SUPREME COURT OF KOSOVO

Ap-Kz 337/2010
02 August 2011

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel composed of EULEX Judge Charles Smith as Presiding Judge, EULEX Judge Gerrit-Marc Sprenger and Supreme Court Judge Marije Ademi as panel members, with the assistance of EULEX Legal Officer Olivia Debaveye,

V. M.

In the criminal case against defendant [redacted] son of [redacted] and [redacted] born on [redacted] in the village Kosuriq, Pejë/Peć Municipality, residing in Pejë/Peć – [redacted] Kosovo Albanian, of poor economic conditions, in detention since 23 July 2010,

Convicted by the District Court of Pejë/Peć on 23 July 2010 for the criminal offence of *Provoked Murder* contrary to Article 33 of the Criminal Law of Kosovo ("CLK") for the murder of Xhafer Belegu committed, on 23 August 2003, in Pejë/Peć

Acting upon the appeal of the defendant filed through his Defence Counsel Zenel Mekaj on 15 October 2010 against the judgment of the District Court of Pejë/Peć in case no. **P.nr. 29/08**, dated 23 July 2010, whereby the court found the defendant guilty and sentenced him to 8 years of imprisonment.

After having held a session on 02 August 2011 open to public, in the presence of the State Prosecutor and the Defence Counsel Zenel Mekaj, and in the absence of the defendant who did not wish to attend the session and after a deliberation and voting held on the same day 02 August 2011,

Pronounces the following

JUDGMENT

V. M.

The appeal filed on behalf of the defendant [redacted] against the Judgment of the District Court of Pejë/Peć in the case P.nr. 29/08, dated 23 July 2010, is hereby REJECTED as ungrounded.

The Judgment of the District Court of Pejë/Peć is affirmed in its entirety.

REASONING

I. PROCEDURAL HISTORY

The Indictment PP.nr. 437/03 was filed on 21 November 2003 by the District Public Prosecutor against [redacted]li for the criminal offence of *Murder, Lenient Bodily Harm and illegal possession of weapons and ammunition* because on 23 August 2003, following a quarrel between his father and the victim, whereby the victim shot at his father, he intentionally murdered [redacted] and hit [redacted] sister of the victim.

The first main trial was held on 28 January 2004. The defendant was acquitted for the charge of *Murder* as it was proven that he acted in necessary defence but he was convicted for the charge of *illegal possession of weapons* and for the charge of *lenient bodily harm* against [redacted] He was sentenced to 6 months imprisonment.

Following an appeal by the Prosecutor, the Supreme Court on 21 January 2005 quashed the judgment of the District Court as to the acquittal of the murder charge and sent the case back for retrial.

The second main trial was held on 8 May 2007. The defendant was again acquitted because it was proven that he acted in necessary defence.

Following an appeal, the Supreme Court decided on 6 December 2007 to quash the judgment and to send the case back for retrial again.

The third main trial was held on 2, 3, and 8 June 2010, 21, 22 and 23 July 2010 in the District Court of Pejë/Peć. The case had been previously assigned to EULEX, therefore a panel of 2 EULEX judges and one local judge decided on this case and on 23 July 2010 found the defendant guilty of *Provoked Murder* and sentenced him to 8 years of imprisonment. The charge had been amended by the Prosecutor during the closing speech from Murder to Provoked Murder.

An appeal was filed by the defendant through his defence counsel Zenel Mekaj on 15 October 2010.

The OSPK filed its Opinion on 24 November 2010.

II. THE APPEAL OF THE DEFENCE

The defendant filed an appeal through his defence counsel Zenel Mekaj on 15 October 2010.

The defence counsel alleges that the judgment of the District Court of Pejë/Peć contains

- a substantial violation of the criminal procedure
- an erroneous determination of the factual situation
- a violation of the criminal law
- a wrong decision on the punishment

II. 1. The substantial violation of the criminal procedure

The defence counsel alleges that the enacting clause is incomplete and incomprehensible. The enacting clause does not establish the intensity and the way of the attack from the victim [redacted] (father of the defendant), so it cannot be clearly understood the reaction of the defendant after having seen his father attacked.

The enacting clause does not specify that the victim shot four times at the defendant's father but leave it open on which way the victim attacked the defendant's father so it is incomplete and incomprehensible.

II. 2 The factual situation has been improperly determined

The District Court did not appropriately assess the reasons why [redacted] tayed behind the corner of the victim's house and did not consider the version of the defendant that as soon as he entered the yard of the victim, the victim shot towards him. This is the reason why the defendant hid behind the wall to protect himself. The District Court considered that he hid behind the corner in order to shot at the victim as he wanted to revenge his father.

In addition, the District Court did not consider the fact that there was a fire exchange between the victim and the defendant, as confirmed by the witness [redacted]

Furthermore, the District Court did not consider that the fifth shot fired by the victim, (cartridge number 7) was directed at the defendant. The location of this cartridge explains that the victim has shot at the defendant. Therefore, the defendant reacted to this shot.

Finally, the defence is claiming that it is possible that the victim shot more than 5 times, but that all the cartridges have not been found, which would then explain that the victim had shot more than one time towards the defendant. However, the District Court disavowed this possibility completely.

II.3. A violation of the criminal law at the detriment of the defendant:

The District Court should not have qualified the criminal offence as a *provoked murder* under Article 33 of the CLK but as a *murder in necessary defence.*

A correct determination of the factual situation would have shown that the defendant acted in necessary defence, as the defendant was provoked, he tried to defend himself and his actions were proportionate.

Accordingly, Article 9, paragraph 1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY CC") should be applied because it states that "*An act committed in necessary defence is not considered a criminal act*". The defence counsel alleges that the defendant should therefore be acquitted as he acted in necessary defence. Alternatively, according to Article 9 paragraph 3 of the SFRY CC, if the offender exceeded the limits of necessary defence, the court may reduce the punishment, and if he has exceeded the limits by reason of great excitement or fright stirred up by the attack, it may also refrain from imposing a punishment on him.

The defence counsel requests that this should apply to the defendant and the sentence should therefore be reduced.

II.4. The decision on punishment

The defence counsel alleges that the punishment is too severe. Indeed, the criminal offence of *provoked murder* is punishable from 1 to 10 years, according tor CLK. Therefore, an 8 years sentence is almost the maximum sentence. This does not take into consideration the fact that the victim had shot the defendant's father four times and that the defendant saw his father on his knees bleeding.

Therefore, the defence counsel requests that the verdict of the District Court of Pejë/Peć **be modified** in order to acquit the defendant or to impose a more lenient sentence on him **or be annulled** and the case returned for re-trial and a new decision.

III. The Opinion of the OSPK

V. M.

The State Prosecutor in its Opinion dated 23 November 2010 proposes to reject as ungrounded the appeal of the defence counsel of [redacted] and to confirm the judgment of the District Court of Pejë/Peć for the following reasons:.

- The enacting clause is comprehensible and the factual description is in compliance with the evidence;
- The factual situation has been correctly established;
- The Court has sufficiently detailed its reasons and evaluation of the evidence in the judgment, such as witnesses and crime scene reports;
- The State Prosecutor considers that this is not a case of self-defence pursuant to Article 8 of the CCK because when the defendant shot at the victim, he was not being attacked by the victim and he ran after the victim to kill him. So there was no unlawful, real and imminent attack against the defendant. It cannot be qualified as excess of self-defence either as the first element of the self-defence, i.e. the imminent attack is not fulfilled.
- This is a clear case of provoked murder. The criminal offence was adequately re-qualified.

- The State Prosecutor believes that 8 years sentence is adequate.

IV COURT FINDINGS

IV.1. Admissibility of the appeal

The Supreme Court finds that the appeal filed on behalf of the defendant is timely filed and is therefore admissible. The appealed verdict was served to the defendant on 18 October 2010 and to the defence counsel on 8 October 2010 and the appeal was filed on 15 October 2010, thus within the limit of 15 days as prescribed in Article 359 paragraph 1 of the Law on Criminal Proceedings ("LCP"). The appeal was filed by the Defence Counsel, an authorized person.

IV.2 the substantial violation of the criminal procedure

The Supreme Court has carefully considered in particular the enacting clause of the judgment of Pejë/Peć issued on 23 July 2010 to evaluate if this could be considered as a substantial violation of the criminal procedure under Article 364, paragraph 1, subparagraph 11 of the LCP. The content of the enacting clauses has been discussed already on a number of occasions by the Supreme Court[1] in order to assess whether an enacting clause containing only limited details as to the facts and circumstances of the criminal offences in question should be considered as incomprehensible.

The enacting clause of the judgment of the District Court of Pejë/Peć dated 23 July 2010 reads as follows:

V.M [redacted] FOUND GUILTY of ***Provoked Murder*** *contrary to Article 33 of the Criminal Law of Kosovo (CLK) as to the murder of* [redacted] *committed, on 23 August 2003, in Peja, because after having been brought, not by his own fault, to a state of exasperation caused by a serious attack conducted by* [redacted] *against* [redacted] *the father of the defendant, he was provoked to take the life of* [redacted] *and shot at him by a pistol hitting the victim deadly on the right front of the trunk, thus causing his death."*

X.B. X.B. R.M. [redacted] X.B.

The Supreme Court considers that this enacting clause fulfills the requirements of Article 357 paragraphs 3 and 4 as read with Article 351 of the LCP. Indeed, the enacting clause mentions the name of the victim, the place and time of the commission of the criminal offence, the fact that the defendant committed the criminal offence in a state of exasperation caused by serious attack by the victim on his father and the consequent provocation to take the life of the victim. The panel also notes that the pertinent legal provisions are mentioned. The defence counsel states that the enacting clause is incomprehensible because it does not specify that the victim had shot at the defendant's father four times, therefore, it cannot be understood the intensity of the attack sustained

[1] Judgment Ap-Kz 108/2010, I[redacted]G[redacted] 25 November 2010, Judgment Ap-Kz 128/2010, F.B, 3 August 2010, Judgment Ap.-Kz. No. 89/2010, I[redacted]G[redacted] et al., 26 January 2011

and the reaction of the defendant. However, on the contrary, the Supreme Court finds that the enacting clause provides sufficient information as to the facts and circumstances which constitute the features of the criminal act and those on which the application of the particular provision of the criminal law depends, as required by Article 351 of the LCP. The fact that it is not clearly stated that the victim shot at the defendant's father four times does not make the enacting clause incomprehensible.

Furthermore, as stated previously by the Supreme Court, a judgment has to be considered as a unique document composed of three parts: an introduction, an enacting clause and statement of grounds pursuant to Article 357 paragraph 1 of the LCP. Since the enacting clause is an integral (and the most decisive) part of the judgment, it has to be read and interpreted in connection with all the other parts of the judgment.

In the statement of the grounds part of the judgment, it is well explained that the victim [redacted] before being killed shot at [redacted] father of the defendant, causing him five wounds and it is particularly detailed in page 12, 17, 22 of the judgment (English version).

The panel therefore decides to reject this ground of appeal as the District Court of Pejë/Peć did not substantially violate the criminal procedure.

IV.3 The erroneous determination of the factual situation

The panel carefully reviewed the description of the events as provided by the witnesses and in the reports and statement of expert witnesses[2] summarized in pages 6 to 11 of the judgment by the District Court of Pejë/Peć based on the following points:

- The relationship between the M[redacted] family and the B[redacted] family;
- The quarrel related to the hole in the street between the two houses and the shots fired by X[redacted] B[redacted]
- The reaction of the defendant and the killing of X[redacted] B[redacted]
- The events soon after the shooting.

The panel finds that the District Court of Pejë/Peć made a well reasoned presentation of the factual findings in page 12 and discussed possible versions of events in order to finally conclude on page 17 that : " *Therefore it must be affirmed that after having shot 4 times against* [redacted] *went towards his house, then shot one more time (most likely against* [redacted] *and after having run out bullets was heading towards the garage and the back of the house when* [redacted] *entered the victim's courtyard, hid behind the pillar of the house, addressed the above words to* [redacted] *nd hit him on his chest with the lethal bullet.*"

It is clear that the first instance court considered the version presented by the defendant that he hid behind the pillar in order to protect himself from the alleged shots fired

[2] See page 4 and 5 of the judgment of the District Court of Pejë/Peć, dated 23 July 2010 (English version)

towards him by the victim. But the panel of the Supreme Court agrees with the stance of the District Court which explains in details the reasons why this theory is disavowed by the objective evidence that no cartridges spent by the pistol of the victim were found in the alley leading to the garage and by the unlikelihood that additional shots were shot by the victim but the cartridges not retrieved by the police which attended the scene 20 minutes later.

As stated in the *V[redacted] U[redacted] R[redacted] S[redacted] and S[redacted] Islami* judgment(Ap – Kz 428/2007 dated 28 May 2007),

"The Supreme Court of Kosovo must defer to the assessment by the trial panel of the credibility of the trial witnesses who appeared in person before them and who testified in person before them. It is not appropriate for the Supreme Court of Kosovo to override the trial panel assessment of credibility of those witnesses unless there is a sound basis for doing so".

This also applies in the case in question. There are no valid reasons or additional facts and evidence presented by the defense counsel which are strong enough to override the conclusion made by the District Court of Pejë/Peć.

Therefore, the panel of the Supreme Court did not find that the state of facts has been incorrectly or incompletely established and that the court has erroneously established some decisive fact or has failed to establish it as foreseen under Article 366 of the LCP.

IV.4 The violation of the criminal law

The legal qualification of the criminal offence in question follows the determination of the factual situation.

The first instance court established that the defendant did not shoot in order to protect himself from an imminent attack but entered the courtyard of the victim, hid and shot at the victim. It concluded that the actions of the defendant cannot be explained as an act of necessary defence as the attack against the defendant's father had ceased and it has not been proven that there has been an attack from the victim to the defendant.

This stance is in line with the guidelines set in the ruling of the Supreme Court dated 06 December 2007 where the case was sent back fro re-trial and a new decision: "*Therefore, the conclusion of the first instance court that in the actual case has to deal with a criminal act of murdering of defence necessity pursuant to Article 30 paragraph 1 of the CLK in conjunction with Article 9 paragraph 1 and 2 of the CC SFRY cannot be accepted for the reason that there is no similarity with the action of the accused hence such a conclusion is contrary to the administered evidence*". This point had already been raised in the first ruling of the Supreme Court dated 27 January 2005, which had also sent the case back for re-trial and a new decision the first time. The panel had already criticised the first instance court for having incorrectly established the factual situation which led to

the violation of the criminal law: the claim that the victim was shooting at the defendant is not corroborated with the findings of the ballistic report.

The Supreme Court agrees with the first instance court that Article 8 of the Criminal Code of Kosovo is more favorable than Article 9 of the Criminal Code of the SFRY. In any case, Article 8 of the Criminal Code of Kosovo requires an "unlawful, real and imminent attack" and Article 9 of the Criminal Code of the SFRY requires an "immediate and unlawful attack". This immediate and unlawful attack was not proven in this case. The court of first instance rightfully established that this is not an act of necessary defence which would then preclude criminal liability nor a case of excess of self defence which would have reduced the punishment.

The Supreme Court finds that the actions of the defendant were adequately re-qualified by the District Public Prosecution and the District Court from *murder* under Article 30 of the CLK to *provoked murder*, under Article 33 of the CLK. Indeed, the first instance court adequately showed that

- the perpetrator, at the moment when he committed the criminal act, was in a state of exasperation: this was confirmed by the expert witnesses Dr Nazife Sylejmani and Dr. Bujar Berisha in the court hearing dated 21 July 2011 as well as by Dr Gani Rana in his statement dated 23 December 2003;
- that the perpetrator through no fault of his own was brought in such as state by an attack or a serious insult by the killed person: It has been proven through the testimony of witnesses, the medical examination of [redacted] as well as the ballistics report that the victim [redacted] had previously shot four times the defendant's father. This was not the fault of the perpetrator as he was in his house when the quarrel between his father and the victim started and this has to be considered a serious attack; R.M. X.B.
- that therefore the homicide was provoked: it has been shown that after having seen his father covered with blood out the shots fired by [redacted] the defendant was provoked to take the life of the victim. X.B.

Considering the factual situation, the Supreme Court is of the opinion that the first instance court adequately qualified the offence in question as provoked murder pursuant to Article 33 of the CLK and therefore did not violate the criminal law.

IV.5 The punishment

The panel of the Supreme Court also considered that the act in question is particularly serious and that the defendant pursued the victim following the provocation in order to shoot at him and in effect took the law into his own hands when in fact he could have easily contacted the police to undertake an arrest and an investigation of the victim.

For these reasons, the Supreme Court notes that the punishment falls within the legal frame as the provoked murder is punishable from 1 to 10 years of imprisonment

according to Article 33 of the CLK and does not deem that the punishment pronounced by the trial panel is excessive.

IV.6 The *ex officio* assessment of the violations under Article 376 of the LCP.

In addition to the grounds specified in the appeal of the defence counsel, the Supreme Court is also under an obligation to analyse *ex officio*:

- whether there has been a violation of the provisions of criminal proceedings set forth in Article 364, Paragraph 1, Items 1, 5, 6, 8 through 11 of the LCP,
- whether the main trial was held in the absence of the accused contrary to the provisions of this LCP,
- in the case of mandatory defense, whether the main trial has been held in the absence of counsel for the defense of the accused;
- whether the Criminal Law (Article 365) has been violated to the detriment of the accused.

No such violation has been noted.

V. CONCLUSION

It is therefore decided as in the enacting clause.

Prepared in English, an authorized language.

Ap-Kz. 337/2010

Dated this 2nd of August 2011

Presiding Judge

Charles L. Smith III

Recording Officer

Olivia Debaveye

Member of the Panel

Gerrit-Marc Sprenger

Member of the Panel

Marije Ademi