SUPREME COURT of KOSOVO

Supreme Court of Kosovo
Ap.-Kz. No. 84/2009
Prishtinë/Priština
03 December 2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 24 November 2009 in the Supreme Court building in a panel composed of International Judge Gerrit-Marc Sprenger as Presiding Judge, International Judge Maria Giuliana Civinini and Kosovo National Judges Avdi Dinaj, Osman Tmava and Gjuran Dema as panel members

And with Mr. Robert Abercrombie as Court Recorder,

In the presence of the

International Public Prosecutor Theo Jacobs, Office of the State Prosecutor of Kosovo (OSPK)

Defense Counsel Ibrahim Z. Dobruna for the defendant

In the criminal case number AP-KZ 393/2006 against the defendant:

, born on in the village of Municipality of national and last residence in in n, fathers name , mother's name , continuously in custody since 09 November 2004; currently detained in Dubrava Detention Centre.

In accordance to the Verdict of the first instance District Court of Prishtine/Pristina in the case no. P. Nr. 628/2004 dated 08 March 2007 and registered with the Registry of the District Court of Prishtine/Pristina on the same day, **the defendant was found guilty of the following criminal offenses:**

[i] Of committing the criminal offence of **Murder** of acting in complicity with and aiding and abetting those charged in a separagraphate indictment and meanwhile finally sentenced by the Supreme Court of Kosovo, namely

contrary to Article 30 paragraph 2 items (1), (3), (4) and (5) of the Criminal Code of the Socialist Autonomous Province of Kosovo (CC SAPK), as read with Article 22 and 24 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY);

[ii] Of committing the criminal offence of **Attempted Murder** of acting in complicity with and aiding and abetting those charged in a separagraphate indictment and meanwhile finally sentenced by the Supreme Court of Kosovo, namely

and contrary to Article 30 paragraph 2 items (1), (3), (4) and (5) of the CC SAPK, as read with Article 19, 22 and 24 of the CC SFRY;

[iii] Committing the criminal offence of **Agreement to Commit the Criminal Act of Murder** of acting in complicity with and aiding and abetting those charged in a separagraphate indictment and meanwhile finally sentenced by the Supreme Court of Kosovo, namely

, contrary to Article 196 of the CC SFRY, as read with Article 22 and 24 of the CC SFRY;

And was convicted as follows:

The accused was sentenced for the criminal act of **Murder** to a term of imprisonment of fifteen (15) years [Article 37 paragraph 1 and 2 of the Provisional Criminal Code of Kosovo (PCCK) as read with Article 30 paragraph 2 of the CC SAPK and UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59]; for the criminal act of **Attempted Murder** to a term of imprisonment of six (6) years [Article 37 paragraph 1 and 2 of the PCCK as read with Article 30 paragraph 2 of the CC SAPK and UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59 and Article 65 paragraph 2 of the PCCK]; **Agreement to Commit the Criminal Act of Murder** to a term of imprisonment of one (1) year [Article 196 CC SAPK]. The First Instance Court the built an aggregate sentence of sixteen (16) years according to Article 71 paragraph 1 and 2 items (2) of the KCCP.

The Defense Counsel of the accused timely filed an appeal dated 03 March 2008 against the Verdict. It was asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. It was proposed to change the challenged Verdict as to acquit the accused from all charges, quash the Verdict and return the case to the First Instance Court for re-trial as well as to terminate the detention of the accused.

The OSPK, with a response dated 02 September 2009 and registered with the Registry of the Supreme Court of Kosovo dated 04 September 2009 objected the appeal partially as being without merit and unfounded. The Public Prosecutor concluded to partially grant the appeal and to modify the contested judgment

a) by re-qualifying the criminal acts of Murder and Attempted Murder for which the defendant was rightly convicted
b) by acquitting the defendant of the crime of Agreement to Commit the Criminal Act of Murder;

but to reject the other challenges raised in the remaining parts of the appeal, including the request to release the defendant.

Based on the written Verdict in case P, Nr. 628/2004 of the District Court of Prishtine/Pristina dated 08 May 2007 (filed with the Registry of that Court on the same day), the submitted written appeals of the defendant, the relevant file records and the oral submissions of the parties during the hearing session on 24 November 2009, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 03 December 2009, hereby issues the following:

VERDICT

Pursuant to Article 420, paragraph 1, points 2 and 4, Article 423, Articles 390, 391, and 392, paragraph 1 of the KCCP; Aticle 41 of the Criminal Law of SFRY; Article 30, paragraph 1 and 2 item (1), and paragraph 3 of the CC SAPK, and Article 2 paragraph 2 of the Criminal Code of Kosovo (CCK) the appeal filed on behalf of the accused is hereby **partially granted** and the appealed Verdict is modified as follows:

, born on in the village of Municipality of govac, Kosovo national and , last residence in . in fathers name mother's name continuously in custody since 09 November 2004; currently detained in Dubrava Detention Centre is found:

GUILTY

Of the criminal offences of five intentional aggravated murders and one attempted intentional aggravated murder, contrary to Article 30, paragraph 1 and 2, item (1), and paragraph 3 of the CC SAPK in relation to Article 19 and 22 of the CC SFRY, as made applicable by UNMIK Regulation 1999/24 (conducts still criminalized under Article 146

and 147, items (3) and (11) of the CCK), because he jointly with others took the lives of [redacted] and attempted to take the live of [redacted] in an insidious manner by actively participating in the creation of an ambush for them and informing the immediate perpetrators by telephone of them approaching the ambush place with their car after they had left a wedding party. Before, he had provided the immediate perpetrators with three AK-47 guns and one foreign weapon to commit the crime. 26 rounds of ammunition (7.36 x 39 calibers rifle) were fired into the car, just without succeeding to also kill [redacted] due to intervening circumstances.

Consequently, the Supreme Court of Kosovo issues the following:

SENTENCE

The accused [redacted] is sentenced for the criminal act of Murder to a term of imprisonment of fifteen (15) years [Article 38, paragraph 1 and 2 of the CCK as read with Article 30, paragraph 2 of the CC SAPK and UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59]; for the criminal act of Attempted Murder to a term of imprisonment of six (6) years [Article 38, paragraph 1 and 2 of the CCK as read with Article 30, paragraph 2 of the CC SAPK and UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59 and Article 65, paragraph 2 of the CCK].

The accused shall serve an **aggregate term of imprisonment of sixteen (16) years** pursuant to Article 71, paragraph 1 and 2 item (2) of the CCK.

Pursuant to Article 391, paragraph 5 of the KCCP, the sentence includes the time the accused has already spent in pre-trial custody from the 09 November 2004 until his first instance imprisonment sentence dated 08 March 2007 and further of.

The accused [redacted] a is:

ACQUITTED

of the criminal act of Agreement to Commit the Criminal Act of Murder pursuant to Article 196 of the CC SAPK as read with Articles 22 and 24 of the CC SFRY with which he was charged as per the amended indictment PP. Nr. 526/02 dated 31 January 2005 and registered with the Registry of the District Court of Prishtine/Pristina on 07 February 2005 because (a) he did not commit the criminal offence of participation in a group committing murder, (b) the agreement to commit the criminal act of murder is no longer a criminal act under the law and (c) he and his perpetrators did not commit the criminal offence of aiding and abetting one another in the perpetration of any of the criminal acts, he is charged with.

COSTS

The costs of the proceedings will remain in charge of the appellant based on Article 121, paragraph 2 of the KCCP.

The decision on costs is based on Article 391, paragraph 1 items (6); Articles 99; 100, paragraph 2; 102 of the KCCP.

REASONING

Procedural History

1. In the evening of 20 August 2001 his wife his son and his daughters attended a wedding party in the village of Baica at the house of and ia, who is the sister of celebrate the wedding of their sons and a.

The family arrived at the party at about 18:00 hrs and left around 23:00 hrs, traveling in a red car along what is known as the bridge road or the Lan neighborhood between the villages of Baica and Terstenik.

When they approached the wooden bridge at or about 23:17hrs, somebody shouted in Albanian language "stop" and as soon as , who at that time was the driver of the vehicle, had stopped, shots were fired at the car. a, his wife his son , and his daughters a and were killed on this occasion. Only ra survived the ambush.

2. Based on the central case of *et al.* (HEP No. 418/2002), which is related to the described context, the investigative proceedings against and others was initiated on 9 July 2002 and conducted while na was at large. An arrest warrant was issued against on 11 July 2002. The investigation was completed and the other defendants were indicted and tried.

3. As for the other defendants, the Supreme Court of Kosovo Judgment AP - KZ 393/2006 dated 20 May 2008, in partial reformation of the Verdict of the first instance District Court of Gjilan in case P. Nr. 162/2003 dated 7 April 2005, convicted the four defendants ( ) of having committed the criminal offences of five **Aggravated** and one **Attempted Aggravated Murder** in violation of Article 30 paragraphs 1 and 2 items (1) and paragraph 3 of the CC SAPK in relation to Articles 19 and 22 of the CC SFRY, as made applicable by UNMIK Regulation n. 1999/24 (conducts still criminalized under

Articles 146, 147 items 3 and 11 in relation to Articles 20 and 23 of the CCK). With Judgment Apl.-Kzl No. 4/2009 dated 16 September 2009, acting on the appeals of the 4 defendants listed above the Supreme Court finally affirmed the second instance decision in its entirety.

4. returned to Kosovo late in the year 2004, purportedly to give evidence on behalf of ' and other defendants who were being tried for the murder of members of the family. On this occasion, . was arrested on 9 November 2004 under the outstanding warrant of 11 July 2002 and has been in custody continuously since that time.

5. On 10 November 2004, the Investigating Judge issued a decision to resume the investigation against on suspicion of complicity in the murder of and four members of his family, the attempted murder in the even of daughter of a, and agreement to commit a criminal act. The investigating Judge imposed a one-month detention on which expired on 9 Decembre 2004. Defendant s detention has been periodically reviewed and extended since then.

6. The investigation against a was completed on 10 December 2004 and indictment PP. Nr. 523/2002 was filed against him on 14 December 2004. The International Public Prosecutor at the District Court of Pristina filed a supplemental indictment PP. Nr. 526/2002, dated 31 January 2005, against him. The indictment, as supplemented, charged the defendant as follows:

- **Murder** of and a acting in complicity with and aiding and abetting those charged in a separagraphate indictment and meanwhile finally sentenced by the Supreme Court of Kosovo, namely Ramadani contrary to 30, paragraph 2 items (1), (3), (4) and (5) of the CC SAPK, as read with Articles 22 and 24 of the CC SFRY;
- **Attempted Murder** of a acting in complicity with and aiding and abetting those charged in a separagraphate indictment and meanwhile finally sentenced by the Supreme Court of Kosovo, namely a, contrary to Article 30, paragraph 2 items (1), (3), (4) and (5) of the CC SAPK, as read with Articles 19, 22 and 24 of the CC SFRY;
- **Agreement to Commit the Criminal Act of Murder** of acting in complicity with and aiding and abetting those charged in a separagraphate indictment and meanwhile finally sentenced by the Supreme Court of Kosovo, namely contrary to Article 190 of the CC SAPK, as read with Articles 22 and 24 of the CC SFRY;

7. The indictment was consolidated by Confirmation decision of the First Instance Court (KA No. 405/2004) on 31 March 2005.

8. With order dated 10 June 2005, the Presiding Judge ordered the main trial to commence on 29 June 2005 (P. No. 628/2004 – HEP No. 418/2002). The verdict of guilty for murder, attempted murder, and agreement to commit a criminal act was pronounced on 8 March 2007 imposing a 16 (sixteen) years prison sentence, and with a separate decision the detention of the defendant has been extended until the verdict becomes final.

9. During the main trial, the First Instance Court examined the accused,
Then, the following witnesses were questioned: as well as those witnesses, who as police officers had been participating in the interrogation when gave his statements as follows:

as witnesses from the immediate crime scene ontext as follows:

10. Based on this evidence, the First Instance Court established the following factual situation:

"The m···ders were planned and instigated by whose motive was revenge. ij induced others to carry out the killings by offering "a big sum of money . i
and others all came together on the afternoon of 20 August 2001 at a house in Drenas. ij arrived at the tea house and called i outside. He told that he had a task for them, to be completed that night and for which he would pay them 20.000 DM. That task was the murder of and his family. After the meeting I and went to Bajca to confirm that the ly would be at a wedding that night (District Court of Prishtine/Pristina, Judgment P Nr. 628/2004, page 2 of the English version).

i and . came back and confirmed that I nd his family would be at the wedding party in Baica.

At about 16:30 hrs everybody left the tea house in their cars. Before they left , handed a mobile phone to . The latter was to use the phone to inform l ıi about the time at which , would leave the wedding party.

At about 21:30 hrs went with a by car to the wooden bridge in Baica. There they met ani, , ani and ıa. told ı that the phone he had got was not charged and the latter gave Jeton the phones of and .

told a to go to the yard of where the latter would give him weapons. eft with his own car and came back with three AK 47s and and a foreing weapon and ammunition for the AK 47s. The ammunition could not be used for the foreign weapon. That foreign weapon was a double-barreled rifle, one for small bullits and one for bigger ones.

At about 22:00 hrs came to the bridge in his car, a black Audi 80. old and that he would be waiting either near a school or at a car wash in his car and ani told ı that he should go to the car wash and wait for a phone call from him. . ıa then left.

4r ınd each took an AK 47, while the foreign weapon was left at the edge of the river. went to the wedding party. He took with him the two mobile phones. At about 22:40 hrs, . called ın his cell phone and told him that a and his family were getting ready to leave the wedding party. Between 22:50hrs and 22:00 hrs approximately, ıa saw a car with its lights on coming from Baica approaching the bridge.

ıi told , ı and ı not to fire before he had started firing. Just before the front of the car had exited the bridge , started shooting at the car. Immediately after, ını and started shooting. They all fired long burst of shots. The car was hit. They then stopped shooting and . a left his side of the road and joined ını and ı ıi.

then heard a girl scream. On hearing that, arted shooting at the car again. ld him to stop after i had shot "three, four or five separate rounds". opped shooting and the voice of the girl could not be heard anymore. The girl who had screamed was later identified as

ı then called a on his cell phone and told him to wait for them at the school in Gllobar. i left with two sacks, a black one and a beige one, in which they had put the weapons. ı was carrying the black sack and , ni the other. Whilst . a and . left in the direction of the school, . crossed the river and ran towaras the

wedding party. . met . here and told him that the job had been carried out. then phoned I lani and asked him where he was heading to and . old . hat they were going to s tea bar to leave the weapons and to celebrate. na and . a stayed at the wedding party and left later.

The next day at around noon was on his way to play soccer. He passed by Era restaurant. He saw i 'ani, i, and l ia outside there. He joined them. They were having a discussion on how to share the amount of 20,000 DM that had given to They were also discussing how to ensure that anybody who knew about the crime remained silent" (District Court of Prishtine/Pristina, Judgment P Nr. 628/2004, page 67-68 of the English version).

11. Based on its findings, on 08 March 2007, the District Court announced the verdict and found the accused guilty of the criminal offences listed above from items [i] through [iii]. Consequently, the Court imposed on the accused the punishments as also specified above.

12. On 10 March 2007, the Defence Counsel of the accused filed an announcement of appeal received by the District Court of Pristina on 13 March 2007. The Defense Counsel, who had received the verdict on 21 February 2008, then timely appealed that verdict on 3 March 2008 in accordance with Article 398, paragraph 1 and Article 399, paragraph 1 of the PCPCK-KCCP.

The Public Prosecutor did not appeal.

The Office of the State Prosecutor of Kosovo filed its opinion and proposal dated 2 September 2009 within this Court, on 4 September 2009.

13. On 24 November 2009, the Supreme Court of Kosovo held a session pursuant to Article 410 of the KCCP.

The Defense Counsel confirmed his submissions and request.

The Public Prosecutor concluded to partially grant the appeal and to modify the contested judgment

c) by re-qualifying the criminal acts of Murder and Attempted Murder for which the defendant was rightly convicted
d) by acquitting the defendant of the crime of Agreement to Commit the Criminal Act of Murder;

but to reject the other challenges raised in the remaining parts of the appeal, including the request to release the defendant.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

I. IMPROPER COMPOSITION OF THE FIRST INSTANCE PANEL

14. The Defense in his appeal **alleges violations of Article 364, paragraph 1 item (1) of the Law on Criminal Proceedings of the Socialist Federal Republic of Yugoslavia (LCP)** (equivalent to Article 403 paragraph 1 item (1) of the KCCP) due to the replacement of two judges in the panel, who took the decision without participating in the main trial. In particular, the original panel was composed of International Judge Vinod Boolell as Presiding Judge and International Judges Leonard Assira and Nurul Islam Khan as panel members, who in the scope of proceedings eventually were replaced by International Judges Carol Peralta and Timothy James Baland. Especially the latter had joined the main trial only on 08 March 2007, when the Verdict was pronounced, whilst in a whole the replacing judges were not informed about the proceedings until they joined the panel.

Moreover, **Article 283 of the LCP and Article 323 of the KCCP would be violated** as well, since during the proceedings there was no request of the Presiding Judge to the Court President in order to assign the two eventually replacing judges to the case in advance, as stipulated by the aforementioned provisions. As a consequence, the two replacing judges had not had a chance to assist the sessions before they joined the panel.

15. The Supreme Court of Kosovo finds that according to Article 550 of the KCCP the KCCP was the applicable Criminal Procedure Law at the time of the proceedings, since indictments against the other co-perpetrators already had been filed in the scope of procedures between the initiation of investigations on 09 July 2002 and the entering into force of the PCPCK/KCCP on 06 April 2004, whilst the accused [redacted] at that time still was at large until he was arrested on 09 November 2004 under the outstanding arrest warrant dated 11 July 2002. That is why criminal proceedings had been started but not been completed before the PCPCK/KCCP entering into force.

As of the aforementioned points of the appeal, the question of proper composition of the panel of the First Instance Court (Article 26, paragraph 1 of the KCCP) needs to be investigated also *ex officio*.

16. However, this point of the appeal is ungrounded. It needs to be underlined that Article 323 of the KCCP is not mandatory for the Presiding Judge, who just *"may request the president of the court to assign one or two judges ... to attend the main trial in order to replace members of the trial panel"* if it appears already at an early stage of proceedings that the main trial may last for some time. Therefore, the provision is not binding for the court and no essential violation of this point can be established.

On the composition of the trial panel, Article 345 paragraph 1 of the KCCP stipulates as follows:

"When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the main panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection".

It needs to be stressed that in the case at hand during the session held on 20 February 2007 the panel announced the changes in its composition and the parties agreed on the basis of Article 345 paragraph 1 of the KCCP not to examine the witnesses again. Therefore, the Supreme Court of Kosovo establishes that there was no violation of the provisions of the criminal procedure by changing the composition of the trial panel during the proceedings.

II. EXEMPTION FOR THE FAMILY MEMBERS FROM THE DUTY TO TESTIFY IN FRONT OF THE COURT

17. The Defense Counsel in his appeal also alleges that the **members of the family** were interrogated as witnesses and that **according to Article 227 of the LCP they should have been exempted from the duty to testify.** According to the appeal, in particular the accused nd a at one side and and at the other are brothers. whilst the accused ıa is the uncle's son of the accused na. the accused a the uncle of the accused ı and the witness a the brother of the accused as well as the uncle's son of the accused

Moreover, the statements of I na, given as a witness on 27 August 2001 in front of police at the Police Station in Drenas/Gllogovac and the witness statements of iven during the investigations would be inadmissible due to the **violation of Article 229 and 231 of the LCP.** None of them had been warned according to Article 231 paragraph 2 of the LCP that they were not obliged to answer the questions as foreseen by Article 229 of the LCP (which stipulates that a witness is not obliged to answer questions whereby it is believed that he will expose himself or a close relative in the sense of Article 227 of the LCP to criminal prosecution).

18. The Supreme Court of Kosovo states that for the court proceedings in question the KCCP is the applicable criminal procedure law as pointed out before, whilst during the course of investigation the provisions of the LCP are applicable. That is why the relevant provision for the exemption of witnesses from their duty to give statements in front of the court is Article 160, paragraph 1, sub-paragraph 2 of the KCCP. The provision states as follows:

"(1) The following persons are exempted from the duty to testify: ...

2) A person who is related to the defendant by blood in a direct line or in a collateral line to the third degree or by marriage to the second degree, unless proceedings are conducted for a criminal offence punishable by imprisonment of at least ten years or he or she is a witness of a criminal offense against a child who is cohabiting with or is related to him or her or to the defendant; ...".

In the case at hand, all crimes the accused is charged with are punishable by imprisonment that can reach a maximum higher than ten years. Therefore, the members of the amily (and the mily) do not fall under any legal provision on exemption from their duty to state as witnesses during the main trial sessions.

19. Also, the statements given especially by the accused nd during the course of investigations have not been taken in violation of the at that time applicable Article 227 of the LCP. Article 227, paragraphs 1, sub-paragraph 2 of the LCP, which deems relevant in the case at hand, stipulates as follows:

"(1) The following persons are exempted from the duty to testify: ...

2) Direct blood relatives of the accused, relatives in the lateral line to and including the third degree, and relatives by marriage up to and including the second degree; ..."

In the present case, the accused a is family related to the witness who is his father, in the 1st degree. Since 's grandfather would be his 2nd degree relative, his uncles and na are his 3rd degree relatives in the lateral line. However, the co-accused nd na are the uncle's sons of a, he son of a and the son of Therefore, both the latter ones are relatives in the lateral line of the 4th degree to the accused a. This is why Article 227 of the LCP does not exempt and their duty to testify during the investigation period.

20. Also Article 229 and 231 of the LCP have not been violated as alleged. The now accused fore stating as a witness in front of police on 23 August 2001, was duly informed about his rights as such. This clearly can be read from the Albanian Version of his witness statement, which under the warning is signed by the now accused. As of the diverse statements of the co-accused already the District Court of Prishtine/Pristina in its Ruling dated 15 July 2005 on rejection of a proposal of the Defense Counsel to hold specific items of evidence inadmissible has established, that there was no ground to separate these statements from the record according to Article 83 of the LCP.

The Supreme Court of Kosovo shares the opinion of the District Court of Prishtine/Pristina, as the co-accused terviewed three times, on 27 August 2001 as well as on 06 and 07 July 2002. According to the minutes, on 27 August 2001, when was heard as witness, he was warned about his right to remain

silent. On 06 July 2002, when he was heard as a suspect for the first time, he was warned about all his rights as such and there is a note in the file that he has signed a document to that end. Finally, when he was interrogated as a suspect on 07 July 2002, the interrogation was done in the presence of his lawyer, Mr. Nike Shala.

As of the admissibility of the statements of the co-accused given on 04 and 07 July 2002, this will be elaborated hereafter.

III. ADMISSIBILITY OF STATEMENTS ON 04 AND 07 JUNE 2002

21. The Defense Counsel in his appeal has claimed for both statements of the witness and later co-accused to be inadmissible. The statement on 04 July 2002 in front of the police, which was video-taped, was given without a defense counsel being present, although this had been mandatory. Although on 07 July 2002, when was interrogated by an International Investigating Judge, a Defense Counsel had been present, the statement would not be given in a proper manner, since the *ex officio* appointed Defense Counsel would not have been efficient in order to protect all the interests of his client. The lawyer had not put any questions to his client during the hearing nor had consulted him preliminary. He also had not seen the case file, before as interrogated. Therefore, and because allegedly only a limited number of defense counsels had been offered to a, his right to proper protection had been violated. As a consequence of both statements being conducted in an improper way, also the accused had been really damaged.

22. **As for the statement given on 04 July 2002** to the police, the Supreme Court of Kosovo finds that no written records can be found in the case file, thus establishing that has been warned about his rights according to Article 67, paragraphs 1 and 2 and Article 218, paragraph 10 of the LCP. Thus, in the interest of the interviewee solely the conclusion is allowed that the police officers may have failed to properly warn him about his rights and that he was not aware of his right to get a defense counsel assigned. Although the case file contains a written transcript of the video-tape, the aforementioned conclusion has to apply also for the case that the police officers, although cautious enough to include an international prosecutor as soon as they got aware of the quality of the statement given, simply have failed to draw up a written record of their activities, especially of the video recording. Even in this case they had violated Article 151, paragraph 2 and Article 87, paragraph 4 of the LCP. Anyway, the video transcript, which does not bear the personal data of ...r is signed at all, does not meet the mandated formal requirements for an official record and thus cannot be taken as substitute for it. This was already established by the second instance Court in the parallel case of aj *et al.* and in this context confirmed by the Supreme Court of Kosovo in its appellate judgment dated 16 September 2009, API.-KZI No. 4/2009 (page 11, No. 18 of the English version). Also a waiver, signed by the accused in order to waive his right to a defense counsel never was entered into a written record, which never was made in the proper way.

Therefore, the Supreme Court of Kosovo considers the statements of a given to the police on 04 July 2002 as inadmissible. Therefore, any further discussion on the statements given by before the Police on 4 July 2002 is superfluous.

23. Nevertheless, the appeal claims that, during his Police statements, was not informed of his rights, of the existing basis of suspicion and - thus referring to Article 364, paragraph 1, item (3) of the LCP - was not given the assistance of a defense lawyer in a case of mandatory defense. The latter also would include the right to have an efficient defense, which had not been the case and thus amongst others would violate Articles 11, 67, 70 through 75, 168, 218 and 301 of the LCP as well as Article 6 of the European Convention of Human Rights (ECHR). Also, the video recording was made without authorization of the Investigating Judge and thus would violate Article 87 paragraph 2 of the LCP and the defendant was not informed in advance of this kind of recording. Moreover, the entire interview was fabricated by the Police, was forced and deceived and also the video recording was in a certain way manipulated. According to the appeal, violation of basic rights of ia and undue pressures on him would have damaged not only the latter but also the other defendants, in the case at hand especially the defendant and would have an effect which could invalidate the following statements given by a himself before the Investigating Judge, since the content of these was the same already given to the Police.

As for the examination of the causes of inadmissibility different from those accepted by the previous Court, the Supreme Court of Kosovo fully refers to its elaborations on the issue given within the judgment in the parallel and central case of Skeder Halilaj *et al.* on 16 September 2009 (API.-KZI No. 4/2009), (page 11 through 14, no. 19 of the English version).

24. **As for the statement given on 07 July 2002,** the Supreme Court of Kosovo considers the statement admissible. It reads clearly from the minutes that as a defendant was duly informed by the Investigating Judge about the charges against him. It needs to be stressed that the request for investigation against , which was filed on 6 July, contains the results of the first investigations (which did not involve any defendant) and the content of the police statements of himself (which in that moment were the unique piece of evidence to substantiate the charges against the latter and the others). The Investigating Judge informed the accused of his right to silence and answered to have given a true statement to the Police and to be *"willing to give a statement before the investigating judge as well"*.

Moreover, ia was properly represented by his Defense Counsel Mr. Fazli Balaj in front of the Investigating Judge. It is noteworthy that the record does not disclose the time when Mr. Fazli Balaj was chosen to represent ia in the hearing nor who has chosen him. Notwithstanding the fact that the appeal claims the Defense Counsel Fazil Balaj to be appointed *ex officio*, the case file does not provide any hint about that. Definitely, it can be read from the records that a had accepted the attorney, thus giving the declaration: *"I accept the lawyer who has been appointed to me and I*

have had a conference with him before the hearing". It is also out of discussion that the lawyer participated in the interrogation of the defendant and put questions. Moreover, from a communication of the same attorney to the Investigating Judge, dated 3 August 2002, it can be elaborated that the lawyer attended all hearings related to the defendant, visited him in the Detention Centre, asked information from the employees about his health conditions and informed the family. The lawyer was also not revoked because of lack of professionalism, as the appeals claim, but quit when the father of informed him that he could not afford his services as Defense Counsel. Finally, no physical or psychological abuses on the defendant are demonstrated with relation to this interview, which was not attended by any Police Officer.

Thus, any kind of violation of the rights to the information to give to an accused according to Article 218 LCP can be excluded in the case at hand. On this background, there especially cannot be any grounded consideration that the charges against were substantiated only by his previous statements.

Also, neither a himself nor his Defense Counsel ever have claimed that they were not given sufficient time to prepare for the hearing or that they experienced other impediments to that preparation. In addition, the record proves that the examination conducted by the Investigating Judge was in full compliance with Article 218 of the LCP.

IV. ADMISSIBILITY OF THE MINUTES OF THE HEARING OF INTERNATIONAL POLICE OFFICER ON AND OF THE LIST OF MOBILE PHONE CALLS

25. The Defense Counsel in his appeal moreover has requested for the **statement of UNMIK Police Officer** n, given in front of the Investigating Judge on 06 and 07 August 2002, to be separated from the records. Since the Defense Counsel had requested the disqualification of the Investigating Judge and his exclusion from the case, but the judge nevertheless had continued to interrogate the above witness, Article 43 of the LCP was violated. There it is foreseen that every judge shall terminate every action in the judicial case in the moment he is informed of a motion for his exclusion.

26. The examination of the file allows finding out that during the interview of witness UNMIK Police Officer on 6 August 2002 the defense counsels filed a request for disqualification of the Investigating Judge Mr. . cording to Article 39 paragraph 6 LCP (page 12) and immediately after abandoned the investigative Proceedings, which was therefore interrupted. The Investigating Judge stated at the end of the minutes that the request would be send to the President of the District Court of Prishtine/Pristina, competent to decide on this issue, and that he would continue the hearing for the testimony of Mr. on the following day 7 August, because of the urgency. That testimony was actually continued the following day, which was 7 August. On 11 August the Investigating Judge informed the defense counsels that the request for disqualification based on Article 39, paragraph 6 LCP is *"rejected as incompliant with sections 7 and 9 of UNMIK Regulation 1999/7".* The same claim was

already raised before and decided by the First Instance Court (rulings of 29 January 2004 and of 18 February 2005).

This Court observes that the request of disqualification made according to Article 39 paragraph 6 LCP is the unique case where the judge, against whom the request is filed, is not obliged to suspend immediately all the works on the case. Whilst Article 39 items 1-5 of the LCP describe absolute impediments, thus obliging the judge to immediately stop all his/her judicial activities, Article 39 items 6 of the LCP is only a relative impediment for performing the duties of a judge in relation to the particular case *(Branko Petric, Commentary on the Law on Criminal Procedure 1986, 2nd edition, Official Gazette of the SFRY, Belgrade; Article 39 LCP, no. 4. and 5.)*. Item 6 of this Article – as the only one – contains grounds for exepmtion which are neither fixed nor exemplified and therefore need to be approved by the President of the District Court, as it was handled by the International Investigating Judge in the case at hand. This is the reason why, according to Article 43 LCP, the judge, even after a petition for exepmtion was filed against him under Article 39 items 6 of the LCP, he *"may, until the decision is made on the petition, take only those actions whose performance is required to avert postponement"*. Only in the case, when a request for recusal of a judge is based on Article 39 items 6 of the LCP, the judge may still undertake actions of unpostponable nature, but not be able to render final decisions. However, these actions shall be considered legally valid even if a request for recusal is granted *(Momcilo Grubac & Tihomir Vasiljevic, Commentary on the Law on Criminal Procedure, 2nd edition 1982, "Savremena Administracija", Belgrade; Article 43 LCP, no. 2)*.

In the case at hand, the interview of UNMIK Police Officer by an Investigating Judge was a matter of urgency, considering that this witness was leaving the mission on 8 August and it was necessary to hear him before his leaving. This was the reasoning given by the Investigating Judge and it appears to be correct. There is no claim about the decision to reject the request for disqualification. The investigative activity performed by that Investigating Judge after the dismissal of this request (included the hearing of on 14 October 2002) was therefore regular.

27. Moreover, it can be understood from the files that the witness Mr. .
later on returned to the Mission from California and thus was examined and cross examined during the main trial of the co-defendants in the parallel and central case of Skender Halilaj *et al.* in 2004. There was no claim of inadmissibility regarding his trial statements.

28. **As of the admissibility of the list of calls of mobile network and the extract of this list possessed by the Defense Cousel,** the latter in his appeal has requested them to be separated from the file, since police had obtained these lists illegally from PTK. According to Article 83 of the LCP, they therefore had to be separated from the file; otherwise Article 84 LCP would be violated.

29. This Court finds that there is no reason to declare the aforementioned mobile call lists inadmissible notwithstanding the fact that the call lists in the case at hand have not been of any decisive meaning for the First Instance Court decision.

It can be read from the case file that on 23 November 2001, based on the request of the Investigating Judge, a letter was sent to the Directorate of Infrastructure Affairs and Communications, thus requesting outgoing and incoming call details related to the time period 19 throough 21 August 2001 for 11 Vala numbers as follows:

-
-
-
-
-
-
-
-
-
-
-

Corresponding to this request, details of the following seven numbers were made available:

-
-
-
-
-
-
-

The list of calls from which a compilation was made has been sent to the Defense Counsel. This compilation shows clearly that the details reflect those from the official list, which was submitted by PTK.

The official PTK list itself completely follows the request of the Investigating Judge dated 23 November 2001.

V. LACK OF MOTIVE DUE TO THE ACQUITTAL OF

30. Finally the Defense – especially during his verbal explanations of the appeal in the course of the session dated 24 November 2009 - claims that there is **no motive for the defendant o participate in the criminal offences** he is charged with, since j, who according to the statement of had planned and

instigated the murders, thus offering a big sum of money to the killers, was acquitted of all relevant charges.

31. This Court finds that this claim is ungrounded. Although there is no discussion that indeed Skender Halilaj was acqitted by the 2nd instance decision of the Supreme Court of Kosovo dated 20 May 2008 (AP-KZ 393/2008). it in the case at hand is not the task of the appellate instance to evaluate on the case of

As of a possible motive of it especially needs to be pointed out that the motive of a crime is not part of the crime itself as it is defined in the law. A crime as it concerns the personal responsibility of a perpetrator is defined by two elements only. As a material element there is the conduct as defined by the requirements set up by the relevant provisions of the law and as a subjective element there is the intent of negligance of the perpetrator. Different from that the motive may be important to understand all facts of a case and especially the background situation, which may be of interest when it comes to the court imposing a certain punishment.

32. However, despite from this it may not remain unmentioned that according to the witness statement of as given in front of the International Investigating Judge on 07 July 2002, in the context of sharing the amount of 20.000, - DM amongst the perpetrators on the following day *"it was further said that ould not get any of the money because he had enough money already"* (page 5). From this it can be understood that articipated in the crime without any monetarial interest, so that the role of j is completely irrelevant even in order to explain a possible motive of the defendant.

B. Erroneous and incomplete determination of the factual situation

33. The Defense Counsel in his appeal has stressed erroneous and incomplete establishment of the factual state of the crime, thus claiming that the **evidence presented against the defendant as fabricated** in the way that a team of police officers as well as the representative of the prosecution had worked together and obviously had set the witnesses, especially under pressure. Moreover, no sufficient attention was paid to the fact that had recanted his previous statements both before the Investigating Judge (on 11 October 2002) and at the main trial. In this way the alibi of the defendant who had been celebrating at the wedding party, when the murder was committed, had been undermined. As corroborating evidence supporting this viewpoint, especially the witnesses and as well as d stated in favor of the defendant .

34. The First Instance Court, as pointed out before, grounds its judgment on factual evidence, in the first place in form of the statements given by before the Investigating Judge on 7 July 2002 and on 11 Oct. 2002 as well as during the main trial

on 01 Nov. 2005; the testimony of UNMIK Police Officer ɔn; the testimony of UNMIK Police Officer n; the statement of witness a; the statement of na; the statement of a; the statement of ı and the statements of other expert witnesses and witnesses, among them , about the passage of the cars of the defendants in front of his house on the night of the fact.

35. The Supreme Court of Kosovo finds that it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again. In the case *Runjeva, Axgami and Dema (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, the Supreme Court of Kosovo in this context has pointed out that *"appellate proceedings in the PCPCK rest on principles that is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own, unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous' "*.

Therefore as a rule, this Court will not elaborate on the collection of evidence and based on this on the details of the findings of the First Instance Court.

36. However, it needs to be elaborated on the establishment of evidence by the First Instance Court, especially on the **credibility of na as a witness and the reliability of his statements**, as challenged by the appeal.

37. As to the claim related to **undue pressure** and physical abuse reference is made to what already was elaborated above (see point 22. through 24.). There in particular is no evidence of manipulation by the Police. No abuse is claimed nor indicated by the documents provided in the case file during the interview before the Investigating Judge. Moreover and in difference from the previous interrogation by UNMIK Police on 04 July 2002, no police officer was present, when appeared in front of the Investigating Judge.

38. As for the **interrogation by UNMIK Police on 4 July 2002**, which results are not admissible at all, it however becomes clear by the review of the videotape and by the testimonies of the Police Officers present at the interview that also there no undue pressure was made on the defendant .

The Police video recorded the interview upon request of the Prosecutor, according to his power to guide preliminary criminal proceedings, to take steps in proceedings, to delegate these to the law enforcement agencies (Articleicles 45 paragraphagraph 2 item 1, 49, 153 paragraphagraph 2, 155 LCP) because at that moment the Investigating Judge had not yet been involved in this part of the investigation (in fact the request for an investigation against a is dated 6 July 2002). Thus there was no violation of the provision of Article 87 paragraph 1 LCP (violation that, anyway, has no sanction).

At the beginning of the video the Police Officer informs o *"speak loudly so the microphone can pick you up"*, hence making him clear the presence of the recording. As to the information of his rights, it must be reminded that when he voluntarily showed up at the police station that morning vas still considered as a witness and only after his first admission on the facts his position changed into that of a suspect. After consultation with the Prosecutor the latter indicated Police to interview ıa as a suspect, which was done in the afternoon of the same day. a especially was not arrested or caught against his will but had shown ın and stated voluntarily. He was neither compelled to appear nor to answer. a was repeatedly informed about his right to be assisted by a lawyer, to stop the interview at any time and to talk with a lawyer (see pages 1 and 34 of the transcription of the video record), a right which he waived. As for the reason for him to waive the right to be represented by a lawyer he explained that he did not want this thing to be spread. This as well shows that his waiver was made voluntarily and in an informed manner. The charges against him were grounded in his own statements and it must be recalled that in the indictment is reported that before statements the police investigation had not produced evidence sufficient to justify charges. Thus he was well informed about the charges. His statements were spontaneous and voluntary, from the video it results that investigators were able to formulate questions only in order to complete or to clarify, but that they had not any previous knowledge of the personal involvement of the defendants and of other details narrated by

The review of the videotape convinces of the absence of any pressure. Although the interview lasted a reasonable time (two hours and two minutes), it went on in a smooth way from the beginning to the end, thus giving the impression that ıa and his interviewer were talking on the same level. a was free in person, sitting in a normal position and – considering the subjects of his statement – quite relaxed. It becomes clear that during the whole interview ıa and his inteview paragraphticlener both are sitting on chairs opposite to each other, thus talking on the same level and that moreover the interviewer does not wear a uniform, which otherwise might have irritated or scared the interviewee. is provided with water as much as needed and – as he whishes – with cigarettes. He is never forced to answer to anything nor put in any inappropriate condition.

Any kind of manipulation of the video itself can be excluded, because there are no visible cuts or interruptions, questioning and answers are continue and logically related to each other. The time of the interview stated by the proceeding officers (from 4.08 to 6.10 is two hours and two minutes) matches with the overall duration of the video, this also is a confirmation of the absence of cuts or interruptions in the video. During the video interview there are no suggestions given by police officers to as to the answers to give.

39. The appeals raise **doubts on the mental ability of** but these doubts were convincingly rejected by the judgments in the paralallel and central case of Halilaj *et al.* (see judgment of the Second Instance Court page 14 and especially the

judgment of the First Instance Court page 99 as well as minutes of the main trial dated 31 January 2005) according to the observations made by Dr. who excluded that could be defined psychotic.

40. The claim of the appeal that the **narration of as the result of a fabrication** made by the police as read together with the recantation made by at the main trial are not founded in the case file.

41. **The recantations of** n relation to his previous statements as given to the Investigating Judge on 11 October 2002 and in front of the main trial panel are not convincing. ated that it was KPS Police Officer i who had instructed him on the entire story, but has stated not to have had any access to the case file and and that he got involved in the case the first time on 4 July 2002.

Additionally, UNMIK Police Officer confirmed that prior to the arrest of only International Police Officers had an investigative role in this case (hearing of 25 August 2004 page 31). This excludes the possibility for ci to know the case and to give instructions on its details. Moreover, stated to have been instructed repeatedly by lso in the following days until the moment of the interview before the Investigating Judge, but tated that as with him most of time before he was taken to the Investigating Judge, he stayed in the office with International Police Officers *"because he was not comfortable in the cells"* (page 13). Thus, the allegation of having had even the possibility to reach and to give him instructions without being realized by other – international – police officers can be excluded.

In his Interview in front of the Investigating Judge dated 11 October 2002 (page 33 of the English version), stated that, when he was taken to the Investigating Judge on 7 July 2002, the International Police Officer let him alone in a small corridor, after that arrived and refreshed his memory on what to tell to the Judge. It is highly incredible and most unlikely that , being an arrested person, was left alone in a small corridor with the risk that he could escape.

In the same interview (page 30) stated that he had been maltreated by who had grabbed him by the chin and moved him to the sides. At the main trial added that ad beaten him with a baton on his back. However, asked to explain why the fact of the baton was not mentioned in the minutes of the interview before the Investigating Judge, swered that on that occasion he had narrated also this detail but did not know what was written in the minutes. This explanation is contradicted by the minutes of the interview dated 11 October, where this very important fact is not noted but which were duly signed and in this way confirmed by a. Moreover, despite the fact that was in the hospital of Dubrava Detention Centre for physiological reasons (hearing 11 November 2003 page 41 of the English version), no wounds in his back were certified by a medical doctor, which could have come from him being beaten up with a baton..

42. Only during the main trial introduced the suspicion that the two **cigarettes offered to him on 4 July 2002 could have contained some drug.** This allegation appears to be late and not credible, aparate from being denied by the witnesses and by the images of the videotape which don't show neither any "strange" or not normal behavior of na nor any sign of violence or threaten against him.

43. in this context also remembered that he had been **told of the possibility to go and live abroad** and regarding this he mentioned he had liked England. However before the Investigating Judge on 11 October 2002 ia stated that he had spoken about this issue both with an American and an Albanian Police Officer, whereas in the main trial he denied that he ever had this discussion with an Albanian policeman. Furthermore at the main trial he stated that there was no connection between the discussion about England and the investigated murder (hearing of 11 November 2003 page 35). No evidence corroborates the claim of and of the appeals that he was proposed a benefit for his co-operation with the Police. himself excludes any connection between the issue which State he liked and the ongoing investigation.

Already in the parallel and central case of , the First Instance Court has correctly noticed the unreliability of a when he states that the suggestions prepared by KPS Officer would have been contained in only four pages A4, while the transcript of the video recording encompasses 36 (thirty six) pages in English. Here – without elaborating on all the details of the witness statements of ra - it can be added that some details given by as for example the screaming of i the middle of the shooting, which was confirmed by the victim herself ..., ...e known only to a person present on the spot and could not be suggested by the Police.

44. Last but not least it is noteworthy that himself in the interview in front of the Investigating Judge dated 07 July 2002 (page 5 and 6 of the English version) has given an explanation as well as for his motivation to state, which was for the sake of the children being killed as well, as why he now – in difference to previous situations – would tell the thruth to police and Investigating Judge. He literally stated: *"Two weeks after the killings I was summond to the police station in Gllogovac.*
who was a KPS officer working at that station, called me outside the police station before I was interviewed and said to me 'I heard that you know who committed the crimes and if you are questioned by the police, do not ever tell the thruth, because you and your family will have the same fate as nd his family'. Because I was scared, I did not dare tell him the truth...I was summoned again ...on 04 July 2002 by UNMIK Police. ... The interview was this time videotaped. This time I told the truth to the police. I told the police that I would tell the truth but asked them to protect my family. An US police officer told me that he would contact my family and ask them if they wanted protection. ... I came voluntarily to the police station ... because of concern of the children that were killed on the critical night". This explanation illuminates as well the behaviour of , when he recanted his previous statements in front of the Investigating Judge on 11 October 2002 and at the main trial.

C. **Substantial violation of the Criminal Law**

45. The First Instance Court convicted the defendant of the crimes of **Murder** contrary to Article 30, paragraph 2, items (1), (3), (4) and (5) of the CC SAPK, as read with Articles 22 and 24 of the CC SFRY and of **Attempted Murder** contrary to Article 30, paragraph 2, items (1), (3), (4) and (5) of the CC SAPK, as read with Articles 19, 22 and 24 of the CC SFRY.

46. The Supreme Court of Kosovo finds that the correct legal qualifications of the crimes, for which a should have been convicted, are:

- **Murder** contrary to Article 30, paragraph 2, items (1) of the CC SAPK, as read with Articles 22 of the CC SFRY and
- **Attempted Murder** contrary to Article 30, paragraph 2, items (1) f the CC SAPK, as read with Articles 19, 22 of the CC SFRY.

47. **As to the crime of Murder**, the established fact shows that the defendant substantially contributed to the commission of five intentional aggravated murders and one attempted intentional aggravated murder. Taking into consideration all the circumstances of the action as there are in particular the time and place of the attack, the number of shooters, the kind of weapons and the number of rounds fired, there is no reasonable doubt that there was the intention amongst all participants in the crime to kill all occupants of the car used by the amily and that it was just by chance that ı has survived.

48. There is also no reasonable doubt that **had a key role** for the successful commission of the crime. It was him to collect the three weapons (two AK-47 guns and one foreign gun) as well as the ammunition then used for the ambush and provide them to the shooters, thus using his car. It also was him to inform the attackers by mobile phone, as to when the mily would have left the wedding party. By doing so, he substantially contributed to the criminal activities undertaken in the night of 20 August 2001 as a co-perpetrator, as already as already ascertained by the First Instance Court.

49. However, in the case at hand and in the person of a, only the aggravating circumstance of an insidious execution as envisaged by Article 30 paragraph 2 items 1 of the CC SAPK is present in its complete feature. The victims were ambushed and taken by surprise. Such a mode of assault is insidious by definition and the defendant was aware about and actively contributing to the way how the crimes would have been committed.

The crimes – although giving a spotlight on the emotional and mental structure of the perpetrators - were not conducted in a certain brutal (Article 30, paragraph 2, items (2)) nor in a wanton manner (Article 30, paragraph 2, items (5)) but carried out in a way that made sure that the victims would be killed in a most efficient way and without them suffering more than necessary. There is especially no proof that a was motivated for the murder by aspects of personal gain (Article 30, paragraph 2, items (3)),

since according to the other accused he did not participate in the shore of 20.000 DM, thus reasoning that *"he already had enough money"*. Since did not participate in the interests of and it cannot be proved that he knew about the latter's alleged blood feud motivation, also the requirements of Article 30, paragraph 2, items (4) are not fulfilled.

50. **As to the referral of Article 24 of the CC SFRY**, the behavior of the defendant falls within the category of Article 22 of the CC SFRY. Even assuming that providing the weapons to the other perpetrators may categorize the defendant's behavior as as falling within the category of "aiding" (Article 24 CC SFRY), has to be considered as a co-perpetrator and thus as an accomplice in the meanings of Article 22 CC SFRY (equivalent of Article 23 of the CCK). Having a substantial role without which the crime would not have been possible to be committed, thus providing the shooters with the weapons and the needed ammunitions as well as with the information, when approximately the victims would approach the ambush, he also wanted the commission of the crime as his own and participated voluntarily. Moreover, it illuminates from the statement of given in front of the Investigating Judge on 07 July 2002 that wanted to participate in an even more intensive and immediate way, since according to that statement *"the reason that ught four weapons was because he wanted a weapon himself"* (page 8 of the English version).

51. **As to the crime of Agreement to Commit a Criminal Act of Murder** according to Article 196 of the CC SAPK, the defendant needs to be acquitted, since Article 196 CC SAPK was no longer effective, even when the First Instance Court announced its verdict. On 06 April 2004, the Provisional Criminal Code of Kosovo (PCCK), which is now the Criminal Code of Kosovo (CCK), entered into force. The most similar provision to the aforementioned Article is Article 26 CCK (Criminal Association). However, under the new law, the mere agreement to commit a criminal offence punishable by imprisonment of at least five years is not enough to integrate the crime. An additional objective element is now required: the undertaking of preparatory acts for the fulfillment of the agreement. Therefore, the crime as set out under Article 196 of the CC SAPK does not exist anymore.

Moreover, the role of in the Murder of the mily and the Attempted Murder of a as the only survivor of the attack goes well beyond the undertaking of "preparatory acts for the fulfillment" of the criminal agreement.

D. Decision on the punishment

52. The decision on the punishment is fair. The First Instance Court in accordance with the framework of possible punishments given by the relevant laws, has imposed for the Murder of five members of the family (Article 30, paragraph 2, of the CC SAPK, as read with Articles 22 and 24 of the CC SFRY) a separate punishment of fifteen (15) years, whereas the separate punishment for the Attempted Murder of

(Article 30, paragraph 2 of the CC SAPK, as read with Articles 19, 22 and 24 of the CC SFRY) was six (6) years and for the criminal offence of Agreement to Commit the Criminal Act of Murder (Article 196 CC SAPK, as read with Articles 22 and 24 of the CC SFRY) a separate punishment of one (1) year. Based on these separate punishments an aggregate punishment of altogether sixteen (16) years of imprisonment was imposed according to Article 71, paragraphs 1 and 2, item (2) of the KCCP.

The Supreme Court of Kosovo considers that the First Instance Court correctly and completely has taken into consideration all the circumstances that influence in severity of punishment and has fairly evaluated those circumstances. Therefore, no reason can be seen to lower the punishment, even after the accused was acquitted from the criminal act of Agreement to Commit the Crime of Murder contrary to Article 196 CC SAPK, as read with Articles 22 and 24 of the CC SFRY, since the criminal offence does not exist as such anymore under the new applicable law. The reduction of punishment established by the aggregate sentence of the First Instance Court is already so strong that the acquittal from a criminal offence for which a separate punishment of only one (1) year was imposed, now cannot have any measurable effect.

Taking also into consideration the level of social risk of the commission of criminal offenses as well as the level of responsibility of the accused, the latter is very well served with the aggregate sentence as imposed.

E. Continuation of the detention on remand until the judgment becomes final

53. The Defense Counsel in his appeal also has proposed to release the defendant from Detention on Remand. Although this proposal is subject of a separate Ruling, it shall be mentioned in the reasoning of the Judgment, that there is no reason to release the defendant from Detention on Remand. First of all, the aggregate sentence on imprisonment is final now, so that the accused from now on is serving his punishment instead of being under Detention on Remand as it was before. Notwithstanding this aspect, the defendant has been living in Sweden for about 10 years, where he came from, when he participated in the commission of the crime, and where he returned to after the crime. Just by chance he was arrested on 09 November 2004, when he tried to enter Kosovo. Therefore, the Supreme Court of Kosovo sees a high risk of flight as required by Article 281, paragraph 1, item (2) (i) of the KCCP. This danger of flight is concrete and cannot be prevented by more lenient measures; since it has become clear after the arrest of the defendant on 09 November 2004 that he has come to Kosovo only because he was not aware of an arrest warrant against him.

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

Panel Member

Maria Giuliana Civinini

Presiding Judge

Gerrit-Marc Sprenger

Panel Member

Avdi Dinaj

Panel Member

Osman Tmava

Panel Member

Gjuran Dema

Legal Remedy

Pursuant to Article 430 of the KCCP, no appeal is possible against this Judgment. Only a request for the protection of legality is possible, to be filed with the court which rendered the decision in the first instance, within 3 months of the service of this decision (Art. 451 – 460 of the KCCP).