Ap – Kž – 323/2010
24 August 2011

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of EULEX Judge Martti Harsia as Presiding Judge, with EULEX Judges Charles Smith and Lars Dahlstedt and Supreme Court Judges Emine Mustafa and Marije Ademi as panel members,

In the criminal case against defendant [redacted] convicted by the District Court of Pristina for two counts of Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph 2 of the CCK] because he has fired towards the vehicle in which A[redacted] B[redacted] was travelling with the intention to deprive him of his life on 28 February 2007 and 12 April 2007. While doing so he had in his possession and used an automatic rifle and a rocket launcher,

defendant [redacted] convicted by the District Court of Pristina for two counts of Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph 2 of the CCK] because he has fired towards the vehicle in which A[redacted] B[redacted] was travelling with the intention to deprive him of his life on 28 February 2007 and 12 April 2007. While doing so he had in his possession and used a TT pistol and a rocket launcher. Further he had in his possession two automatic guns,

defendant [redacted] convicted by the District Court of Pristina for one count of Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph 2 of the CCK] because he has fired towards the vehicle in which A[redacted] B[redacted] was travelling with the intention to deprive him of his life on 12 April 2007. While doing so he had in his possession and used a hand grenade. Further he had in his possession two hand grenades,

Defendants [redacted] and [redacted] acted in co-operation with the aim to deprive Berisha of his live. On 12 April 2007 the defendant Spahiu joined Hoti and Qela in their pursuit.

Acting upon the appeal of the defendants through their Defence Counsels Mahmut Halimi on 31 August 2010 and Bekim Veliqi on 16 August 2010, Haxhi Cekaj on 24 August 2010, and finally D[redacted] S[redacted] personally on 24 August 2010 and through his

Defence Counsel Hasan Jashari on 17 August 2010 respectively against the Judgment of the District Court of Pristina in case no. P.nr. 429/2007, dated 20.11.2009 whereby the District Court found the defendants guilty and sentenced them to imprisonment.

After having held a session on 23 August 2011 open to public, in the presence of the State Prosecutor Gabriele Walentich, the defendants, Defence Counsels Mahmut Halimi, Haxhi Cekaj and Hasan Jashari and after a deliberation and voting held on the same day,

On 24 August 2011 pronounces the following

JUDGMENT

A.H. [redacted] nickname [redacted] name of father [redacted] name of mother and maiden name of mother [redacted] place of birth and last residence village of Polac/Poljance in Skenderaj/Srbica, date of birth [redacted] Kosovar, student, single, no children, completed high school, of average financial situation, in detention and house arrest since 12 April 2007,

M.Q [redacted] no nickname, name of father [redacted] name of mother and maiden name of mother [redacted] place of birth village of Jabllanicë/Jablanica in Djakovë/Đakovica, last residence in Pristina, date of birth [redacted] Kosovar, student, single, no children, completed high school, of poor financial situation, in detention since 12 April 2007,

D.S. [redacted] no nickname, name of father [redacted] name of mother and maiden name of mother [redacted] place of birth Mitrovice/Mitrovica, last residence in Pejton, Pristinë/Priština, date of birth [redacted] Kosovar, worker, single, no children, completed high school, of poor financial situation, in detention since 12 April 2007,

The appeals filed on behalf of the defendants against the judgment of the District Court of Pristina in case P.nr. 429/2007, dated 20 November 2009 are hereby **partially accepted**. The sentencing is amended as follows:

A.H For [redacted] the sentence for the first count (attempt aggravated murder on 28.2.2007) is 10 years, for the second count (attempt aggravated murder on 12.4.2007) 11 years and for the third count (Unauthorized Ownership, Control, Possession or Use of Weapons) 1 year. The aggregate sentence is 14 years.

M.Q For [redacted] the sentence for the first count (attempt aggravated murder on 28.2.2007) is 10 years, for the second count (attempt aggravated murder on 12.4.2007) 13 years and for the third count (Unauthorized Ownership, Control, Possession or Use of Weapons) 1 year. The aggregate sentence is 15 years.

D.S.

For [redacted] the sentence for the second count (attempt aggravated murder on 12.4.2007) is 11 years and for the third count (Unauthorized Ownership, Control, Possession or Use of Weapons) 6 months. The aggregate sentence is 11 years 4 months.

The rest of the Judgment of the first instance Court is confirmed.

REASONING

I PROCEDURAL HISTORY

The Prosecutor of the Special Prosecution Office of the Republic of Kosovo (SPRK) filed an indictment against the defendants on 31 July 2007. [redacted] were indicted for two counts of the criminal offence of Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and for Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph 2 of the CCK] and [redacted] was indicted for an Attempted Aggravated Murder in co-perpetration [Article 147 paragraph 1 item 4 as read with Article 20 and 23 of the Criminal Code of Kosovo (CCK)] and for Unauthorized Ownership, Control, Possession or Use of Weapons [Article 328 paragraph 2 of the CCK]. This indictment was confirmed by the District Court of Pristina on 17 September 2007. H.Q.

The main trial started on 22 April 2008 but it was adjourned to 15 May 2008 and subsequently to 29 May, 24 June, 11 September, 8 October and 18 November 2008.

On 2 June 2009 the President of the Assembly of the EULEX judges issued a decision assigning the case to EULEX Judges.

The main trial was recommenced and held during October and November 2009. On 20 November 2009 the judgment was announced whereby the District Court of Pristina found the defendants guilty and sentenced [redacted] to an aggregate sentence of 16 years of imprisonment, the defendant [redacted] to an aggregate sentence of 20 years of imprisonment, and the defendant [redacted] to an aggregate sentence of 15 years and 6 months of imprisonment. A.H. M.Q. D.S.

The judgment was served to the defendant [redacted] personally to Detention Center Dubrava on 16 August 2010. The defence counsel Halimi filed an appeal against the verdict of the district court on 31 August 2010 and the defence counsel Veliqi on 16 August 2010. A.H.

The judgment was served to the defendant [redacted] personally to Detention Center Dubrava on 13 August 2010. The defence counsel Cekaj filed an appeal against the verdict of the district court on 24 August 2010. M.Q.

D.S.

The judgment was served to the defendant [redacted] personally to Detention Center Dubrava on 13 August 2010. The defence counsel Hasan Jashari filed an appeal against the verdict of the district court on 17 August 2010 and the defendant personally on 24 August 2010.

On 25 February 2011 the opinion of the State Prosecutor was received by the Supreme Court. The Special Prosecutor did not file a response.

II THE APPEALS AND THE RESPONSE OF THE PROSECUTION

1. The Appeals of [redacted] A.H.

The Defense Counsel Mahmut Halimi proposes that the Supreme Court amends the first instance verdict by acquitting Hoti from the charge 1 (Attempt Aggravated Murder) due to lack of evidence and imposes a more lenient sentence for the counts 2 (Attempt Aggravated Murder) and 3 (Unauthorized Ownership, Control, Possession or Use of Weapons). Failing that the Defense Counsel proposes that the Supreme Court quashes the verdict and returns the case to the court of first instance for retrial.

The presented grounds for the appeal are summarized as follows:

Firstly, the provisions of the Kosovo Code of Criminal Procedure (KCCP) are substantially violated because the judgment is based on inadmissible evidence. Also, the Judgment is based primarily on the statements given at the police station as opposed to the statements given at the main trial. These statements were extorted by force. The presence of the lawyers at a later stage, when singing the statements, does not rectify the extorted confessions. According to Article 235 of the KCCP such a statement is inadmissible. Moreover, the identification of the defendants done by [redacted] and [redacted] is carried out in violation of the Article 255 of the KCCP. The principle of free assessment of evidence described in Article 152 paragraph 2 does not extend to inadmissible evidence. The Court is bound by the legal principle of "in dubio pro reo" (meaning a doubt shall be interpreted in the favor of the accused) as expressed in the international conventions for human rights and specified in the Constitution of Kosovo and in the Article 3 paragraph 2 of the KCCP. Also, the grounds for the judgment concerning the first count of attempt aggravated murder are contradictory and insufficient. Further, the Court omitted to apply a provision of the criminal procedure code or applied it incorrectly during the course of the criminal proceedings (Art 403 paragraph 2 item 1).

J.K.

J.M.

Secondly, the factual situation was determined by the court of first instance in an incomplete and erroneous way concerning the first count of attempt aggravated murder. The reasoning does not state whether any traces or material evidence such as casings was found in the crime scene. The whole attack might have been invented to distract attention from the accusations against [redacted] Further, the identification procedure was not

A.B.

conducted according to the Article 255 of the KCCP and the identifications are implausible. Also, the Court assessed the evidence incorrectly when it found the statements given to the police and the statement of [redacted] given at the prosecutor's office more credible than the medical documentation and the statements of Hoti given at the prosecutor's office and the court.

Thirdly, the criminal law was violated because the Court did not order a neuropsychiatric examination to be conducted in order to establish whether there are reasons to exclude criminal responsibility although there were grounded reasons to. These doubts are based on the report of the forensic doctor [redacted] dated 5 July 2010, and the impressions of the presiding judge stated in the ruling dated 15 July 2010.

Lastly, the sentencing is too harsh. The judgment does not state any reasons regarding the mitigating or aggravating circumstances. As [redacted] and his vehicle were the targets of the attack the presence of [redacted] and [redacted] in the second car cannot be taken into account when assessing the punishment. The consequences of the attack were bodily injury to [redacted] and material damage. [redacted] has never before been tried for an offence, he has admitted the offences he is guilty of, and he is poor, relatively young and in ill health.

The Defense Counsel Bekim Veliqi proposes that the judgment of the District Court of Pristina is annulled and the case is send back for retrial, or failing that, the judgment is amended.

Firstly, the provisions of the criminal procedure have been substantially violated. The reasoning of the Judgment is unclear. Concerning the decisive facts of the judgment there are crucial contradictions between what is stated in the Judgment and the declarations as well as the minutes. Further, the Judgment is based on inadmissible evidence especially concerning the first account of attempt aggravated murder. Also, the evidence provided does not support the act described in the indictment. Moreover, the indictment is based fully on the statements given at the police station on 12.4.2007. This statement is taken without the presence of the defense counsel and only signed at his presence. It is therefore inadmissible evidence. Also, Article 3 paragraph 2 of the PCCK and the principle of "In dubio, pro reo" has been violated when the Judgment states that the investigations did not bring any significant results. Further, the defendant has been subjected to violence, torture and physical as well as physiological pressure when the statement on 13.4.2007 was taken. Moreover, the identification of the suspects was not done according to the Article 255 paragraph 1 and 2 of the KCCP because it lacks the description of the person and because the same number was used to each person in the pictures. Also, the court did not explain clearly which facts it considers proven and why it considers those facts proven. Nor does the court explain how it constitutes the criminal responsibility particularly the first act of attempt aggravated murder. Also, the court did not evaluate the evidence thoroughly.

Secondly, the factual situation is determined erroneously and incompletely. The reasoning of the indictment is not supported by the police report on 28.2.2007 because their finding was "OK". Also, the factual description is based in inadmissible evidence.

Thirdly, from the previously mentioned violations result the violations of the provisions of criminal code. Further, the court did not evaluate the intent or the motive for the actions. Also, it has not been proven that on 28.2.2007 [redacted]ted as claimed in the indictment and his actions on 12.4.2007 do not fulfill the description of the criminal act. H.

As a fourth and last point the appeal claims that the criminal sanction is too severe considering for example the consequences of the act, the health of the defendant, the fact that he is facing the law for the first time, his partial guilty plea and his deep remorse and his family relations. There are reasons as stated in the Article 66 of the CCK for mitigation of punishment. The purpose of the punishment will be achieved with a lesser punishment

2. The Appeal of [redacted] Q.

In the appeal defence counsel H[redacted] C[redacted] proposes that Supreme Court annuls the first instance judgment and sends the case for retrial. Failing that the Supreme Court should amend the first instance verdict by acquitting [redacted] from the charges. In any case the Supreme Court should modify the judgment of the first instance by reducing the sentence [redacted] Q. Q.

The presented grounds for the appeal are summarized as follows:

Firstly, the provisions of the criminal procedure have been substantially violated. The judgment is confusing, unclear and inconsistent. It does not state clearly the factual description of [redacted] it considers proven. Also, the evidence presented does not prove that the actions of [redacted] constitute the crimes he is charged with. Further, the enacting clause of the judgment has exceeded the indictment. Moreover, the identification is not done according to the Article 255 of the KCCP and unreliably and as it is done after the second attempt aggravated murder it does not relate to the first attempt. Also, the assessment of the evidence is done in a selective or biased way - the self-accusations as well as the accusation against perpetrators are accepted but not the declaration of innocence for the first attempt. Therefore the principle of "In dubio, pro reo" was not respected. Further, witness [redacted] should have been heard at the trial. Moreover, the Judgment should be based on the evidence administrated in the main trial but this is not the case in this case. Lastly, the rights of the defense have been violated because the defense counsel was not present during the whole of the interview at the police station. Therefore this statement is inadmissible evidence. H. Q. J.M.

Secondly, the factual situation is determined erroneously and incompletely. No casings have been recovered from the crime scene of the first attempt aggravated murder nor has it been proven that [redacted] touched the weapon. Also, because of the minor damages caused by his actions the elements of the crime [redacted] is charged with are not fulfilled. Therefore Q. Q.

he should be acquitted. Shooting with a handgun does not constitute attempt aggravated murder but rather brandishing a weapon at the most. Further, the statement of [redacted] is not reliable evidence but it should be backed up with material evidence.

Thirdly, provisions of criminal code have been substantially violated. The criminal liability of [redacted] has not been established by evidence.

As a fourth and last point the appeal claims that the criminal sanction is too severe. The purpose of the punishment has been accomplished with the time already spent in detention. The calculation of the sentence is not based on law. Only the aggravating circumstances have been taken into account but not the mitigating circumstances. [redacted] is a student about to graduate, he has not previously faced the law, he is of poor economic status and he has behaved well during the proceedings.

3. The Appeals of [redacted]

The Defense Counsel Hasan Jashari proposes that the Supreme Court annuls the first instance verdict and returns the case to the court of first instance for retrial. Alternatively the defense counsel proposes the first instance verdict to be amended.

The presented grounds for the appeal are summarized as follows:

Firstly, the provisions of the criminal procedure have been substantially violated. The reasoning of the judgment is unclear because there is a contradiction between the enacting clause and the reasoning. Also, the judgment is mostly based on the statements given at the police. Those statements have been taken contrary to the provisions of law. Further, the judgment does not state clearly which facts it considers proven and why. Moreover, the evidence is not assessed and analyzed clearly nor the criminal responsibility of [redacted] explained.

Secondly, the factual situation is determined erroneously and incompletely. The procedural violations lead to the erroneous determination of the facts. [redacted] did not know that the other two defendants were intending to deprive the life of [redacted].

Thirdly, provisions of criminal code have been substantially violated since it has not been proven that [redacted] committed the criminal offence.

As a fourth and last point the appeal claims that the criminal sanction is too severe. The mitigating circumstances have not been taken into account. [redacted] has not previously faced the law. The consequences of the act are minimal. The family and personal reasons of [redacted] are not taken into account.

[redacted] himself proposes that the Supreme Court annuls the first instance verdict and returns the case to the court of first instance for retrial. Alternatively the defense counsel proposes that he should be acquitted from the charges.

The presented grounds for the appeal are summarized as follows:

Firstly, the provisions of the criminal procedure have been substantially violated. The enacting clause for the second count of attempted murder has exceeded the indictment. Also, the judgment is unclear and controversial and it does clearly state the proven actions of [redacted] in relation to the second count of attempt murder. Further, the intent does not exist. Moreover, the statements given at the police station are inadmissible evidence because the accused were examined without their lawyers or notifying them of their rights.

Secondly, the factual situation is determined erroneously and incompletely. The evidence does not suffice to conclude that [redacted] has committed the criminal acts he is charged with and therefore the evidence does not support the charges. None of the witnesses or the other defendants implicate [redacted] Also, none of his claimed actions has any consequences. Further, the evidence is assessed incorrectly. Moreover, the court does not state which actions of S[redacted]it considers proven.

Thirdly, provisions of criminal code have been substantially violated.

As a fourth and last point the appeal claims that the criminal sanction is too severe. The purpose of the punishment is achieved by the time [redacted] as already spent in detention. Also, [redacted] is relatively young and has not previously faced the law. His financial situation is poor.

4. The Opinion of the Public Prosecutor

The Public Prosecutor proposed to reject the appeals as unfounded.

The Public Prosecutor argued that the police interviews conducted on 13 April 2007 are admissible evidence as none of the conditions of the Article 235 of the KCCP rendering a statement inadmissible are met. Also, the court of first instance has properly addressed the alleged undue pressure and rejected the allegations. The examination was done in full respect for all legal rights of the defendants and all the defendants have singed the records.

The Judgment does not exceed the scope of the charges for [redacted] so there is no violation of Article 403 paragraph 1 Item 10 of the KCCP.

There is no violation of Article 403 paragraph 10 Item 12 of the KCCP. The enacting clause contains the data required in the Articles 396 and 391 of the KCCP. It is not contradictory to the reasoning as the statements of grounds and the facts considered proven in the reasoning are clearly in line with the content of the enacting clause. Contradictions with the indictment do not fall within the scope of Article 403 of the KCCP. Considering [redacted] the Public Prosecutor notes that in the enacting clause references are made to both paragraphs 2 and 3 but the original Albanian Indictment only refers to paragraph 2.

S. In the procedure there are no breaches compatible with Article 403 paragraph 2 item 1 of the KCCP. The quilt of [redacted] was proven beyond a reasonable doubt. According to Article 153 of the KCCP evidence obtained during the investigation is only inadmissible if this is expressly prescribed in the law. The KCCP does not determine violations of Article 255 rendering the evidence inadmissible. Therefore the result of the identification is not inadmissible evidence. The court of the first instance has assessed the issue of identification correctly. The court of first instance acted according to the Article 368 paragraph 1 item 1 concerning the statement of [redacted] J. M.

There are no violations of the criminal law in the procedure. The court of first instance has thoroughly assessed the criminal intent of all the defendants and elaborates this assessment in the Judgment. Therefore there is no violation of Article 15 of the CCK.

H. The defense counsel of [redacted] did not request a neuropsychiatric examination. Further, the commission of the crimes and the planning and carrying them out do not indicate the existence of any mental incompetence or diminished mental capacity. Therefore, there is no violation of Article 12 of the CCK.

The factual situation was determined correctly and completely. The Supreme Court does not assess the credibility of the witness statements but defers to the assessment of the trial panel.

H. The court of first instance rightfully considered the circumstances of the criminal offence and the guilty plea of H[redacted] when considering the sentencing. The imposed sentences are not disproportionate to the gravity of the crime.

III COURT FINDINGS

A. Permissibility of the appeal

The Supreme Court finds that the appeals were filed within the limit of 15 days as prescribed in Article 398 of the KCCP and they were thus timely and permissible. The appeals were filed by the Defence Counsels, authorized persons, and the defendant Spahiu personally.

The Panel will now assess each of the arguments raised in the appeals of the Defence.

B. Alleged violations of criminal procedure code

All three defendants claim that the statements of the defendants given at the police station on 13.4 2007 are inadmissible because they have been heard without the presence of their

lawyers and mistreated by the police to compel the confessions. [redacted] also claims that the defendants were not notified of their rights.

As stated in the District Court's judgment all three defendants gave their statement before the police on the day following their arrest and in the presence of their defence counsels. Both the defendants and their defence counsels have signed the statements. [1] The Supreme Court points out that the statements of [redacted] and [redacted] indicate that the police did hear them both on 12.4.2007 as both of the statements contain a question "*Do you accept as yours the statement given to the police yesterday on 12.4.2007?*" However, these statements from 12.4.2007 are not part of the case file. The content of the statement on 13.4.2007 of [redacted] confirms the presence of the defence counsel at the interview when it states that "*Q: Can you tell us in the presence of the attorney, what you told us yesterday regarding the attacks on* [redacted]" [2] The statement of [redacted] repeats the question almost to the word. The only reasonable conclusion is that the whole interview on 13.4.2007, rather than just the signatures, was done at the presence of the defence counsels. The statement of [redacted] contains no reference to an earlier interview so there is even less reason to believe that he was heard without the presence of his defence counsel.

The statements of all the defendants state that they have been informed of their rights.

As to the claim of mistreatment by the police to extort the confessions the Supreme Court simply refers to the arguments of the District Court. [3] The District Court has clearly and exhaustively argued the reasons for dismissing the claim and the Supreme Court fully accepts these arguments.

Therefore the statements are admissible.

All three defendants have also claimed that the statements of identification of the defendants by [redacted] and [redacted] are inadmissible because the idenfication procedure is not done according to the KCCP.
As stated in the District Court's judgment [4] the witness M[redacted] was unable to attend the trial due to her poor health condition. The District Court has correctly applied the Article 386 paragraph 1 item 1 of the KCCP and read her statement into the records. Further, as discussed in the District Court's judgment [5] the Article 153 of the KCCP states that the evidence obtained in violation of the criminal procedure shall be inadmissible when the Code or other provisions of the law expressly so describe. The Criminal Procedural code does not expressly prescribe the lack of description in the identification procedure as resulting in inadmissibility of that identification. Thus, the statements of identification are admissible. Therefore the Court is free to admit and consider as well as assess freely the statements of identification even if they had lacked a description.

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[1] Page 11-12 of the English version
[2] Minutes of the examination of defendant H[redacted]on 13.4.2007
[3] Page 12-13 of the English version
[4] Page 18-19 of the English version
[5] Page 17-18 of the English version

As to the lack of neuropsychiatric examination the Supreme Court notes that according to the minutes of the main trial there was no request for neuropsychiatric examination. Nor is there anything in the case file that would raise a doubt as to the mental state of the defendant. It is worth pointing out that both of the documents which defence counsel Halimi is referring to are dated after the pronouncement of the Judgment on 20 November 2010.

M. Q. A. H

[redacted] and [redacted] are accused of "*two criminal acts of attempted aggravated murder against Article 147 paragraph 1 items 4 and 7 in connection with Articles 20 and 23 of the PCCK*" and D. S. of "*one criminal act of attempted aggravated murder against Article 147 paragraph 1 items 4 and 7 in connection with Articles 20 and 23 of the PCCK*". Defendants [redacted] and [redacted] are also accused of "*unauthorized ownership, control, possession or use of weapons against Article 328 paragraph 2 of the PCCK*". [redacted] the Spahiu is also accused of "*unauthorized ownership, control, possession or use of weapons against Article 328 paragraph 3 of the PCCK*". [6]This indictment was confirmed without modifications. Therefore the enacting clause of the Judgment does not exceed the indictment.

D. S. A. H. D. S. M. Q. D. S.

C. Alleged lack of criminal responsibility

The intent of the defendants is clearly argued in the District Court's judgment. [7] The Supreme Court accepts this assessment. Therefore the intent is sufficiently evaluated and properly established.

D. Alleged lack of evidence and false or inadequate assessment of evidence presented

The KCCP does not require a specific type of evidence to be administered before an accused can be found guilty. On the contrary, Article 152 paragraph 2 KCCP states that "*The court according to its own assessment may admit and consider any admissible evidence that it deems is relevant and has probative value with regard to the specific criminal proceedings and shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility.*"

As to the assessment of evidence the Supreme Court notes that a thorough evaluation of the District Court's judgment shows that it has exhaustively discussed the evidence presented in the main trial. The District Court has considered all the evidence and made its own evaluation or assessment. The District Court's Judgment is not based purely on the statements of the defendants given at the police station. When considering the attack on 28 February 2007 the District Court refers to the declaration given by [redacted] at the police station on 13 April 2007 in relation to what he has stated in the main

A. H.

[6] Indictment dated 23.7.2007, pages 2-3 of the English version
[7] Page 20-21 of the English version

trial. Further, the District Court has considered the statements of the injured parties [redacted] and [redacted] as well as witness [redacted]. Also, the District Court has taken into consideration the Report of the Police patrol dated 28.2.2007. When considering the attack on 12 February 2007 the District Court refers to the statements of the injured parties [redacted] and the members of the close protection unit who escorted him at the time, the medical report on [redacted], the information presented in the forensic reports, the confessions by [redacted] in relation to what he has stated in the main trial, the statements of [redacted] in relation to what they have stated in the main trial, the presence of the three accused near the crime scene as well as the possession of two hand grenades by [redacted] and his fingerprints on the rocket launcher.

Both factual and legal reasoning are indicated in the judgment. The District Court has provided a convincing analysis with regard to the description of the actions of all the defendants relating to the crimes for which they are found guilty. This evidence clearly supports the conclusions made by the District Court as embodied in its enacting clause. The Supreme Court has not been persuaded by the allegations raised in the appeals.

Also, the Supreme Court notes that the European Court of Human Rights will not generally review the assessment of the evidence national courts. It will only do so where the national court has drawn 'arbitrary or grossly unfair conclusions from the facts submitted to it'.[8]

E. Legal qualification

The CCK does not only provide for the punishment of those who have culpably caused harms but it also penalizes those who are trying to cause the harms. According to the Article 20 of the Criminal Code of Kosovo *"Whoever intentionally takes an immediate action toward the commission of an offence and the action is not completed or the elements of the intended offence are not fulfilled has attempted to commit a criminal offence."*

In the case in question the defendants have finished the action of committing the offence; on 28 February 2007 [redacted] and [redacted] had fired the guns towards the vehicle of [redacted] and on 12 April 2007 [redacted] had fired the rocket launchers and thrown the hand grenade. The District Court has clearly argued the intent of the defendants. This intent was to kill [redacted] had the defendants succeeded the legal qualification of the act would without a doubt have been aggravated murder. Therefore the main element of the intended criminal offence of murder – the deprivation of the life of [redacted] – is not fulfilled and the actions of the defendants fall under the scope of attempt as it is prescribed in the Article above.

[8] Waldberg v Turkey. No. 22909/93 (Hudoc database)

F. Sentencing

According to Article 64 paragraph 1 of the CCK *"The court shall determine the punishment of a criminal offence within the limits provided for by law for such criminal offence, taking into consideration the purpose of punishment, all the circumstances that are relevant to the mitigation or aggravation of the punishment mitigating and aggravating circumstances) and, in particular, the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, the past conduct of the perpetrator, the entering of a guilty plea, the personal circumstances of the perpetrator and his or her behaviour after committing a criminal offence. The punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender."*

The starting point when determining the punishment is the limits provided for by law for such criminal offence. According to Article 147 of the CCK prescribes imprisonment of at least ten years or a long term imprisonment as the punishment for aggravated murder. Article 65 paragraph 2 states that " *The punishment imposed for attempt, .. shall be no more than three-quarters of the maximum punishment prescribed for the criminal offence. ...* "

The purpose of punishment as stipulated in Article 34 of the CCK is "*To prevent the perpetrator from committing criminal offences in the future and to rehabilitate the perpetrator; and to deter other persons from committing criminal offences.*" These principles do not offer a great deal of help when determining the length of the imprisonment for the perpetrator.

When determining the sentence the District Court had taken into consideration as aggravating and mitigation circumstances the number of possible victims of the attempted murders and the degree of respect of human life shown by the defendants, the potential of the weapons used especially on 12 April 2007, the determination of the defendants to conclude the act and the lack of any remorse or re-thinking between the first and the second attack [redacted] and [redacted], the qualification of the act as an attempt, the partial confession of [redacted] (count 2) and the occasional involvement of [redacted] in the sense that he did not take part to the planning but joined [redacted] and [redacted]. The Supreme Court in general agrees with the assessment of mitigating and aggravating factors made by the District Court.

H. Q. H. S. A.H. M.Q.

However, the Supreme Court further specifies the grounds for sentencing. The phrase "in particular" used in Article 64 paragraph 1 of the CCK means that the grounds listed here are of distinct importance. As to the the degree of criminal liability the Supreme Court points out that the general justification of criminalizing an attempt is not the occurrence of harm but the prevention of it. The Article 20 of the CCK seems to suggest that there are two kinds of attempts – those in which the defendant didn't finish the action of committing the offence and those in which the elements of the intended offence are not fulfilled. In the case in question the defendants completed the actions and therefore the defendants are more culpable than if they had aborted the commission of the crime in the last minute. The incident ended without injuries to anyone by chance rather than by

A.B. choice, purely due to luck of [redacted]. The moral culpability of the defendants in this case is no less than if they had succeeded in their attempt since the outcome had nothing to do with the will of the defendants. Therefore the punishment should be closer to the punishment that of a punishment for a completed crime.

A.H. Further, in relation to the motives for committing the act the Supreme Court notes that the indictment clearly states that the [redacted] were recruited to commit the crime in exchange for a payment and therefore they had a goal of financial profit. [9] The defendants were not, however, found guilty according to Article 147 paragraph 1 item 7 (for the purpose of obtaining a material benefit) nor is this motive construed in the description of the criminal acts in enacting clause. Although the trial panel in the reasoning of the Judgment discussed the meanness of the reasons as a circumstance for aggravated crime [10] it does not seem it necessary to illustrate this any further. The panel also states that "*It was clear to the judges that the three accused ... were not those who inspired them. They were just mercenaries.*" [11] The panel goes on to state that the defendants "*showed their loyalty to whom mandated them.*" [12] The Supreme Court is of the opinion that because the defendants have not been found guilty for acting for the purpose of obtaining material benefit their motives cannot be consider as aggravating factors in relation to sentencing. M.Q

The object of legal protection stipulated by Article 147 is the life of another person. The District Court has exhaustively discussed the intensity of danger the protected value caused by the criminal acts. It is has not, however, discussed the actual injury to the protected value when determining sentencing although this is a criteria stipulated in Article 64 paragraph 1 of the CCK. Therefore the Supreme Court points out that, luckily, the attacks did not result to consequences more severe than bodily injuries to one person.

The District Court has not discussed past conduct of the perpetrators when determining sentencing although this is a criteria stipulated in Article 64 paragraph 1 of the CCK. Also, in its previous judgments [13] Supreme Court has concluded that lack of past conflict with the law is a mitigating fact. All three defendants claim this is the first time they are facing the law. The Supreme Court is not aware of previous sentences of either of the defendants.

The District Court has not discussed the personal circumstances of the perpetrator although this is a criteria stipulated in Article 64 paragraph 1 of the CCK. This is confirmed in previous judgments of the Supreme Court. [14] Report of Physical examination of [redacted] dated 5 July 2010 by [redacted] concludes that [redacted]

A.H. A.H.

[9] Indictment, page 2 of the English version
[10] Judgment dated 20 November 2009, page 21 of the English version
[11] Judgment dated 20 November 2009, page 22 of the English version
[12] As above
[13] See for example Ap. Kz. No. 180/2005 dated 24.5.2005, Ap. Kz. No. 62/2005 dated 21.4.2005 or Ap. Kz. No. 401/2004 dated 12.12.2004
[14] As above

has slight neurological deficit in both lower legs, slightly more on the left side [redacted] M.Q. D.S. [redacted] and [redacted] are in poor financial situation.

As to the behavior after committing the crime, the Supreme Court notes that [redacted] A.H. did not confess to the first account of attempt aggravated murder but only to the second. Therefore the reduction of sentence based on the mitigating fact of confessing to the crime does not apply to the first count of attempt aggravated murder.

Finally Article Article 64 paragraph 1 of the CCK states that the "*punishment shall be proportionate to the gravity of the offence and the conduct and circumstances of the offender.*" The Supreme Court is of the opinion that the sentences handed down by the District Court are too severe. Therefore the Supreme Court has reduced the sentences for all the defendants.

IV CONCLUSION

The Supreme Court finds that the appeals are partially founded.

The Supreme Court did not recognize *ex officio* any violations of law (as per Article 415 paragraph 1 of the KCCP) which were not the subject of appeal by the defense.

Based on all of the above stated reasons it is decided as in the enacting clause.

Dated this 24 August 2011.
Ap.-Kž. No. 323/2010

Prepared in English, an authorized language.

Presiding Judge

Martti Harsia

Recording clerk

Noora Aarnio

Member of the Panel

Charles Smith, III

Member of the Panel

Lars Dahlstedt

Member of the Panel

Marije Ademi

Member of the Panel

Emine Mustafa