COURT OF APPEALS

Case number: **PaKr 503/13**

Date: **27 May 2014**

THE COURT OF APPEALS OF KOSOVO in the panel composed of EULEX Judge Manuel Soares as presiding and reporting judge, EULEX Judge Annemarie Meister and Kosovo Court of Appeal Judge Xhevdet Abazi as members of the panel, with the participation of EULEX Legal Officer Andres Parmas acting as recording officer, in the criminal proceeding against

Jovica DEJANOVIC, acquitted in the first instance of the criminal offences of **War Crime against the Civilian Population** pursuant to Art-s 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalised under Art-s 31 and 153 of the Criminal Code of the Republic of Kosovo (CCRK) and **Unauthorised ownership, control or possession of weapons** pursuant to Art 328 of the Provisional Criminal Code of Kosovo (CCK), currently punishable under Art 374 CCRK;

Djordje BOJKOVIC, convicted in the first instance of the criminal offence of **Unauthorised ownership, control or possession of weapons** pursuant to Art 328 of the Provisional Criminal Code of Kosovo (CCK), currently punishable under Art 374 CCRK, and acquitted in the first instance of the criminal offence of **War Crime against the Civilian Population** pursuant to Art-s 22 and 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), currently criminalised under Art-s 31 and 153 CCRK;

Acting upon the Appeal of Defence Counsel Miodrig Brkljac filed on 31 October 2013 and joint appeal of the SPRK Prosecutors Erik Larson and Diana Wilson against the judgment of the Basic Court of Mitrovica no P 946/13 dated 31 October 2013;

Having considered the responses to the Prosecutors' appeal by Defence Counsel Ljubomir Pantovic on behalf of J. Dejanovic filed on 19 November 2013 and by defence Counsel M. Brkljac on behalf of D. Bojkovic filed on 19 November 2013;

Having also considered the opinion of the Appellate Prosecutor within the State Prosecutor's Office, no PPA/I.-KTŽ 463/13 dated 20 January 2014 and filed on 21 January 2014;

After having held a public session on 27 May 2014, with all parties duly invited, in the presence of Appellate Prosecutor K. Lamberg and the Defence Counsels L. Pantelic on behalf of J. Dejanovic and M. Brkljac on behalf of D. Bojkovic;

Having deliberated and voted on 27 May 2014,

Pursuant to Art-s 398 and the following of the Criminal Procedure Code (CPC)

Renders the following

JUDGMENT

---

1. **The Judgment of the Basic Court of Mitrovica in case no P 13/2013 dated 17 April 2013 is hereby modified in the following:**
   1) **Applying the Law on Amnesty, the indictment is dismissed in part where Djordje Bojkovic has been charged with unauthorised ownership, control, possession or use of weapons, contrary to Art 328 (2) CCK (now Art 374 CCRK);**
   2) **The acquittal of Jovica Dejanovic and Djordje Bojkovic from the criminal offence of War Crime against Civilians under Art 142 CC SFRY is annulled;**
   3) **Jovica Dejanovic is convicted of the criminal offence of War Crime against Civilians (rape of V. K[redacted]) under Art 142 CC SFRY (now Art 153 CCRK) because he, in his capacity as a Serbian Police Officer, during the period of the armed conflict in Kosovo, on 14 April 1999, abducted and raped V[redacted] K[redacted], a Kosovo Albanian female civilian, by driving her to an uniknown location near Babin Most and by forcing her, while armed with a rifle and threatning her with a knife, to have various tipes of sexual intercourse against her will inside his car ;**
   4) **Djordje Bojkovic is convicted of the criminal offence of War Crime against Civilians (rape of V. K[redacted]) under Art 142 CC SFRY (now Art 153 CCRK) because on 14 April 1999 he raped Vasfije Krasniqi, a Kosovo Albanian female civilian who had been abducted by the Serbian Police officed Jovida Dejanovic, by in possession of a gun, taking her to an unfinished house in Babin Most, throwing her on to the floor and forcing her to have sexual intercourse against her will;**
   5) **Jovica Dejanovic is sentenced to 12 years of imprisonment;**
   6) **Djordje Bojkovic is sentenced to 10 years of imprisonment;**
   7) **In the remaining part the Challenged Judgment of the first instance court is confirmed.**
2. **The Appeal of the Special Prosecutor is partly granted.**
3. **The Appeal of the Defence Counsel Miodrag Brkljac on behalf of the Defendant Djordje Bojkovic is partly granted.**

4. **Defendants Jovica Dejanovic and Djordje Bojkovic both shall reimburse 250 (two hundred fifty) Euro as part of the costs of criminal proceedings, but shall be relieved of the duty to reimburse the rest of the costs, pursuant to Art 453 (1) and (4) CPC.**
5. **The Court of Appeals rejects the request of the Special Prosecutor dated 20 February 2014 to submit supplementary evidence.**

REASONING

I. Procedural history of the case

On 12 November 2012 the Special Prosecution Office of the Republic of Kosovo filed the indictment PPS nr. 89/2012 against the accused with the then District Court of Mitrovica. On 26 November 2012 the District Court of Mitrovica issued a ruling to amend the indictment. On 30 November 2012 the Prosecutor filed an amended indictment.

On 5 February 2013 the Basic Court of Mitrovica issued a decision rejecting the Defence request to dismiss the indictment and the Defence objections on admissibility of evidence. This decision was affirmed by a decision of the Court of Appeals dated 6 March 2013.

The Main Trial in the criminal case at hand was held between 4 and 15 April 2013. The verdict was announced on 17 April 2013. Jovica Dejanovic was acquitted of all charges. Pursuant to Art 115 (1) and (2) CPC in conjunction with Art-s 38 and 2 (1.42) of the Law on Weapons, the the nine calibre 9 mm rounds, found during the search of the house of defendant J. Dejanovic were confiscated. Djordje Bojkovic was acquitted of the charge of war crime against the civilian population (rape) punishable under Art-s 22 and 142 CC SFRY. D. Bojkovic was found guilty of the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Art 328 CCK (currently criminalized under Art 374 CCRK). He was sentenced to 1 year and 6 months of imprisonment. The sentence was suspended for a verification period of 2 years. Pursuant to Art 374 (3) CCRK, the automatic gun M-70 AB2, magazines and 69 rounds of ammunition, found during the search of the house of defendant D. Bojkovic, were confiscated. The costs of the criminal proceedings were ordered to be paid from budgetary resources in case of the accused Dejanovic. The accused Bojkovic was ordered to pay 100 Euro as part of the costs and was relieved of the duty to pay the rest of the costs.

The Basic Court established during main trial that on 13 April 1999 several men, dressed in uniform, came to the house where V[redacted] K[redacted] lived with her family members, and where at that time a lot of refugees were staying. These uniformed men ordered the refugees to leave. It was established that the next day one of the men, dressed in uniform, came back to the house, and by way of threats with a firearm, forced V. K[redacted] to come with him to a vehicle parked outside the gate of the house and then drove away. The Basic Court also established that subsequently the abductor raped the victim and afterwards another man raped her once more.

However, the Basic Court failed to establish beyond reasonable doubt that the Defendants were the persons who committed the above acts. The Trial Panel, after an extensive analysis of the photo line-ups where the Defendant J. Dejanovic had been recognised by the victim and witnesses H. K[redacted], N. K[redacted], M. K[redacted] and I. G[redacted] and photo line-ups of D. Bojkovic, where this Defendant had been positively identified by the victim, came to a conclusion that none of the protocols of the photo line-ups is a credible evidence. The criticism against the results of the photo line-ups lies in the following.

The photos of the person the Injured Party had identified in October 1999 cannot be found or identified as recorded from the case file. Neither is there evidence as to how this photo line-up identification was conducted, whether it was in accordance with the norm of criminal procedure applicable at respective time. At the main trial the Court examined black and white photocopies of two photographs chosen by the victim during the first line-up, but the person on neither of them bears obvious resemblance to the Defendant J. Dejanovic. The Basic Court took the view that the first incorrect identification has reduced the reliability of later identifications and has been likely to contaminate the memory of the victim so that in later identifications she might have not recognised the actual perpetrator, but merely the person she had recognised during first identification procedure.

The identification of J. Dejanovic by witnesses H. K[redacted], N. K[redacted], M. K[redacted] and I. G[redacted] was considered as unreliable by the Court of First Instance, because the witnesses saw the perpetrator only briefly and a long time had passed since the event by the time of identification and because the witnesses belong to the same family and they might have discussed the possible identity of the perpetrator among themselves. The Court of First Instance also found deficiencies in the actual conduct of the identification, since the witnesses were not instructed that the picture of the perpetrator may or may not be included in the identification set and that they were under no obligation to select any person or photo. The police officers who drafted the report on the identification by the victim had also been present during the identification by witnesses H. K[redacted], N. K[redacted], M. K[redacted] and I. G[redacted]. Therefore there is strong possibility that these investigators were themselves aware of the identity of the suspect and it cannot be excluded that the witnesses were influenced in the identification procedure.

Regarding the identification of J. Dejanovic by M. K[redacted] the Court pointed out that she had heard somebody speak Serbian in a shop in 2010, *i.e* 11 years after the event and associated the voice she heard with the person who had abducted V. K[redacted]. When the photo identification was conducted after that event, it cannot be excluded that the witness merely identified the person she saw in the shop. There is no certainty when the photo of J. Dejanovic used in the photo line-ups was taken, which raises doubts in the actual identity of the perpetrator. Also the descriptions of the perpetrator given by the witnesses do not support a conclusion that the perpetrator is J. Dejanovic.

What concerns the identification of the Defendant D. Bojkovic by the victim, the Court of First Instance took the position that the credibility of this identification is seriously hampered by the fact that only one of the picture shown to the victim resembled to this Defendant.

The Court of First Instance found that no other evidence assessed during the main trial is removing the doubts if J. Dejanovic was the person who abducted V. K[redacted] or that J. Dejanovic and D. Bojkovic are the perpetrators of the rapes.

In regard of the charge of unauthorised ownership of nine 9 mm calibre rounds, found in J. Dejanovic's household, the Trial Panel established that the rounds belonged to the Defendant and were in fact in his possession. However, the Court failed to establish that the possession of those rounds was unauthorized, because J. Dejanovic was working as a police officer and he was allowed to carry his service weapon 24 hours a day. There is no evidence that the seized rounds did not belong to his official service weapon.

Concerning the charge of unauthorised ownership of an automatic weapon type M-70 AB2 seized from the household of the Defendant D. Bojkovic, the Trial Panel established that the weapon was in fact in Defendant's possession and the statement of the Defendant, where he declared of not knowing anything about the weapon is not credible.

II. Submissions of the parties

1. The Appeal of the Prosecutors'

On 31 October 2013 the SPRK Prosecutors submitted a Joint Appeal proposing that the judgment of the First Instance Court be modified and J. Dejanovic and D. Bojkovic convicted of the criminal offence of War Crime against Civilian Population or in the alternative to return the case for the Court of First Instance for a retrial. The Appellants claim that the Trial Panel has established the factual situation erroneously and incompletely and the Impugned Judgment is reached with substantial violation of the provisions of criminal procedure.

The Prosecutors argue that the Basic Court erroneously failed to determine that the victim was raped namely by the Defendants. The doubts about the identity of the offender were only created artificially and unjustifiably by the Trial Panel. The assessment by the Trial Panel of the results of photo line-ups is wrong and unjustified. The Trial Panel also availed itself to require meeting of such standards in organisation of the photo line-ups that are not required by Kosovar criminal procedure law and it makes unreliable reference to studies in witness psychology, without referring to any concrete source in that regard. The Prosecutors are of the opinion that if the witnesses were able without hesitation to recognise the perpetrator from the photo line-up not only shortly after the event but again even 13 years afterwards, it increases the reliability of such recognition considerably. There is strong and corroborated evidence that J. Dejanovic and D. Bojkovic committed the war crime they are indicted with. The Prosecutors also submitted new corroborating documentary evidence in the form of 1999 OSCE Kosovo Verification

Mission reports that undermine the statement of J. Dejanovic of not having visited the village where the victim resided anywhere near the timeframe of the offence, *i.e.* April 1999.

The Appellants also claim that the Trial Panel violated substantially provisions of criminal procedure by demanding following of additional criteria by photo line-up procedure that are not provided in Art 255 KCCP (now Art 120 CPC). In that way the Trial Panel erroneously reproached the prosecution that the photograph of the suspect should have resembled to his appearances at the time of the offence and reference photos should have resembled to the witness description of the perpetrator as well; that the photographs should have been presented one at a time; and that the person conducting the procedure should not have known who the suspect is.

The Appellants opine that the Impugned Judgment is not signed by the persons foreseen in the CPC. The EULEX legal officer who has signed the Judgment in the capacity of the recording officer cannot be considered as a recording officer, because she did not in fact record the conduct of main trial sessions. Also, the Trial Panel has distorted the record of the main trial in the Judgments by denying or misrepresenting facts that have been recorded during the session.

On 20 February 2014 the Prosecutor submitted supplementary evidence to the Basic Court of Mitrovica, 3 copies of a CD containing statements collected by OSCE demonstrating that members of Dejanovic's reserve police unit were present in Donje (Lower) Stanovc during the period the victim was abducted and raped. She claims that this evidence discredits Dejanovic's account of where his unit was in April 1999. The proposed new evidence could not have been presented earlier as explained already in the Prosecutor's Appeal.

2. The Responses to the Prosecutors' Appeal

Defence Counsel of the Defendant J. Dejanovic, filed a response to the Appeal dated 15 November 2013, proposing to reject the Appeal of the Prosecutor as ungrounded and to affirm the Impugned Judgment of the Basic Court in the part related to the Defendant J. Dejanovic.

He objects to the Appeal stating that contrary what is written in the Prosecution's appeal, the identification of J. Dejanovic and all the prosecution witnesses were very insecure and inconsistent, full of contradictions, giving a detailed analysis of these statements in his submission. The Defence Counsel also points out that the identification of J. Dejanovic through a photo line-up is completely unacceptable and concludes that the Basic Court was right when it found that the identification of J. Dejanovic was not reliable.

Concerning any substantial violations of the criminal procedure, the Defence Counsel argues that the prosecution's claim in this regard is arbitrary and incorrect. Even if there were some violations of the procedure then they were only relative, not substantial and definitely not such that would deem the verdict defective. Furthermore the Defence Counsel claims that the supplement to the appeal, the OSCE report just shows that the prosecutor lacks any kind of evidence against J. Dejanovic.

Defence Counsel of the Defendant D. Bojkovic, filed a response dated 15 November 2013, proposing to reject the Appeal of the Prosecutor in part concerning D. Bojkovic as ungrounded and to affirm the Judgment of the first instance court.

He claims that Prosecutor's Appeal shows a disregard to the fundamental legal standard that a conviction requires evidence which proves beyond reasonable doubt that the accused did commit the criminal offence.

The key question in this case was the reliability of the identification and the court of first instance in the Challenged Judgment gave clear and firm reasons why the identification was not reliable in case of D. Bojkovic. He argues that the prosecution does not deal with the contradictions in the victim's statements because it does not suit the prosecution and that is why in the appeal – again – the prosecutor claims only that the victim without hesitation described Bojkovic. He further refers to his closing statements and discusses the unreliability of the description of D. Bojkovic by the victim and witnesses.

3. The Appeal of the Defence Counsel of the Defendant D. Bojkovic

The Defence Counsel submitted an Appeal on behalf of the Defendant D. Bojkovic dated 29 October 2013 proposing that charges against his client be rejected because of the coming into force of the Amnesty Law. The Appellant claims that according to Art-s 2.1 and 3 of the Amnesty Law /Law no. 04/L-209, the alleged criminal offence of D. Bojkovic is covered by amnesty. Therefore criminal proceedings against his client have to be terminated. The costs of criminal proceedings in regard of D. Bojkovic have to be covered from the public funds.

4. The Opinion of the Appellate Prosecutor

The Appellate Public Prosecutor moves the Court of Appeals to grant the appeal of the Special Prosecutors and to modify the Challenged Judgment as proposed by them or annul this part of the Judgment and return the case for re-trial. He further proposes to reject the Appeal of the Defence Counsel of the Defendant D. Bojkovic, except in regard of the punishment which should be annulled based on the Law on Amnesty. The seized weapon and cartridges shall be confiscated.

The Appellate Prosecutor concurs with the reasoning in the appeal of the special prosecutors regarding the erroneous determination of the factual situation. He opines that the identification of defendants J. Dejanovic and D. Bojkovic have been done in a reliable way and in accordance with the regulations in force at that time. The Court's findings in the judgment are not justified in this respect.

The Appellate Prosecutor also concurs with the special prosecutors' reasoning that the wrong interpretation of the procedure for identification is a substantial violation of the criminal

procedure; however, the problematic with the recording clerk is a formal violation, not a substantial one.

He partly agrees with the appeal of Defence Counsel of the Defendant Bojkovic that the Law on Amnesty – that entered into force after the first instance judgment was pronounced –, should be applied concerning the weapon charge (Count 2). The claim of the Defence Councel that the evidence in connection with this charge was not properly evaluated by the court is without merit.

Regarding the request to admit supplementary evidence the Appellate Prosecutor submitted a motion requesting the Court of Appeal to grant the submission of the Prosecutor.

III. The Findings of the Court of Appeals

1. Applicable Procedural Law

16. The criminal procedural law applicable in the respective criminal case is the (new) Criminal Procedure Code of Kosovo (CPC) that came into force on 1 January 2013 pursuant to its Art 549.

2. Findings on merits

2.1. General

The Court of Appeals holds that issues raised in the appeals deserve detailed attention. However, before starting to elaborate on the merits of the appeals, the submission of the Special Prosecutor dated 20 February 2014 where it was requested that supplementary evidence would be admitted by the Court of Appeals has to be addressed. The Prosecutor referred thereby to paragraph 18 of the Prosecutors' Appeal, where new proposed evidence was indicated, but also stated that the international legal assistance request to ICTY to formally obtain these statements had not yet been complied with by the time of filing of the Appeal.

The submission of the Special Prosecutor has to be rejected for the following reasons. According to Art 382 (3) CPC new evidence may be presented in the appeal, but the appellant shall be bound to give reasons for failing to present them before. The Prosecutors' have in fact explained in paragraph 17 of the Appeal that the evidence was only discovered by the prosecution after the verdict was rendered in the present case. The Court of Appeals finds this explanation of the Appellants inappropriate. The evidence can be deemed new and capable of being presented even after main trial has started, if there are objective reasons why the specific evidence could not have been discovered earlier by the prosecution. This could be the case *e.g.* if a new document is found, which is of importance in a case, but the existence or the contents of which were unveiled before; or if a new witness comes forward, who could not have been reasonably expected to be identified before by the prosecution. This is, however, not the case, when the prosecution just fails to take into account existing and available evidence. The OSCE Kosovo Verification Mission (KVM) operated in 1999 and its report was published already in November 1999, as

already referred by the Appellants themselves. It cannot be said that the information in those publicly available reports could be new information only detected by the prosecution in 2013. Therefore the submission is belated. The proposed new evidence would also be inadmissible, because it does not meet the requirements set to witness statements by the CPC. Proposed excerpts of statements are taken by unknown persons and they are not recorded in a manner acceptable under the procedural norms applicable at the time of taking these statements. The statements are given by persons without any procedural position in the ongoing proceedings and therefore they do not meet the criteria for witness statements as stipulated in Art-s 123 and 261 CPC or in respective norms of LCP SFRY applicable at the time of gathering the statements.

2.2. Amnesty

The Court of Appeals concurs with the Appeal of Defence Counsel of the Defendant D. Bojkovic that according to the Law No. 04/L-209 on amnesty (Amnesty Law) the charge of D. Bojkovic having committed the criminal offence under Art 328 (1) CCK has to be rejected and criminal proceedings terminated. The Amnesty Law was promulgated by the President of the Republic of Kosovo on 18 September 2013 and published in the Official Gazette of the Republic of Kosova / No. 39 on 19 September 2013. Hence the law came into force on 4 October 2013. Pursuant to Art 2 (1) of the Amnesty Law all perpetrators of offenses listed in Art 3 of this law that were committed before 20 June 2013 shall be granted a complete exemption from criminal prosecution or from the execution of punishment for such offenses, in accordance with the terms and conditions of Art 3 of this law. According to Art 3 (1.2.5.) also the criminal offence of unauthorized ownership, control or possession of weapons contrary to Art 328 (2) CCK (now Art 374 CCRK) falls under the scope of amnesty. Because D. Bojkovic committed the criminal offence of unauthorised weapon possession before the date set in Art 2 (1) of the Amnesty Law, he must be exempted from criminal prosecution in regard of this crime.

For the reasons above and based on Art 363 (1.3) CPC the Court of Appeals rejects the charge of the criminal offence of unauthorized ownership, control or possession of weapons contrary to Art 328 (2) CCK against D. Bojkovic.

2.3. Erroneous establishment of facts

The Court of First Instance established, in brief, that the victim V[redacted] K[redacted] was visited on 13 April 1999 in her place of residence, in Stanovc, where she lived with her family and where a lot of refugees were staying, by several men dressed in uniform who ordered the refugees to leave. In the evening of the next day one of the same men, dressed in uniform and carrying a firearm, came back and took her against her will, under threat, driving her in a car to the surroundings of the village of Babin Most, where he raped her vaginally, orally and anally, inside the vehicle. Later, on the same day, she was driven by the uniformed man to the village of Babin Most, where another man took her to an unfinished house and by the threat of a pistol, raped her

vaginally from behind, After these events, both mentioned men drove her back to her house. This factual situation was established by the First Instance Court based on the examined evidence described in the judgment and was not challenged in any of the appeals. The Court of Appeals is satisfied with these findings and concurs with the establishment of the factual situation described in more detail in para-s 28 to 32 of the Challenged Judgment.

The First Instance Court, however, did not establish as proven that the facts described above were perpetrated by the Defendants as they were charged in the indictment. It concluded after an extensive analysis that the protocols of photo line-ups on identification of the Defendants by the victim and several witnesses are not reliable evidence and cannot prove their involvement in the rape of V. K[redacted]. In the eyes of the Trial Panel the reliability of this evidence is diminished by several factors: 1) there is no evidence as to how the first photo line-up identification in October 1999 was conducted, where the victim had recognised J. Dejanovic as the first rapist – there is doubt that the person conducting this investigative action might have biased the victim; 2) the photo-copy of the pictures chosen by the victim in the first line-up depict a person with no obvious resemblance to the Defendant J. Dejanovic; 3) the fact that the victim had been already in 1999 shown the picture of J. Dejanovic, had contaminated her mind and therefore the results of further identification procedures are of reduced reliability; 4) the identification procedures conducted in 2010-2012 are of reduced reliability because of the fact that a long time had passed since the events under investigation and therefore the memories of the witnesses had become blurred and distorted; 5) victim had a chance to discuss the details of the identity of the Defendant J. Dejanovic with the witnesses, which turns the later identifications by these witnesses unreliable; 6) the reliability of identification of D. Bojkovic is severely reduced by the fact that none of the persons on other photos shown to the victim resembled to D. Bojkovic – he was the only old person on the photos; 7) the actual conduct of identification procedures was unreliable because of several procedural shortcomings.

The Court of Appeals is not satisfied with these conclusions. The evidence submitted to the First Instance Court have been carefully reassessed by the Appellate Panel and are found sufficient to conclude beyond any reasonable doubt that the defendants are guilty as charged.

Regarding the first photo line-up conducted in 1999 by the police investigator Sh[redacted] K[redacted], the Court of Appeals agrees with the Prosecutors' that the conclusions of the first instance court are inconsistent. On the one hand the Trial Panel raises doubts in the impartiality of S. K[redacted], inferring that S. K[redacted] at the time was already suspecting specifically of J. Dejanovic in the rape of V. K[redacted] and therefore the choice between pictures could have been influenced. On the other hand the Court asserts that the person depicted on the pictures chosen by the victim do not bear obvious resemblance to J. Dejanovic. These two conclusions are contradictory. If the person on those photos is J. Dejanovic – as the first instance court seems to agree and the defendant did not oppose – then the fact that the witness identified the same person many years later on a very different and even non-resembling photo means that she was strongly convinced of the identity of the perpetrator and could not have been influenced by any reference made to her in 1999. The

Court of Appeals agrees however that the first identification is problematic, because there is no record of photos between which the victim had to choose and how the identification was actually conducted. Therefore merely the identification of J. Dejanovic on that occasion would not suffice to remove the doubts in the identity of the perpetrator. The conclusions of the Basic Court in this regard are valid and the Court of Appeals is satisfied with them.

However it has to be born in mind that the victim and several other witnesses had recognised J. Dejanovic on later occasions. The Court of Appeals in this regard disagrees with the restrictive viewpoint of the court of first instance as if the identification procedure can only be reliably conducted once. The reliability of identification could be diminished if the same photographs would have been shown to the person on several occasions within a short period of time – not more than some weeks or months between them. This is not the case, when the set of photographs is different and the time between the identification procedures is in years (more than 12 years in this case). As the court of first instance has pointed out itself, the memory of a person blurs and distorts details over time. This surely means that it would be difficult for a person to be influenced by a single earlier occasion of seeing a picture of a strange person for a short period. Taken into account that the victims as well as the witnesses were able to identify J. Dejanovic without hesitation, even after passage of so many years, significantly raises the credibility of this identification.

The Court of Appeals also disagrees with the doubts raised by the Trial Panel in regard of the possibility that the victim and the witnesses were discussing the identity of the perpetrator. This concern could be relevant only in a situation, where the perpetrator could be visually observed by the witnesses or where this person would bear some distinct features (such as *e.g* visible scars) that would make it easy to indoctrinate somebody with the "right" picture of the perpetrator. J. Dejanovic does not bear any such distinct marks nor had he been moving in the circles of the victim and the witnesses before or after having committed the crime. The only two occasions, when the persons who identified him during the proceedings, met J. Dejanovic were on 13 and 14 April 1999 *i.e* in immediate connection with the offence. On the other hand, excluding the referred identification that took place in 1999, the Defendant was identified by the witnesses before being identified by the victim. M[redacted] K[redacted] and I[redacted] G[redacted] identified him on 26 April 2012, N[redacted] K[redacted] on 16 May 2012 and H[redacted] K[redacted] on 21 May 2012, while V. K[redacted], the victim, only made a photo identification on 17 July 2012. So, in the Court of Appeals' opinion, it cannot be said that the witnesses were influenced by the identification made by the victim, because until 17 July 2012 she had only identified the defendant once trough non-resembling photos (the ones identified in 1999) completely different from those shown to the witnesses many years later. Therefore the allegations of the victim and the witnesses having only later agreed on the identity of the Defendant are in fact excluded in the opinion of the Court of Appeals.

What concerns the critique of the Trial Panel that the persons depicted on photos shown to the victim together with the photo of D. Bojkovic, were not similar enough to this Defendant, the

Court of Appeals admits that this could somewhat diminish the reliability of the identification. In such a situation it is especially crucial that the person identifying someone had given a description of the person identified before picking the picture. V. K[redacted] had indeed described the Defendant, stating *inter alia* that he was an old man and as a specific personal characteristic that he was limping. Both these characteristics apply to D. Bojkovic, as the Trial Panel itself had no problems to establish. There is no logical explanation, why should V. K[redacted] have picked the picture of D. Bojkovic from the other photos only because he was the only old person shown to her. It is highly unlikely that she would have picked a picture only based on this feature and would have later on persisted on pointing on a person she in fact had never seen before. In this regard it is relevant to draw attention also to the fact that the contact between D. Bojkovic and V. K[redacted] lasted for some time and she had a chance to observe D. Bojkovic thoroughly. Therefore the Court of Appeals is satisfied that the identification of D. Bojkovic from the photo-set on behalf of V. K[redacted] is reliable evidence.

Regarding the first instance court's critique towards the actual conduct of the identification procedure the Prosecutors have asserted that the Basic Court was setting additional criteria for the procedure of identification of persons as compared to Art 233 of the Law on Criminal Proceedings of the Socialist Federative Republic of Yugoslavia (LCP SFRY) and Art 255 KCCP. The Basic Court held that in order to be reliable the identification of persons during a photo line-up has *inter alia* to meet the following requirements:

a) The photograph of the suspect has to resemble to the appearance of this person at the time of the offence and the other individuals used in the composition of the line-up should resemble to the witness' description of the perpetrator;
b) The photographs should be presented one at a time; and
c) The person conducting the identification procedure has to be unaware of the identity of the suspect.

The Court of Appeals draws attention that the photo line-ups relevant in this case were conducted in 1999 and 2010-2012. The procedural rules for this investigative action were stipulated in Art 233 LCP SFRY and Art 255 KCCP respectively. As it shows from the plain text of referred norms, neither of them makes any reference to the criteria required by the Basic Court in the Contested Judgment.

In the Commentary on the Yugoslav law on criminal procedure[1] it is clarified that before identifying the witness should first describe the person in the greatest possible detail (it is especially important to state, if he or she knows them, some specific characteristics), and then to include that description in the minutes, and only then to carry out the identification. The basic rule of the identification process is to present a number of persons and objects to the witness, because thus a proper and efficient identification is being ensured, which can have a procedural value. It is necessary to provide at least five persons or objects, besides the one that is the subject

[1] See the Commentaries of the Articles of the Yugoslav Law on Criminal Procedure. Book III. 1988, 3rd edition, Official Gazette of the SFRY, Belgrade. Commentary to Article 233 by Branko Petric.

of identification, so that the witness really must carry out the identification. If the identification of a person is being carried out, then the other persons must be approximately resemble the person that is to be identified; it is necessary that they be of the same height, that they have the same hair color (if the defendant is dark-haired, a blond-haired person or a bald person cannot be part of the identification process *etc.*), that they be dressed in approximately the same manner etc. The text of Art 255 KCCP basically leads to the same conclusions with the exception that Art 255 (3) adds as an additional requirement: the obligation to instruct the witness he or she is under no obligation to select any person or object or photograph, and that it is just as important to state that he or she does not recognize a person, object or photograph as to state that he or she does.

Prior identifying the perpetrators, the victim, as well as other witnesses have given statements. The fact that these descriptions are not part of the protocol of the identification procedure but are included in the protocol of interview of the witness cannot be found to be a violation of norms of criminal proceedings. It is true that the requirement set by Art 255 (3) KCCP has not been met in any of the identifications under question. However, the Court of Appeals finds this procedural violation not to be of such nature, that it would automatically turn the result of identifications void or unreliable. In the case at hand there are no circumstances that would turn this violation into a serious violation putting under doubt the results of the identification procedure.

Therefore the Court of Appeals agrees with the critique raised in the Appeal of the Prosecutor and holds that indeed the Basic Court has violated the norms of criminal procedure by demanding adherence by the photo line-up identification procedure to criteria not foreseen in the procedural regulations relevant at the time of conduct of these investigative actions.

Based on the considerations above the Court of Appeals holds that the identification of J. Dejanovic by the victim V. K[redacted] and witnesses H. K[redacted], N. K[redacted], M. K[redacted] and I. G[redacted] and the identification of D. Bojkovic by the victim V. K[redacted] are reliable evidence.

The first instance court, in addition to not accepting the validity and sufficiency of photo line-up identification, noted and pointed out a number of inconsistencies and contradictions found in the the other evidence that led it to a serious doubt as to the identity of the perpetrators. But the Court of Appeals is of different opinion. The identifications of the perpetrators are corroborated by significant indirect evidence. Among these are the statements given by witnesses H. K[redacted], N. K[redacted], M. K[redacted] and I. G[redacted] and also the statements given by the victim; the documentation on an old injury of the right hand of J. Dejanovic; the fact that D. Bojkovic in fact limps as stated by the victim; and that D. Bojkovic in fact can understand and speak Albanian. The Court of Appeals also points out the fact established by the court of first instance that J. Dejanovic was stationed at the time of events under investigation, in the vicinity of victim's place of residence. The positive identifications of both Defendants together with corroborating evidence leaves no reasonable doubt that J. Dejanovic and D. Bojkovic were the persons who entered into sexual intercourse with the victim V. K[redacted] on 14 June 1999.

The Court of Appeals will now examine all other evidence and address the doubts raised by the first instance court to conclude that the criminal offenses were perpetrated by the defendants.

Circumstantial or indirect evidence may be characterized as that evidence that proves a fact or series of facts from which the facts in issue may be established by inference. The admissibility of indirect evidence as a valid means to establish the factual situation beyond a reasonable doubt is not questionable due to the principle of free evaluation of evidence. The degree of certainty that is given by this type of evidence is not less than that one resulting from direct evidence such as witness testimony, on which the the vital issue of credibility must also be evaluated based on subjective criteria. Indirect evidence will be admissible as a means to prove a fact beyond any reasonable doubt when the following criteria are met: (1) there must be a plurality of circumstances from which the inference is drawn, (2) the circumstances have to be accredited on direct evidence, (3) the circumstances have to be directly interrelated with the fact under demonstration, (4) no equally strong circumstance denying the veracity of the infered fact may exist and (5) the reasoning for the inference must be rational and supported on the rules of logic, experience and common sense.

In the case under adjudication the Court of Appeals finds that there is direct evidence supported and corroborated by indirect and circumstantial evidence sufficient to conclude beyond a reasonable doubt that the defendants were the perpetrators of the criminal offenses. Those are the following:

Regarding the guilt of the defendant Dejanovic

The first important aspect to enlighten is that the Defendant was seen by a plurality of persons and for a considerable period of time. This is not a case of an event that lasted a few seconds and was only witnessed by the victim. In the evening of 14 April 1009 the uniformed man that abducted the victim from her family's house was seen by other four persons besides her: M[redacted] K[redacted], H[redacted] K[redacted], M[redacted] K[redacted] and [redacted] C[redacted]. And, having in mind the events described by those witnesses, it is clear that his presence there lasted several minutes and that he moved around in a manner that permitted him to be seen lingeringly. Although the victim and her family were for sure in a distressing situation, fearing for what would happen, the Panel of the Court of Appeals notes at the same time that it is reasonable and logical to conclude that they were attentive to the movements of the person who posed a threat to them.

On the other hand, the Court of Appeals is convinced by the evidence that the Defendant was also present at the scene on the previous day. Not only because the victim stated this very clearly but because this is the only logical and sensible conclusion. It would not be normal that the person that abducted the victim would go to her family's house alone if he did not know what he could expect there. During an armed conflict this type of actions are normally performed by a group of armed persons. On 13 April a group of uniformed men went to the victim's house to order the retreat of some people that was seeking refugee there and it cannot be a coincidence the presence of a uniformed man in the same place on the following day. This presence on two consecutive days strengthens the reliability of the testimonies, because the perpetrator not only

was seen for a considerable period of time, by a plurality of persons, but he was also seen there twice.

These circumstances are important to attribute credibility to the identification that both the victim and other elements of her family did later. They had a chance to have a good look at the person and it is not likely that all of them would be wrong in the identification and pointing to the same suspect. If they were mistaken, surely they would have identified different photos and not coincidentally the same person on different occasions. Moreover, because the Court of Appeals is convinced that there are no reasons to suspect that the identification was influenced or prepared. As it was previously pointed out, it is not reasonable to state that the identification made by the victim in 1999 would influence the identifications made so many years later, especially considering that the photos were different. Besides that, there is another strong argument showing that there is no valid reason to suppose that the identifications may have been influenced by the victim. Looking at the sequence of identification by the witnesses (paragraphs 80 to 88 of the Challenged Judgment), the panel notes that apart from the identification occurred 1999, witnesses M[redacted] K[redacted], [redacted] G[redacted], N[redacted] K[redacted] and H[redacted] K[redacted] identified the Defendant's photo before the identification made by the victim on 17 July 2012. The victim, who by the time her relatives identified the defendant only was familiar with the photos shown in 1999, could not possibly have influenced them. If she had done it they would never point to the photos as they did because the information given to them would have lead them to error.

It is also important to point out that the victim's mother, when she was first heard on 31 March 2003, said that she could recognize the perpetrator if she was shown a photo. The identification only occurred many years later during the trial, but this allows the conclusion that she was aware of the characteristics of the perpetrator and had a good knowledge of his looks. If the victim's mother was influenced regarding the identity of the suspect she would have described him immediately to the police in 2003 instead of stating that she was not really able to describe him but she believed she could identify him by photo.

Finally, as to the credibility of the identification concerns, the panel notes further that the witness M[redacted] K[redacted] saw the defendant in a shop in April 2010 and only two years later did she identify him through a photo. If, as the first instance court assessed, serious doubts should be raised against the credibility of this identification, it would remain unexplained another remarkable coincidence. How would the witness be the first to identify exactly the same suspect identified later by others? The argument that the witness may have identified the defendant because she saw him in a shop two years earlier would only make sense if he was not the same person identified by all the other witnesses that saw him at the scene.

Besides the coincident and reliable identification made by all the witnesses that could have seen the perpetrator, which is a valid direct evidence, the Court of Appeals finds that other indirect evidence support and corroborate the conviction of his guilt as well.

Stanovc, the place where the victim lived and was abducted from, is quite close to Babin Most, the place to where she was driven to and not far to Cicavica, the place where the Defendant lived (looking at a map it is easy to establish a distance less than 10km). The Court of Appeals believes that the perpetrator must have been familiar with that area. No one would go to an unknown place to abduct and rape a girl risking to be caught unless was pretty sure to remain unnoticed. This conclusion is reinforced by the fact that the perpetrator went to Babin Most and entered in a store from where the second perpetrator came out a few moments later. After the second rape they both drove her home. This also shows that the first perpetrator knew the area and the second perpetrator because any other explanation would be senseless. This indirect evidence points in the direction of the defendant as the First Instance Court established he lived in that area.

Reference to an injury on one of the upper limbs of J. Dejanovic was raised in such an early stage – on 13 October 1999 – that it could not have been invented or guessed. How would the victim be aware of this fact and relate it to the defendant in 1999 if only more than ten years later she identified him by photo and this was not even visible? Not even when she gave statement in the main trial she could have seen the marks of that injury. But the fact is that the Defendant has an injury compatible to the description made by the Victim. The expert report on the injury did not exclude the explanation given by the Defendant but neither did it exclude the possibility that the injury happened in 1999. This is also very important indirect evidence that points clearly to the defendant.

The possession of a Zastava 101 car is not that relevant, as this was a common car at the time. But even not being so essential, the coincidence is there and cannot be ignored as corroborating circumstantial evidence.

The Appellate Panel cannot ignore either that the first instance court did not believe the J. Dejanovic's statement regarding his whereabouts in the critical days. Being obvious that he knows the area, this could not be a mistake. As cannot be ignored also that the Defendant did not admit in a clear manner that he is the person on the photos. Denying the obvious is not again a coincidence.

There was a reference to a name "Pero" that is not related to the Defendant. The Court of Appeals does not consider this as an element that should raise critical doubts. The victim stated during the trial that she was not sure if she mentioned this name as referred to the Defendant or as referred to the occasion and place.

There are also some contradictions on the statements of the victim regarding the description of the perpetrator, such as those related to his age. But they are not on essential details and can be easily explained by her youth and condition. Contradictions on statements are normal, especially when the facts occurred many years ago. If each piece of evidence is removed out of the context and assessed as if it was the only one, one can always find inconsistences or contradictions to diminish the value of it. But the assessment of the facts must consider the evidence as a whole and not isolated. The Court of Appeals would consider more doubtful if all the statements

matched without relevant contradictions because this would mean that there was some kind of preparation that would jeopardize their credibility.

Regarding the guilt of the Defendant Bojkovic

Since the first moment, starting in 1999, the victim described the perpetrator of the second rape as an old man. She identified the Defendant by photo on 17 July 2012. According to the Defendant, that photo was taken in 2009, ten years after the events. This means that the photo shows the Defendant older that he was in 1999. The Court of Appeals would agree with the first instance court as to the doubts raised against the identification if there would not be other corroborating decisive evidence.

First of all, there is the detail related to the fact that the perpetrator limped and spoke Albanian with a non-native accent. This was mentioned formally for the first time on 24 August 2010 but the panel notes that the Victim had mentioned it to her brother before 2008. This is why her brother went to Babin Most in 2008 giving a description of the man and trying to find out who he was. It was established by the first instance court, based on witness evidence and on its own assessment that the Defendant in fact limped and spoke Albanian deficiently. These are notorious characteristics that could not have been missed by the victim. The panel is aware of the fact that many people of that age may limp. It is also possible that more than one person on the same village limps. But the fact is that when the victim's brother gave the description in Babin Most, the second Defendant was immediately referred to as the suspect. Someone in the area, some years later, identified immediately the characteristics of the suspect with the nickname Gjoko (which relates to the Defendant). This makes sense because it seems obvious that when the perpetrator came out of the store house in the presence of other persons and when he returned there after the rape, they became aware of what happened. So, it is not difficult to believe that the rape and its perpetrator were known by others on that community, as it is most probably that such information would spread. This explains why the second Defendant was pointed out as a suspect in a randomly inquire.

The Court of Appeals is also convinced that the second perpetrator was very familiar with the area of Babin Most and with the unfinished house where the rape occurred. He was in the store house with at least one more person when the first Defendant arrived there. He took the Victim to a house at 20 to 50 meters distance. It was night, but this was a populated area. This means that he knew the place and knew exactly where he would perpetrate the rape. It is not credible that someone would rape a girl in those circumstances in a randomly chosen location, risking to be caught. It cannot be a coincidence the fact that the second Defendant and his brother were building two houses in that village, close to each other, and that the first instance court established that most probably the rape occurred in his brother's house.

Finaly, there is evidence that the second Defendant at the crucial days was going to Babin Most. The testimony of witness S[redacted] M[redacted] is not credible, as it would be impossible for anyone to remind who was there on that specific date 14 years later. The Defendant tried to deny his presence there and this is also an important corroborating element that the panel noted.

In conclusion, the Court of Appeals finds that there is sufficient evidence to conclude that the Defendants perpetrated the criminal offenses they were charged with.

2.4. Other substantial violations of CPC

Besides taking issue with the establishment of facts by the Basic Court and the conduct of the identification procedures, the Prosecutors found another serious violation of the provisions of criminal procedure in the Challenged Judgment.

The Prosecutors have also asserted that the norms of criminal procedure were seriously violated because the Contested Judgment of Basic Court has not been duly signed by all persons required by Art 369 (2) CPC. The Appellants insinuate that the EULEX Legal Officer Karen Kort, who has signed the Judgment cannot be regarded as recording clerk in the sense of Art 369 (2) CPC.

The Court of Appeals does not agree with the above view of the Appellants. It is obvious that the person recording the public session of the court is a recording clerk and this person is obliged by the law to sign the minutes of the session. The purpose of recording clerk's co-signature is nothing more than to verify the correctness of the minutes taken during the session.

It has to be noted however that the term "recording clerk" has a dual meaning in the CPC. The recording officer, who takes part in the public sessions, usually is not the person who also participates in the closed deliberation of the Panel. Hence it would be meaningless that the recording officer, who has only participated in the public session and could be regarded recording clerk in the sense of Art-s 204; 207; 297 (1); 298 (1); 317 (1) and (4); and 318 (1) co-signs also the actual decision of the Panel as the recording clerk in the sense of Art-s 320 (1.3), 369 (2) and 473 (2) CPC. The recording clerk, who only participated in the public session of the panel, cannot verify anything else, but a correct reference to session minutes in the decision, which bears no additional value, since the correctness of the minutes is already verified by the recording clerk. It has obviously not been the intention of the legislator to invest the person who recorded the public court session to assess the court's interpretation of facts.

On the other hand, at least in the practice of court panels with EULEX participation, the EULEX legal officer takes part in the deliberation of the Panel and records the minutes of the deliberation. Hence it is indeed the EULEX legal officer, who has to be deemed the recording clerk in the sense of Art 369 (2) CPC, because this official can substantially contribute to the verification of the correspondence of the drafted decision to what had actually been deliberated and decided by the panel. The signature of the recording clerk who participated in the deliberation, thus verifies that the written Judgment faithfully mirrors the decision of the Panel during the deliberation.

Therefore the correct interpretation of the law is that the legal officer being present during the deliberations of the Appeals Panel, recording the exchange of views during it, is to be considered recording clerk in the sense of Art 369 (2) CPC.

2.5. Conviction in War Crime

The Appeals Panel holds that based on the evidence in the case-file which has been duly presented during the main trial it is possible to reassess the case in the Court of Appeals, without sending the case back for a retrial, and to render a verdict.

Both Defendants have been indicted with one count of criminal offence of War Crimes against Civilian Population under Art 142 in conjunction with Art 22 CC SFRY (still punishable under Art-s 31 and 153 CCRK). In order to decide, whether they can be found guilty in this criminal offence, it has to be established that 1) there existed an armed conflict at the time of commission of the act the Defendants are charged with; 2) there was a nexus between the acts and the armed conflict; 3) the acts committed towards the victim qualify to rape; 4) D. Bojkovic as a civilian could be considered as a perpetrator of the war crime; 5) if J. Dejanovic and D. Bojkovic can be considered co-perpetrators; 6) the perpetrators had the necessary intent for the commission of the criminal offence; and 7) there exist no circumstances excluding the criminal liability of either Defendant.

The Court of Appeals is satisfied that there existed the context of an armed conflict in Kosovo at the time of perpetration of acts described in the Indictment, *i.e* on 14 April 1999. This has been established repeatedly in both the practice of ICTY and Kosovo courts.[2] Moreover, the fact that there was an armed conflict ongoing in Kosovo between the KLA and Federal Republic of Yugoslavia (FRY) government forces from 28 February 1998 (from the start of NATO air strikes on 24 March 1999 also between NATO and FRY) until June 1999, is common knowledge and needs no specific proof hereunder.[3]

Based on the assessed evidence. the Trial Panel established that J. Dejanovic was stationed as a military reservist not far from the victim's residence. This conclusion has not been contested by any of the parties and the Court of Appeals finds no reason to disagree with it. As shows from the statements of the victim and her family members J. Dejanovic entered the premises of victim's place of residence twice, on 13 and 14 of April 1999. On both occasions he was dressed in FRY military uniform. On first occasion he together with other uniformed persons ordered that a number of Kosovar-Albanian refugees staying in the house, where the victim lived with her family, should leave. The next day, returning to the house alone, he abducted the victim under the pretext of interviewing her in order to clarify the whereabouts of her father. Although it is not clear if J. Dejanovic was acting on orders or tolerance of FRY military powers or he was merely abusing his powers as a FRY military reservist, the Court of Appeals that the above

[2] See *e.g* Judgment of the District Court of Pristina no. P 371/10 dated 23 November 2011 in the case against F.Gashi para-s 98 *etc.* (upheld in regard of the existence of the armed conflict by Judgment of the Court of Appeals no PaKR 1175/12 dated 10 February 2014)and Judgment of the Trial Panel of ICTY no IT-05-87-/1-T dated 23 February 2011, para-s 1579-1580.

[3] See *e.g* http://1997-2001.state.gov/www/regions/eur/fs_kosovo_timeline.html

clearly shows that J. Dejanovic was acting in the context of the armed conflict between FRY government forces and the KLA.

Although D. Bojkovic had no formal position in FRY government force at the time of the conflict, the circumstances of the rape he committed ascertain that his act too has to be qualified as a war crime. Based on the statements of the victim, before the rape J. Dejanovic drove together with the victim to the village of Babin Most, where he left the victim visible to the villagers. After J. Dejanovic had raped her, he drove her back to the village of Babin Most and left her sitting in the car. There *inter alia* the Defendant D. Bojkovic approached her, took her to an unfinished house and by threatening with a gun raped her. Afterwards both Defendants drove the victim back to her home.

It is a fact of common knowledge that one of the commonly known tactics of FRY forces in the conflict was to intimidate the Kosovar-Albanian population by way of making their lives totally insecure and to make them either by way of direct threats and use of force or by way of indirect pressure to leave their places of residence and in fact flee from Kosovo. Various crimes such as murders, robberies and different type of violence were either endorsed or at least tolerated by the FRY authorities towards Kosovar-Albanian population at that time, thus effectively turning them into outlaws. Objectively, the victim was left unsafe by a military at the disposal of the population that easily could assume that she had been maltreated and could continue maltreating her. Therefore also the second rape, committed by D. Bojkovic, took place in the immediate context of the ongoing armed conflict as a part of ongoing intimidation campaign against the Kosovar-Albanian population. Based on the above the Court of Appeals is satisfied that a nexus between the acts committed by both perpetrators and existence of an armed conflict is established.

The Court of Appeals holds that in the part relevant for the present Judgment the armed conflict was of non-international character, because all relevant acts were committed in the context of suppressing the KLA armed resistance and to intimidate the Kosovar-Albanian civilian population on behalf of FRY government forces.

Based on the evidence J. Dejanovic and D. Bojkovic both entered into sexual intercourse with the victim. The intercourse was involuntary and committed through threats of using immediate violence against the victim. Therefore it is established that all constituent objective elements of rape are fulfilled by both Defendants.

According to the Indictment J. Dejanovic and D. Bojkovic have been charged with the war crime as co-perpetrators. The Court of Appeals finds no evidence indicating beyond a reasonable doubt that the Defendants committed the war crime together. According to Art 22 CC SFRY and also the Art 31 CCRK in force at present co-perpetration is a joint commission of a criminal offence by participation in the criminal offence or substantially contributing to its commission in any other way. By definition co-perpetration therefore requires a jointly made-up mind, a cognitive recognition of at least two persons to act together. This does not necessarily mean a need for an advance planning of the offence, but can also occur in the midst of the already ongoing

commission of a criminal offence in concluding manner. However it is unavoidably necessary that a decision to act jointly is shown. Beside the voluntative aspect of an agreement, co-perpetration also requires a joint action, either by way of at least two persons fulfilling the objective elements of the criminal offence together or by at least all of them holding the overall course of the events under his or her decisive control. Thus there exist no constitutive elements of co-perpetration in their actions. It can only be concluded from the above that J. Dejanovic and D. Bojkovic acted consequently, but independently, when raping the victim.

The Court of Appeals holds that the conduct of both Defendants witnesses their intent to commit the criminal offence they are indicted with. J. Dejanovic abducted the victim from her place of residence under pretext of questioning her about whereabouts of her father, but in fact drove her to a Serb village and by threatening with a knife coerced her to enter into oral, vaginal and anal sexual intercourse with him. Such actions indicate that J. Dejanovic was acting with a direct intent. Later D. Bojkovic came to the car, where the victim was sitting, took her to an unfinished house and by threatening her with a firearm forced her into a sexual intercourse against her will, which also corresponds to direct intent.

There is no evidence on any circumstances that could exempt either of the Defendants from criminal responsibility.

2.6. Sentencing

The Defendants are found guilty of the criminal offence of war crime against the civilian population under Art-s 142 CC SFRY. The acts committed by the Defendants have under subsequent criminal codes applicable in Kosovo continuously been qualified as war crimes (today under Art 153 CCRK). When starting to determine the sentence for the Defendants, the Court of Appeals notes that also the relevant norms of criminal law concerning the types and levels of sentences have been repeatedly changed since the commission of the offences. Therefore it is requisite to establish the most favourable law to the Accused.

The Court of Appeals assesses that Art-s 38 and 142 CC SFRY foreseeing a sentence of imprisonment for not less than five years or the death penalty for the criminal act committed by Defendants is the most favourable law to them. In reaching this conclusion it has to be taken into account that the capital punishment was abolished by UNMIK regulation No. 1999/24, whereas pursuant to Art 38 CC SFRY, the term of imprisonment may not be less than 15 days and not longer than 15 years. It also has to be noted that in the second sentence of this article it is stipulated that exceptionally, in case of criminal offences punishable by death penalty, the maximum term of imprisonment is 20 years. However, the Court of Appeals holds that in the absence of any clear legislation in this regard, in the situation where the sentence of death penalty had been abolished by UNMIK, no more reference can be made to second sentence of Art 38 CC SFRY. Hence the available maximum term of imprisonment can only be determined based on first sentence of Art 38 CC SFRY and the respective article of the special part,

foreseeing the criminal offence which the Defendants have been convicted of. This view also concurs with jurisprudence adopted by courts in Kosovo.[4]

When determining the punishments the Court of Appeals takes into account the circumstances stipulated in Art 5, 33 and 41 CC SFRY. The Court of Appeals if of the opinion that based on the mentioned provisions the applicable principles to calculate the punishment are the following:

- The criminal sanction is the last resort to protect social values and cannot intervene beyond what it is found as strictly necessary. A sanction must not be higher that the necessity of justice enforcement and disproportionate to the fact that endangered the social protected values. Therefore, according to this principle of minimum intervention of the criminal sanction, it must be assumed that the lower punishment foreseen in the law will be sufficient, adequate and normal for standard situations that may be subsumed in the legal incriminating provision.

- The punishment is bounded by the purposes of ensuring individual prevention and rehabilitation, ensuring general prevention, expressing social disapproval to the violation of the protected social values and strengthening social respect for the law.

- While determining the punishment, the maximum penalty applicable in concrete will be given by the degree of guilt of the perpetrator and the minimum by the intensity of the demands of social reprobation. Inside this new limit, the sanction must not be in contrary to the referred principles of prevention and rehabilitation and shall consider in a proportionate manner all specific mitigating and aggravating circumstanced related to the criminal fact and the conduct and personal and social circumstances of the offender.

The Appellate Panel holds that although the criminal offence of war crime J. Dejanovic is charged of is limited to one episode, the circumstances under which the offence was committed are of increased gravity. The rape was committed in an overall situation where the Serbian officials and their supporters among the Serb population acted with a perception of virtual impunity. After having raped the victim himself, J. Dejanovic put her in a situation, where also the other Defendant D. Bojkovic could rape her. The fact that J. Dejanovic and D. Bojkovic were taking her home together after the second rape, infers that J. Dejanovic was well aware of the second rape. It was not established that he left the victim available for the second Defendant knowing that he was going to rape her – this is why they were not considered as perpetrators – but objectively by placing her in that situation he was obliged to know that he was placing her at risk. This increases his responsibility. He has shown no remorse whatsoever for his actions.

The guilt of J. Dejanovic is further aggravated by several factors.

As witnessed by the fact that, after having visited the home of the victim on previous evening, he returned the next day to abduct the victim under the false pretext of questioning her in the police

[4] See Supreme Court of Kosovo in *re* Latif Gashi *et al* – judgment in case No. AP-KZ 139/2004 dated 21 July 2005, but also District Court of Prishtina in *re* S. Abazi *et al* judgment in case No. P 592/11 dated 17 December 2012 (affirmed by the Court of Appeals in part of the assessment of most favourable law for sentencing purposes – judgment No. PaKr 102/13 dated 12 December 2013).

station, the Defendant acted in premeditated manner. He was specifically taking advantage of his position of authority as the armed member of Serbian police forces to facilitate its commission.

The victim was still a very young person at the time, which turns the committed rude sexual violence especially blameworthy. The circumstances of the act, where the young victim was abducted from her family in front of gunpoint and apparently without any legal justification and enforcing her subsequently into vaginal, oral and anal intercourse shows the utmost disrespect to another human being and witnesses a particular cruelty of the perpetrator.

It has to be noted that the criminal offence took place in the context of ongoing massive campaign against Kosovo-Albanian population, which contributed to overall disregard of basic human rights and lawlessness on behalf of Serbian forces towards the Kosovo-Albanians. This combined with the facts that the victim was a young girl abducted from her home, taken to strange environment populated by Serbs and being threatened by the perpetrator with a knife witnesses a particular defencelessness of the victim, because under these circumstances the victim had effectively no chances of protecting herself against the attack. Also has to be considered against the Defendant the fact that he did not try to hide his actions from the villagers, showing how strong were his sensation of impunity and disregard for the values protected by law.

However, notwithstanding all aggravating factors elaborated previously also some mitigating circumstances have to be taken into account. The offence was committed already more than 15 years ago. Over the time the need for application of punishment, as seen from the perspective of preventive purposes, diminishes.

Also relevant as a mitigating circumstance, but at a lower level, is the fact that the conflict in which the events occurred was not one subject to the normal rules of was. There was no hierarchy, no discipline, no line of command, no responsibility and each man or group of man could act spontaneously picking their own targets. This context of lack of control also facilitated the wrong actions committed by the Defendant.

There is no record of J. Dejanovic having committed another criminal offence after the one being subject to present proceedings.

As the result of above factors the Court of Appeals considers 12 years of imprisonment to be the proportionate punishment for J. Dejanovic.

The Appellate Panel holds that although the criminal offence of war crime D. Bojkovic is charged of is also limited to one episode, the circumstances under which the offence was committed are of increased gravity. The rape was committed in an overall situation where the Serbian officials and their supporters among the Serb population acted with a perception of virtual impunity. D. Bojkovic acted in premeditated manner and raped the victim taking advantage of the fact that she was left abandoned and defenceless by J. Dejanovic. It was not proven that he knew she had been raped before by D. Bojkovic but seeing the victim in that condition he was obliged to know that she had been subject to maltreatment. Therefore,

continuing the maltreatment increased his guilt. He has shown no remorse whatsoever for his actions. On the contrary, during the session on 4 April 2013 the Defendant was only laughing when listening to the statement of the victim.[5]

The guilt of D. Bojkovic is aggravated by the fact that he committed the crime against a very young victim, taking advantage of her particularly vulnerable and defenceless position as explained above in this judgment. The act of D. Bojkovic has to be considered particularly cruel, because he went on to further violate the sexual integrity of the victim notwithstanding the fact that she had already been subject to maltreatment by the Defendant J. Dejanovic. These circumstances also indicate premeditation of D. Bojkovic – he was approaching the victim with a firm intention to take her to a quiet place and to force her into sexual intercourse and he had taken a gun with him to coerce the victim for this. The fact he did not care to act that way publicly is also demonstrative a higher degree of indifference for the values protected by law.

The punishment of D. Bojkovic should be mitigated because of the fact that a long time has passed since the commission of the offence. There is no information of D. Bojkovic having committed another criminal offence after the one being subject to present proceedings. It also has to be taken into account as mitigation that D. Bojkovic is elderly being 77 years old by today.

As the result of above factors the Court of Appeals considers 10 years of imprisonment to be the proportionate punishment for D. Bojkovic.

The Court of Appeals notes that although the charge of the criminal offence of unauthorized ownership, control or possession of weapons contrary to Art 328 (2) CCK against D. Bojkovic is rejected, it does not exempt the Defendant of all the consequences of his original conviction in this criminal offence by the Basic Court of Mitrovica. Namely, with the Contested Judgment the Trial Court confiscated the weapon and ammunition that were found to be in unauthorised possession of D. Bojkovic. According to Art 9 of the Amnesty Law regardless of the application of amnesty under this law to any criminal offence, if an object has been confiscated in accordance with the law during the criminal proceedings based in whole or in part on that criminal offence, the person receiving amnesty does not have a right to ask for the return of that confiscated object. Therefore the Court of Appeals upholds the decision of the Basic Court of Mitrovica to confiscate pursuant to Art 328 (5) CCK the weapon and ammunition, seized from illegal possession of D. Bojkovic.

2.7. Costs of the proceedings:

Referring to Art 453 (4) the CPC, the Court believes that there are grounds, especially the age of the Defendants and thus their low income, but also absence of possibilities to increase the income, to relieve both Defendants of the duty to reimburse entirely the costs of the criminal

[5] Record of the Main Trial session on 4 April 2013, page 45.

proceedings as prescribed by Art 453 (1). Therefore, the Court decides that both Defendants shall reimburse 250 Euro of the overall costs of the criminal proceedings against them.

2.8. Final provisions

The Court of Appeals found no need to hold a hearing, pursuant to Art 392 CPC, since the Court found that there was no need to examine any new evidence. Further the Court of Appeals found that since the evidence examined by the Basic Court Trial Panel was sufficient but in regard to the determination of the factual situation a different judgment should have been rendered. Therefore the Court of Appeals finds that there are grounds to modify the Impugned Judgment pursuant to Art 403 (1.2) CPC.

The Court of Appeals notes that since the Court of Appeals has modified the judgment of acquittal by the Basic Court and rendered instead a judgment of conviction an appeal against this may be filed with the Supreme Court of Kosovo within 15 days of the day the copy of the judgment has been served according to Art-s 380 (1) and 407 (1) CPC.

Presiding Judge

Manuel Soares

EULEX Judge

Panel member	Panel member	Recording Officer
Annemarie Meister	Xhevdet Abazi	Andres Parmas
EULEX Judge	Judge	EULEX Legal Officer

Prepared in English, an authorized language. Reasoned Judgment completed and signed on 17 June 2014.

COURT OF APPEALS

Case number: PaKr 503/13

17 June 2014

Dissenting opinion of EULEX Judge Manuel Soares attached to the judgment of the Court of Appeals dated 17 June 2014, pursuant to Article 398.4 of the CPC.

As presiding and reporting judge on this case I disagreed with the majority decision in relation to two aspects: (1) the maximum limit of the imprisonment sanction applicable to the criminal offense of *war crime against civilian* under Article 142 of the Criminal Code of SFRY and (2) the imprisonment sentences imposed to the defendants. I find that these matters of disagreement are sufficiently important to justify a written dissenting opinion. However, it is not necessary more than a brief explanation.

The matter of the limits of the imprisonment sanction

By majority it was decided that pursuant to Article 38 of the Criminal Code of SFRY the term of imprisonment may not be less than 5 years and longer than 15 years. I am fully aware of the previous jurisprudence quoted in the judgment concurring with this assessment but with all due respect I am not convinced by it.

Under the former Criminal Code of SFRY the criminal offense for which the defendants were convicted was punishable by imprisonment for not less than 5 years and no longer that 15 years or by the death penalty, that could be replaced by imprisonment for a term of 20 years (Articles 38 and 142). Capital punishment was abolished by UNMIK regulation No. 1999/24 (Paragraph 1.5 of Section 1). This abolition, however, in my opinion, did not revoke the Criminal Code of SFRY's provision that permitted the imposition of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. I cannot agree with the conclusion that in the situation where the sentence of death penalty had been abolished by UNMIK no more reference can be made to second paragraph of Art 38. The criminal act was no longer eligible for the death penalty but remained eligible for the alternative imprisonment up to 20 years. The only aspect that the UNMIK revoked was the option of imposing a capital punishment but not any other sanction applicable to the respective criminal offense.

Therefore, I think that the applicable sanction of imprisonment may not be less than 5 years and longer than 20 years.

The imprisonment sentences imposed to the defendants

Defendant Jovica Dejanovic was sentenced to 12 years of imprisonment and defendant Djordje Bojkovic to 10 years of imprisonment. In my opinion, when considering the limits accepted by the panel from 5 to 15 years, the adequate sanctions would be respectively 10 and 9 years of imprisonment.

The judgment considered as a mitigating circumstance for both defendants the fact that the criminal offenses were committed more than 15 years ago because the need for a punishment, seen from the perspective of the preventing purposes, diminishes over the time. I agree completely with this principle but I am of the opinion that its mitigating value is stronger and should determine lesser punishments that those imposed.

The purposes of a punishment, as it is written in the judgment, are related to ensuring individual prevention and rehabilitation, ensuring general prevention, expressing social disapproval to the violation of the protected social values and strengthening social respect for the law. The need of imprisonment to protect all the referred purposes is strongly wreaked now that more than 15 years passed since the crimes were committed. As to the knowledge of the court, the defendants did not commit any other criminal offense since then, showing that individual prevention and rehabilitation have been achieved without the punishment. Expressing social disapproval for the disrespect of the law through a punishment would be much more efficient and reasonable if decided nearer the date of the events. My assessment could be different if the time elapsed since the crimes could be somehow attributed to the defendants. But this is not the case, as the crime was reported to the authorities and there was a period superior to 10 years during which no relevant investigation occurred. Of course the troubled circumstances of Kosovo after the armed conflict contributed to this delay. But punishing the defendants as this factor did not exist does not seem fair to me.

Additionally, it has to be considered that war crimes against civilian may be perpetrated through more serious actions, such as, for example, the abduction, torture and and killing of several persons. If for those actions the maximum admissible sanction would be 15 years of imprisonment, without denying the wrongfulness of the defendant's acts, I find too harsh sentencing them to 12 and 10 years.

Presiding Judge

Manuel Soares

EULEX Judge