

Supreme Court of Kosovo
AP – K 191/2009
8 December 2009

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo, in a panel constituted pursuant to Article 26 paragraph (1) of the Kosovo Criminal Code of Procedure (“KCCP”), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (“Law on Jurisdiction”), composed of:

1. Guy Van Craen, EULEX Judge, Presiding Judge and a reporting judge
2. Emilio Gatti EULEX Judge, Panel Member
3. Gerrit-Marc Sprenger EULEX Judge, Panel Member
4. Zait Gjemajli, Supreme Court Judge, Panel Member
5. Avni Dinaj, Supreme Court Judge, Panel Member

Assisted by Driton Musliu, EULEX Legal Assistant, as recording officer, Stephen Parkinson, EULEX Court recorders, Arlinda Gjebrea and Lekë Nimani, EULEX Interpreters;

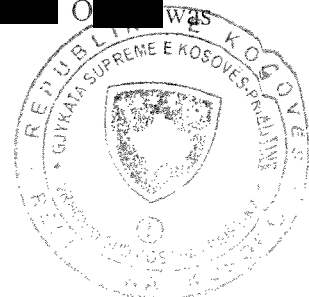
In the presence of the Public Prosecutors, Anette Milk EULEX from the State Public Prosecutor office, Defence Counsels Tome Gashi and Fazli Balaj, and Defendant Gani Gashi;

In the criminal case against the defendant Gani Gashi, father’s name [REDACTED], born on [REDACTED], in Komoran village, Municipality of Glogovc, Kosovar Albanian, married, and without previous convictions;

held in pre-trial detention from 16 August 2007 until 16 November 2007, and house detention from 16 November 2007 until 2 March 2009, in detention pending appeal since 2 March 2009,

Charged with

- a. the willful murder of I [REDACTED] O [REDACTED], a civilian person, on 12 July 1998, by shooting him in the back with a firearm while I [REDACTED] O [REDACTED] was sitting in a Fiat vehicle, on the road between Komoran/e village and Kishnareke/Kisna Reka village in Glogovc/Glogovac municipality, Kosovo, and as a result of this shooting [REDACTED] O [REDACTED] died;
- b. the willful attempted murder of Sh [REDACTED] O [REDACTED], a civilian person, on 12 July 1998, by shooting him in the head with a firearm while Sh [REDACTED] O [REDACTED] was



sitting in a Fiat vehicle on the road between Komoran/e village and Kishnareke/Kisna Reka village in Glllogovc/Glogovac municipality, Kosovo

- c. the violation of bodily integrity and health of H [REDACTED] O [REDACTED] and S [REDACTED] O [REDACTED] civilian persons, on 12 July 1998, by shooting them with a firearm while H [REDACTED] O [REDACTED] and S [REDACTED] O [REDACTED] were sitting in a Fiat vehicle on the road between Komoran/e village and Kishnareke/Kisna Reka village in Glllogovc/Glogovac municipality, Kosovo

By these actions, Gani Gashi committed the criminal offence of War Crimes against civilian population, in violation of Socialist Federal Republic of Yugoslavia Criminal Code (SFRY CC) article 142, ref. article 19 as for item b, ref UNMIK Regulation 2000/59, as read with the rules of international law effective at the time of war, armed conflict, or occupation, namely the Geneva Convention Relative to the Protection of Civilians in the Time of War (hereafter Geneva Convention IV) Articles 3 and 147 and in violation of Protocol II to the Geneva Conventions, Article 4.

deciding upon the appeal filed by his defense counsels, Fazli Balaj and Tome Gashi, against the Verdict P. No. 23/2008, rendered by the District Court of Pristina on 3 March 2009,

in a session, held on 8 December 2009, after deliberation and voting, issues the;

JUDGMENT

The judgment rendered in District Court of Prishtinë/Pristina is modified and the appeal of the defense counsel is granted partially, in particular as to the punishment imposed.

The decision of the District Court of Prishtinë/Pristina is confirmed, except as follows:

1. The reference to Article 147 of the Fourth Geneva Convention, relative to the Protection of Civilian persons in the time of War, 12 August 1949, is **Eliminated**;
2. The elements of the criminal act are to be précised that the act was perpetrated during the armed conflict, that the defendant was a KLA soldier in a checkpoint armed with AK 47 (Kalasnikov).
3. The punishment is modified by imposing a punishment of imprisonment of 15 (fifteen) years by reducing the punishment of the District Court of Prishtinë/Pristina.



4. The verdict is also modified as to the crediting of the time spent in detention, therefore, the time spent on detention on remand from 16 August 2007 until 16 November 2007, and house detention from 16 November 2007 until 2 March 2009, will be credited as a part of the punishment.

Reasoning Gani Gashi.

1) Procedural history

The first instance Court, District Court of Pristina, convicted the defendant Gani Gashi on 3 March 2009.

The timely appeals from the defendant, filed through his advocates Fazli balaj and Tome Gashi, respectively on 28 April 2009 and 7 May 2009, are admissible

The Supreme Court, as the appeal instance, decided to hold a session on the 8 December 2009 and heard all the parties involved, including the injured party.

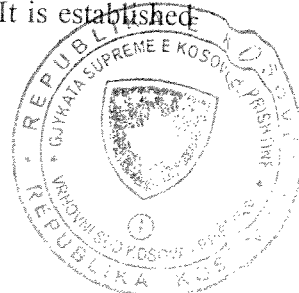
After the deliberation, the public announcement of the judgment of the Supreme Court, by reading the enacting clause, was made by the panel 8 December 2009. A separate ruling was issued the same day on the detention of the defendant.

2) Court assessment of the appeals.

The appeals of the defendant raised several points of interest as to erroneous and incomplete determination of the factual situation by the first instance Court , as to the substantial violation of the KCCP and the CCK and as to the punishment .

2.1. Determination of the factual situation :

The Supreme Court in its analysis of the appealed verdict finds that the first instance court established precise and accurate the factual situation in accordance with the legal methods of fact finding based on the assessment of the evidence presented before the Court as described in the Court's motivation . Contrary to the appeals the first instance Court established indeed all the circumstances of the criminal acts inter alia : the persons present , the victims and their wounds , the movements and action of the defendant and the weapon used , the trajectory of the projectile (bullet), the approximate time, the darkness at the time of the crime, the road , the checkpoint and the presence of KLA-soldiers with their military duty .The firstt instance Court clearly stressed that "there is no evidence –which has been established beyond reasonable doubt-that there were more than one bullet shot “. Through this presented evidence the first instance Court reconstructed precisely the movement and actions of all persons involved in this drama meaning: before, during and after the shot was fired and the exact consequences of the shooting. The fact that S [REDACTED] C [REDACTED] was in a later event wounded (by a granate) does not, if proven, constitute an evidence a contrario . It is established.



without any doubt that S [REDACTED] O [REDACTED] was wounded through the shot fired by the defendant at the car.

The first instance Court determined properly and with great accuracy the factual situation. This determination and description in the motivation of the first instance Court is therefore confirmed by the Supreme Court and considered as its own.

2.2 Substantial violation of the KCCP and violation of the CCK.

The Supreme Court observes that indeed the enacting clause of the first instance verdict contains some shortcomings:

- the reference to art 147 Geneva Convention IV
- the absence of the precision of the elements in the qualification of war crimes
- the absence of the legal citation by which is prescribed that the penalty has to be reduced with the time spent in detention and/or house arrest.
- the penalty is not established correctly

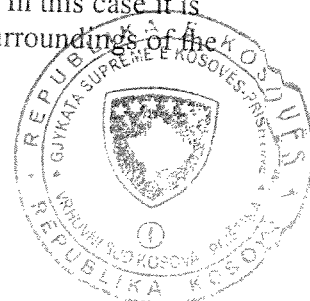
These shortcomings, although in conflict with the applicable law, do NOT constitute a substantial violation of the KCCP and do not necessitate the Supreme Court to annul the appealed verdict (art 424(1) KCCP).

The Supreme Court decides in compliance with art 426(1) KCCP considering that the factual situation (see above) has been properly determined.

a) The enacting clause should be read together (as a whole) with the reasoning and the expressly determined (by the first instance Court) factual situation.

The first instance Court findings and motivation indicates clearly:

- the elements of war crimes because the defendant acted during an ongoing internal armed conflict (not an international armed conflict as 147 Geneva Convention prescribes) as a KLA soldier, armed with a war-weapon (AK 47), on duty as a KLA soldier on a checkpoint installed by KLA, against civilians (victims); the Court referred to the situation at that time in Kosovo, and although there was no fighting at that moment in that place, concluded correctly in accordance with the International and local jurisprudence that there was at that time an armed conflict going on in Kosovo and in particular in that area (place of the crime) as well. The first instance court concluded, without leaving any doubt that the criminal act of the defendant has to be qualified as a war crime. Furthermore it goes without saying that the factual situation as it is described by the first instance court inter alia: action(s) of KLA soldiers armed with semi automatic weapons, the checkpoints and the digging and the organizing of safe havens and the control of all traffic at the place of the crime, are at least supporting evidence of the armed conflict. The Supreme Court adheres to the reasoning of the first instance court.
- in answering the appeal the Supreme Court underlines that the qualified war crime does not require that the illegal act is conducted against a multitude of civilians (supporting the enemy) and does not require a (effective) battle and/or fighting between the armed forces at the crime scene. In this case it is proven that an armed conflict was ongoing in the area and surroundings of the



place where the defendant willingly killed the [REDACTED] O [REDACTED], willfully attempted to Sh [REDACTED] O [REDACTED] and intentionally violated the bodily integrity and health of H [REDACTED] O [REDACTED] and S [REDACTED] O [REDACTED].

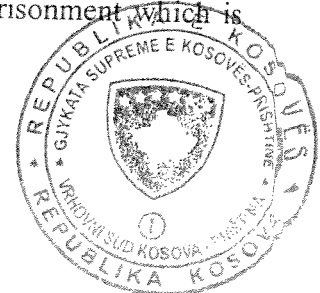
- For the sake of clarity: according to the mentioned Geneva Convention IV :
1. the provision related to protected CIVILIANS (as in this case) finds applications in the whole territory of warring parties regardless whether or not actual combat takes place in every region ;
 2. the requirements to be applicable are further more “the organization ,responsible command, control over a part of the territory, sustained military operations and ability to implement International Humanitarian Law “ (Additional Protocol II)

As mentioned above those substantial elements are met in this case.

- Therefore the Supreme Court in the enacting clause, made the precision in the qualification of all constituting elements of the war crimes and deletes in the qualification of war crimes ,the reference made by to the international armed conflict (art 147 Geneva Convention IV).

b) The Supreme Court does not abide by the conclusion in the appeals by which it is stated that the defendant had no intention to kill , no motivation and/or that he acted by negligence . The Supreme Court by assessing the evidence legally presented to the first instance Court, observes that the intention to kill is proven by the fact that without warning, the defendant shot with his AK47 (war-weapon) into the car, well aware that the car was full of people (including a child of 6 years old sitting on the lap of the deceased) and by doing so he knew perfectly, having seen the people in the car a minute before, he would kill and injure driver and/or passengers. The defense, stating that it was an accident, that the defendant wanted to shoot in the air, does not stand due to the above mentioned facts, the conditions of the road and the geographical indications. The trajectory of the bullet (high to low) shows clearly that the defendant aimed at the back window of the car, for sure knowing that the bullet would penetrate within the passengers’ area within the car. The motivation of this crime is (indeed) not known, but as such this circumstance has no relevance (in this case) to determine the intention (morale element) of the crime.

c) The applicable criminal law, by which the penalty has to be determined, is the most favorable law for the defendant. Taking into account the date of the criminal facts , the most favorable law is the CCFRY art 142(1) of 1977/1993 considering the UNMIK Regulation 2000/59 (abolishment of the death penalty). The first instance court condemned the defendant to the (illegal) penalty of 17 years in stead of a penalty of 20 years imprisonment or a penalty up to 15 years imprisonment. The first instance court decided 17 years imprisonment which is not legally prescribed.



In this case, bearing in mind that the appeal may not harm the appellant (defendant), the maximum penalty for the crime (war crime -willful killing) is 15 years of imprisonment. The Supreme Court abides with the opinion of the Public Prosecutor.

Therefore, the Supreme Court decides to convict the defendant to this penalty of 15 years of imprisonment for the reasons that:

- the crime itself proves the manifest dangerous criminal attitude of the defendant
- the victims (injured party) are still suffering from the enormous moral damage
- the defendant does not show really empathy with these victims.
- the serious social consequences for the society caused by his acts.

Therefore this determined prison time is needed to bring the necessary insight, perception and understanding about his major criminal behavior so that he will become able to function as an honest and peaceful citizen without danger for the surrounding people. A lesser penalty, taking into account the dangerous personality of the defendant, the major criminal acts he performed against totally innocent civilians (including a child), can not be taken in consideration even the Supreme Court is well aware of the fact that the defendant is married and is a father, that he has no previous criminal record and that the criminal facts are perpetrated 12 July 1998.

d) The Supreme Court underlines that the time spent in detention on remand and house arrest have to be deducted from the above prison time.

For the above reasons the Supreme Court, as an appeal panel, decided -in compliance with art 426(1) KCCP- that the first instance verdict has to be confirmed except the changes as defined in the enacting clause. The decision on the further detention of the convicted has been issued by a separate and specific ruling.

SUPREME COURT OF KOSOVO IN PRISHTINË/PRIŠTINA

AP- K No. 191/2009

8 December 2009

Presiding Judge

Guy Van Craen

Panel Member

Emilio Gatti

Panel Member

Zit Gjermajli



Panel Member

Gerrit Marc Sprenger

Panel Member

Avdi Dinaj