judgment of the first instance and the Supreme Court have erroneously and incompletely established the factual state, that the criminal code has been violated, and that the criminal sanction has been imposed erroneously.

The factual description is established erroneously and incompletely so the case should be sent back to the District Court in order to fully establish the facts.

Some of the evidence proving the innocence of [redacted] FG was not administered as evidence in the main trial. The District Court and the Supreme Court also ignored the defence's request for crime scene reconstruction.

Also, the number of shots fired from both sides can be higher than the District Court has found proven. Some of the shells found from the crime scene are shot with a weapon that was not confiscated from the crime scene. Therefore there must have been one more person shooting at the crime scene unidentified by the District Court. Also, the ballistic expertise could not match all the cartridges found with the weapons confiscated.

FG Further, it is unclear if shots could have been shot from the position of the defendant [redacted] towards the location of the victims, especially the victim who was in the excavator on the road. It is undisputed that [redacted] has fired 22 shots at the excavator.

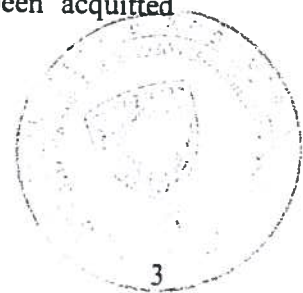
Also, it was impossible to determine the weapons with which the premises of the "Cami"-shop were fired as well as the weapon with which the bullets found inside [redacted] body where fired.

The criminal law was violated because the District Court and the Supreme Court ignored the facts that [redacted] did not provoke the attack, that the attack of the injured parties was imminent as they were going to demolish the building and shoot at the direction of [redacted] FG and that the defence of [redacted] was proportionate to the attack.

Further, if the Supreme Court evaluates that the defence of [redacted] FG was proportionate to the attack then [redacted] should be found guilty of exceeding the necessary defence by reason of strong trauma or fear caused by the attack, and Article 8 paragraphs 3 and 4 of the should be CCK applied. Therefore [redacted] should have been acquitted pursuant to Article 390 paragraph 1 subparagraph 1 of the KCCP.

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From the erroneous and incomplete establishment of the factual description as well as from the violations of the criminal law stems the unlawfulness of the criminal sanction.

III. THE RESPONSE OF THE PROSECUTION

The State Prosecutor proposes that the appeal is rejected as unfounded and the Judgment of the Supreme Court is affirmed.

The appeal merely repeats the arguments of the previous appeal without offering any new arguments.

The factual findings of the District Court are based on a very thorough examination and assessment of the evidence, and the Supreme Court has rightfully supported these findings. Also, reasonable inferences are drawn from these findings. Thus it has been properly concluded that the accused [REDACTED] fired the first shots. This conclusion is also supported by [REDACTED]'s confession at the Public Prosecutor's.¹

The State Prosecutor also recalls the principle of the First Instance Court's discretion over the assessment of the evidence that the Supreme Court will not interfere with so long as the appealed Judgment does not infringe rules of logic and common sense.

As to the claim of necessary defence the State Prosecutor states that it has been established that [REDACTED] fired the first shots and notes that necessary defence is not applicable to the aggressor. The acts of [REDACTED] were correctly legally qualified.

As to the penalty the State Prosecutor opines that the punishment is fair. She notes that the Court has taken into consideration all the circumstances relevant to the determination of the punishment and also evaluated them fairly.

IV. COURT FINDINGS

A. Permissibility of the appeal

1. The Supreme Court finds that the appeal filed on behalf of the defendant is filed within the limit of 15 days as prescribed in Article 398 of the KCCP and thus timely. The appeal was filed by the Defence Counsel, an authorized person. Thus the appeal is permissible.

2. The Supreme Court finds, however that the appeal is not founded. The Panel will now assess each of the arguments raised in the appeal of the defence.

[REDACTED]'s statement at the public Prosecutor on 10 May 2006

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B. The establishment of the factual situation

3. The Supreme Court recalls that it is the prerogative of the trial panel to assess the evidence presented even when it is contradictory. This is because the trial panel, having directly taken the evidence, is in the best position to assess the credibility of the witnesses and/or expert witness. It is the duty of the Supreme Court to determine if the trial panel has done this assessment properly. The Supreme Court's revision of the trial panel's assessment is thus restricted to the questions as to whether the facts have been explored carefully, whether the evidence presented was admissible and whether the evaluation was plausible, logical and comprehensible. The First Instance Court has discretion over the assessment of the evidence that the Supreme Court will not interfere with so long as the appealed Judgment does not infringe rules of logic and common sense. The Supreme Court only reassesses the evidence if they find that the trial panel's assessment is faulty.

4. [REDACTED] alleges that some of the evidence proving his innocence was not administered as evidence in the main trial. He does not specify which pieces of evidence the court has not administered.

5. The Supreme Court has on its Judgment on 19 April 2011 stated that "... the 1st Instance Court has assessed all available evidence in detail, as well generally as one by one, and clearly based its findings and decision upon this evidence."²

6. The Supreme Court notes that the defence counsel has the right to request evidence to be considered in the main trial. On 11 February 2009 the defence counsel [REDACTED] and [REDACTED] had requested the files of the case against [REDACTED] and [REDACTED] to be taken as part of the evidence as they had been charged for the criminal offence of unauthorized ownership, control, possession or use of weapons on the critical day. The trial panel has denied the request. However, [REDACTED] and [REDACTED] were heard as witnesses in the main trial so the defence counsel has had the possibility to clarify any issues regarding their involvement. Further, on 19 February 2009 the defence counsel [REDACTED] has requested a forensic expert to be heard and a reconstruction of the crime scene to be made. On 4 March 2009 the Court heard the forensic expert [REDACTED]. As the case file contains numerous pictures of the crime scene the reconstruction of the crime scene was not necessary. Moreover, on 4 March 2009 the trial panel has denied the defence counsel's request to consider the documents in case files when first attempting to hear the case to be read as the KCCP does not allow such a procedure.

7. Therefore the Supreme Court does not find that the First Instance Court had mistakenly administered the evidence to the detriment of the defence counsel.

8. It is worth pointing out that [REDACTED] does not deny that he was shooting from the premises of the "Cami"-shop. On the contrary, he has stated that "After this person swoop

² Judgment dated 19 April 2011, page 17 of the English version



the digger into the asphalt I have entered into my house and have took the weapon – automatic gun of brand AK-47. ... firstly I have shoot without interruption somewhere around 5-6 pieces upward from the window of the "Cami" facility ..."³ It is also worth noting that he does not claim that there was someone else with him in the premises of the "Cami"-shop.

9. The Judgment of the District Court states "The bursts of fire started from the premises occupied by the [redacted] family, this is clear."⁴ The Supreme Court has stated that "The 1st Instance Court has thoroughly assessed the evidence ... Based on all the evidence the Court has found that it was [redacted] who has opened the fire, thus armed with an automatic gun and that he has fired several bursts without the injured parties being able to react at all ..." and thus accepted the 1st instance Court's assessment.⁵ The Supreme Court has not been persuaded to assess the chain of events otherwise.

10. [redacted] further alleges that someone else might have fired the bullets that caused the death of [redacted]

11. The First Instance Judgment states that "Other witnesses ... confirm that ... [redacted] were shot while seated and didn't have the possibility to escape, caught by surprise."⁶

12. The Supreme Court notes that it is undisputed that [redacted] shot 57 times from the premises of the "Cami"-shop. All the witness state that the café was shot from the direction of the Cami-premises. Witness [redacted] testified that "I heard shots, coming from the opposite side. I did not know what was happening. By the time I entered the cafeteria – because I was close to the door - I saw the doctor and the old man had already been shot." Witness [redacted] seems to suggest that shots were also fired from the house of [redacted]. This is not supported by other witnesses nor have the police secured any casings from this house. Apart from witness [redacted] none of the witnesses claim that the café was shot at from any other direction. On the contrary, when asked "Did you see or hear that anyone was shooting not from the opposite side but the side in which your café bar is?" witness [redacted] stated "No."⁷ Therefore the Supreme Court concurs with the First Instance Courts conclusion that [redacted] was killed by bullets fired by [redacted]

13. As to the clam that it is unclear if shots could have been shot from the position of the defendant [redacted] to the location of the victims, the Supreme Court notes that from picture 306 of the Crime scene report and the picture 14 attached to the "Further report" it is clear that shots could have been shot from the position of the defendant [redacted] to the location of the victims.

³ Minutes of the hearing at the District Public Prosecutor, dated 10 May 2006, page 4 of the English version

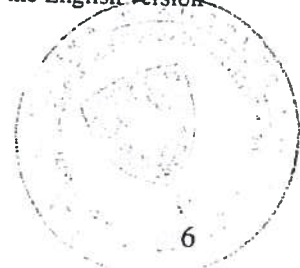
⁴ Judgment dated 27 March 2009, page 13 of the English version

⁵ Judgment 19 April 2011, page 11 of the English version.

⁶ Judgment 27 March 2009, page 12 of the English version

⁷ Minutes of the main trial, on 4 March 2009, page 3 of the English version

⁸ Minutes of the main trial, on 4 March 2009, page 9 of the English version



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C. The alleged violations of the criminal law

14. ██████ alleges that his actions may be categorized as exceeding the limits of necessary defence. It is worth pointing out that he does not deny that he was shooting from the premises of the "Cami"-shop. It is also worth noting that he does not claim that there was someone else with him in the premises of the "Cami"-shop.

15. The Supreme Court recalls that according to the Article 8 paragraph 2 of the CCK *"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."* Paragraph 3 of the said Article continues *"An act which is disproportionate to the degree of danger posed by an attack exceeds the limits of the necessary defence."*

16. Firstly, the Supreme Court notes that the CCK does not recognize defending property as a basis of necessary defence since Article 8 of the CCK states *"...attack from himself, herself or another person ..."*

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17. Secondly, as noted above it is clear that ██████ was the first to open fire. Further, ██████ has stated that *"After this person swoop the digger into the asphalt I have entered into my house and have took the weapon ... and with the same automatic I have entered immediately into the "Cami" facility at the back side entrance ... firstly I have shoot without interruption somewhere around 5-6 pieces upward from the window of the "Cami" facility ..."*⁹. Therefore it is clear that there was no imminent attack on ██████'s life caused by the demolition. On the contrary, he was well aware of the dispute over the property. Also on the critical day he had time to leave the premises, to fetch his gun, to return to the premises through the back door and to shoot at the excavator just after the excavator had been lowered to the ground.

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18. Therefore the institution of necessary defence does not apply, and thus necessary defence cannot be exceeded either, in relation to the actions of ██████.

19. Alternatively, ██████ has claimed that he acted in the state of mental distress.

20. The Supreme Court recalls that the according to the Article 148 of the CCK *"Whoever deprives another person of his or her life in a state of mental distress after being brought, through no fault of his or her own, into a state of severe shock caused by an attack, maltreatment or grave insult by the murdered person, shall be punished ..."*

21. The Supreme Court notes that there is no indication in the case files of an attack, maltreatment or grave insult by ██████ or ██████ towards ██████ as they were sitting in a café opposite the "Cami" premises having a coffee.

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⁹ Minutes of the hearing at the District Public Prosecutor, dated 10 May 2006, page 4 of the English version

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KB RI EF HH XhS FG
IH [redacted] and [redacted] were not attacking, maltreating or insulting [redacted] either as they were executing their rights as the rightful owners of the property. [redacted] BF and [redacted] were at the crime scene just by coincidence. [redacted] was not even at the scene but at her home. And lastly, [redacted] was a police officer who was tasked to supervise the traffic during the demolition. None of them posed any threat to [redacted] FG

22. Article 71 paragraph 2 of the CCK stipulates on imposing an aggregate punishment. Subparagraph 1 of the said Article states that *"If the court has pronounced a punishment of long-term imprisonment for one of the criminal offences, it shall impose this punishment only."* FG

23. The defendant [redacted] was sentenced to a long term imprisonment of 29 years for the criminal offence of Aggravated Murder and to an imprisonment of 2 years for the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons. As an aggregate sentence 30 years of imprisonment was imposed.

24. The Supreme Court notes that this violates the above-quoted Article of the criminal law to the detriment of the accused.

25. Therefore the Supreme Court has modified the sentence as is stated in the enacting clause.

D. Sentencing

26. As the First Instance Court has remarked Article 64 paragraph 1 of the CCK stipulates on the determination of the punishment. The Judgment also states that the limits provided for by law for the criminal offence of aggravated murder are imprisonment of at least ten years of imprisonment or a long-term imprisonment which means a term of imprisonment of twenty one to forty years of imprisonment.¹⁰

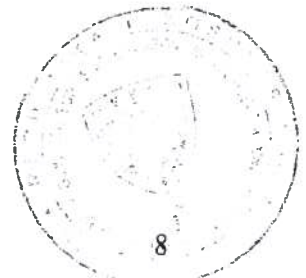
27. The Judgment also discusses the aggravating and mitigating factors taken into consideration by the First Instance Court.¹¹

28. The Supreme Court has found that *"... the 1st Instance Court properly has considered the limits on punishment as provided by the applicable provisions of the CCK It has made elaborate reference to the acts of the accused [redacted] as being odious, heinous and vile as has given proper explanation regarding these aspects."*¹² The Supreme Court has also referred to the assessment of the exceptional brutality of the FG

¹⁰ Judgment, dated 27 march 2009, page 25 of the English version

¹¹ Judgment, dated 27 march 2009, pages 25-26 of the English version

¹² Judgment dated 19 April 2011, page 18 of the English version



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commission of the crime and the mitigating circumstances by the District Court. However, the Supreme Court has found that "... the punishment imposed to the main perpetrator [REDACTED] is too lenient, considering the fact that [REDACTED] not only has killed two innocent people in the streets, but moreover has endangered the lives and seriously hurt the health of numerous others being around in the spot, when the shooting started. Moreover, he has thrown three hand grenades, which luckily did not explode, but generally seriously have endangered the lives and bodily health of many people in the scenery and which would have caused much more merely a massacre, if ever they had exploded as intended by the accused"¹³ and modified the punishment.

29. The Supreme Court agrees with the previous assessment of the Supreme Court. Therefore the Supreme Court deems 29 years of imprisonment for the criminal act of aggravated murder as a just punishment as well as proportionate to the seriousness of the criminal offence and the concrete circumstances in this specific case. As is explained above in the paragraphs 22 - 25 this is also the aggregate sentence.

V. CONCLUSION

1. The Supreme Court finds that the appeal is ungrounded.
2. The Supreme Court modifies *ex officio* the Judgment of the Supreme Court in relation to the sentencing as in the enacting clause. The Supreme Court did not recognize *ex officio* any other violations of law (Article 415 paragraph 1 of the KCCP) which were not the subject of appeal by the defense.
3. Based on all of the above stated reasons it is decided as in the enacting clause.

Dated this 25 September 2012.
Api.-Kži. No. 6/2011

Presiding Judge


Martti Harsia

Recording clerk


Noora Aarnio

¹³ Judgment dated 19 April 2011, page 18 of the English version



Member of the Panel

Apple Kerber
Apple Kerber

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Valdete Daka
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