VERDICT No: 275

City of Sofia, 27 July 2011

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF CASSATION of REPUBLIC OF BULGARIA, second criminal department, in a public sitting on the sixteenth of May in the year of two thousand and eleven comprising of:

CHAIRMAN: SAVKA STOYANOVA
MEMBERS: 1. BILYANA CHOCHEVA
2. JANINA NACHEVA

with secretary Kr. Pavlova, in the presence of the public prosecutor Gebrev, has heard what was reported by judge J. Nacheva, criminal case No. 1504 as described for 2011, and in order to make a statement, has taken into account the following:

The cassation case is established on the basis of objection by the public prosecutor, petition for appeal through the defence, and appeal of the private prosecutors against appellate decision No. 9 of 18.02.2011 of Sofia Court of Appeal, as per general punitive case No. 419/2010.

In the objection, reasons are emphasized supporting the grounds for cassation on the basis of article 348, paragraph 1, point 3*[of the]* Criminal Proceedings Code – apparent injustice of the punishment, following the Court's refusal to accept that the committed crime is extremely grievous, according to the meaning of article 38a *[of the]* Criminal Code. It is requested to over-rule the appellate decision and to return the case for a new hearing.

In the complaint of A.E.Z., as well as in the complaint of A.M.M. and H.Ts.M., each of them in their capacity as a private prosecutor, grounds with similar content have been emphasized in support of the grounds of cassation for apparent injustice of the punishment. They support the case that the crime committed by the accused J.P. reveals characteristics which define the crime as extremely grievous. Therefore, imprisonment as a choice of punishment does not correspond to the collective circumstances of public danger of the act and the characteristics of the personality of the person who committed the act. Justice dictates the ruling of life imprisonment without parole, which also determines the requested revocation of the appellate decision and the return of the case for a new hearing and the increase of the punishment.

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In the extensively motivated complaint of the defence, considerations have been developed regarding the presence of grounds for cassation, on the basis of article 348, paragraph 1, point 1-3 *[of the]* Criminal Proceedings Code. It claims partiality in the consideration of evidentiary sources, lack of response to material arguments of the defence, invalid categorisation of the committed act and as an alternative - an apparent injustice of the imposed punishment. From the various cassation arguments also follow requests – to revoke the appellate decision and return the case for a new hearing; to remove significant procedural violations; to revoke the appellate decision and to acquit the accused, on the basis of article 12, paragraph 1 *[of the]* Criminal Code or to amend the decision by re-categorising the act, according to article 119*[of the]* Criminal Code and reducing the severity of the imposed punishment. The defence believes that it also follows that the amount of the appointed compensations for non-material harm in the sentence should be reduced.

In a court hearing, the prosecutor from the Supreme Cassation Prosecution supports the objection. It finds that the objectives according to article 36 of the Criminal Code can only be achieved with the enforcement of life imprisonment without parole. The complaints of the private prosecutors, with identical requests, are considered as justified. As for the complaint of the accused, it *[the court]* has concluded that it is to be disregarded, because there have been no violations, as it has been stated.

The private prosecutor A.E.Z, through their trustee (attorney Ts.), as well as the private prosecutors A.M.M. and H.Ts.M., personally and through their trustee (attorney K.), support their request to revoke the appellate decision, because of an apparent injustice of the ???*[imposed]* punishment, and insist that the claim of the accused be considered baseless, considering the lack of significant procedural violations and conformity with the law of the legal categorisation adopted in the case.

The defence of the accused (attorney K.) supports the claim for cassation and emphasises the main complaints mentioned within it.

The defence S.P. joins in agreement of the argument of the other defender and in summary states that the decisions of both judicial institutions are extremely confusing and illogical.

In addition the accused J.P. points out that he didn't attack anyone without a reason and has not attacked with intention to kill; also he himself, as well as the persons accompanying him, have been under attack.

The Supreme Court of Cassation, after discussing the arguments in the protest and the claims, verbally elaborated considerations in the open court hearing and examined the judicial act in question within the auspices of article 347, paragraph 1 of the Criminal Proceedings Code, found the following:

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With sentence No. 420, from 2.12.2009, according to general punitive case No. 866/08, Sofia City Court has found the accused, J.P., guilty of, on 28.12.2007 in a [populated area*] has attempted to intentionally kill more than one person – A.E.Z. and A.H.M., where the act has been done with hooligan motives, therefore on the basis of article 116, paragraph 1, point 4, annex 3 and point 11 in relation to, article 115 in relation to, article 18, paragraph 1 and article 54 from the Criminal Code has imposed a sentence of twenty (20) years imprisonment. It is determined that the sentence is to be carried out with an initial strict regime. The accused J.P. is sentenced to pay all of the civil claimants – A.M.M. and H.Ts.M. the sum of 200,000 BGLev (two hundred thousand) each and to the civil claimant A.E.Z. the sum of 50,000 BGLev (fifty thousand), representing compensations for the caused nonmaterial harm, following the lawful repercussions. In burden of the accused are allocated the costs of the case. The time served is reduced, for the time during which the accused has been under irrevocable "Held under arrest", since 28.12.2007 until sentencing.

The appellate decision No. 9 from 18.02.2011, of Sofia Court of Appeal as per general punitive case No. 419/2010 has entirely confirmed the sentence of the Sofia City Court and has sentenced the accused J.P. to pay the costs of 720 BGLev (seven hundred and twenty) to the Interpreter as it is within the appeal case.

The claim of the defender has grounds only in the part for the costs charged for an Interpreter in violation of article 189 *[of the]* Criminal Proceedings Code. The rest of the claim for cassation is WITHOUT GROUND.

In itself, it is said that the appellate court has not followed strictly the requirements of article 14 *[of the]* Criminal Proceedings Code, which instils the responsibility of the Court to make a decision according to an internal conviction based on an objective, impartial and full investigation of all circumstances in the case, when following the law. As a result of that, there has been a substantial procedural violation as per article 348, paragraph 1, point 2 *[of the]* Criminal Proceedings Code that has lead to the restriction of the accused's right for a defence.

The exact arguments are subject to the procedural position, that the court unlawfully has rejected the explanations of the accused, for a situation of imminent defence – actions in defence of two persons, unidentified in the case, and himself, from the wrongful attack by a group of young people, some of whom were witness A.E.Z. and the deceased A.H.M.

In the same context, it argues the factual findings of the court in fact, that at the time the accused has appeared at the scene of the crime, the conflict (verbal and physical) between some of the boys and the unknown persons has already ended. According to the claimant, this untruthful factual conclusion is a result of the excluded testimony of

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witness G., and the unfounded refusal of the court to give them credit, although evidentiary, they have been supported by the testimony of witness N. and witness T., which the Court of Appeal has not discussed, since the second testimony given by the police officers, clarifying the reason as to why the accused has become involved, as well as the sequence of the incriminating events in the case permanently imprinted in the police camera recordings. The false interpretation of the evidence i.e. the ignored possibility, described by the expert, the bodily injuries of the accused to have been caused in the way described by him, have lead the court of appeal to the wrong factual conclusion, that the accused J.P. has had dirt and cement tiles thrown at him only after the committed crime and not before that (paragraph 9 from the motives of the appellate decision).

The arguments are unacceptable.

The testimony of witness G. has not been rejected without grounds, but carefully studied and considered on its own as well as collectively. From the motives shown in the decision, the court arguments can clearly be traced. It is clearly stated that the testimony of witness G. does not fit with the rest of the evidentiary sources, even to an extent of a definite misinterpretation, even with the testimony of the accused J.P. where he has submitted his version of the facts of the event. The testimony of witnesses N. and T. also have not been ignored, but seriously discussed by both authorities, together with other means of evidence. The factual circumstances established by the court, regarding the moment and the exact place of the incident, between the accused and the group of young people, is supported both by the record on the optical carrier CD of the registered information from the security system for video surveillance in the vicinity of the incident, incorporated as a material evidence to the case and examined with the help of an expert. The sequence of camera shots illustrated in the annexes to the specialised conclusion of the expert, add only to the impression that there was a preceding argument, of which the accused was not a part.

The objection to a gratuitous assessment of the testimony of the police officers, given during their second questioning, is also unacceptable in the case for appeal. Their testimony rightfully has not been credited by the appeal institution, because they contain derivative evidence and in the case, such primary ones *[statements]* have been collected through the questioning of eye-witnesses.

Therefore, the liberal judgment of the Court of Appeal, examining the case fundamentally, as to which evidentiary means it’s going to trust and which it is not, is outside the scope of control exercised by the Supreme Court of Cassation, if the way these evidentiary materials have been evaluated, corresponds with the procedural requirements of the law.

According to what has been pointed out by the defender, the Court unlawfully has refused to respect evidentiary requests, which he carefully has made – with the view of

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the principle of immediateness – to have the recordings from the police cameras looked at again, technically reproduced on an optical carrier, as well as to appoint additional extended forensic expertise. The Court of Appeal is in fact a fundamental Court, but it doesn't have an obligation to once again check the material evidence collected by the first authority.

The Court of Appeal single-handedly decides on the need for collecting new evidence in order to reveal the objective truth and may use the evidence collected by the first authority, without having to breach the principle of immediateness in article 18, *[of the]* Criminal Proceedings Code. The principle is introduced in the Criminal Proceedings Code with exceptions, and the use of evidentiary material collected by the Court of first authority is one of them. In the case, the defender has not pointed out what circumstances have imposed the viewing of the records from the police cameras for a second time. There has not been a complaint made for unsubstantiated and wrongful expertise of optical carrier.

A procedural violation is also not in place with the refusal to appoint an extended forensic expertise, when with the conclusion from the accepted expertise it has been given a thorough response to the questions of forensic nature, relevant in establishing the essential circumstances of the case. The conclusion has been accepted by the court as competent, extensive, objective and clear. A specialised analysis has been done and a comparison of the size and shape of the examined knife, the cuts to the clothes of the deceased A.H.M., the morphological characteristics of the puncture-incision injury in the chest as well as the collectiveness of all the remaining data in relation to the criminal act. The refusal to grant the request of the defence is not as a result of unclear judicial discretion, but the decision is made on the basis of material in the case.

Therefore the Supreme Court of Cassation does not ascertain lack of discussion or false interpretation of evidentiary materials, through which is to be violated the principle for revealing the objective truth for making a decision on the basis of internal conviction and the right of defence of the accused.

Without judicial bearing is the statement by the defence, that there have been mistakes made according to article 305, paragraph 2 of the Criminal Proceedings Code by the Court of first authority. In the circumstance that the Sofia Court of Appeal has stated discrepancies in the evidentiary materials and has stated arguments as to why it accepts some of them and rejects others, the violations do not pervert the appellate judicial act, which has been appealed against.

In support of the cassation argument for crucial violation of the procedural rules, the complaint states that the decision lacks responses to the arguments in chief of the defence, in violation with article 339, paragraph 2 of the Criminal Proceedings Code and with article 6, point 1 of The European Convention for the Protection of Human Rights and Basic Liberties.

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Along the same lines, it is clarified that the defence has pointed out numerous and irrevocable flaws that have lead to the initial failure of the investigation, an example of which is the oversight of immediate confiscation of the records from the security cameras, mounted on the building of the Ministry for Healthcare. According to the defence, the court has had to clearly respond, if there have been oversights in the investigation and whether they have brought any doubt in the case of the prosecution, as well as in whose favour they are to be interpreted, in view of the requirement in article 303, paragraph 2 of the Criminal Proceedings Code (the accusation to be proven beyond reasonable doubt).

The Court of Appeal has given an accurate response to the arguments of the defence – through which the defence argues the instigator of the act – based on the collected verbal, written and material evidentiary sources which it has accepted as truthful, aided by the conclusions from the experts. The inability to include the recordings from the cameras from in front of the Ministry for Healthcare has not lead to partial clarification of the circumstances around the incriminating event. The court has searched for other procedural possibilities for determining all relevant circumstances i.e. through hearing the testimony of witness A., therefore the inability to use the recordings from the security cameras from in front of the Ministry for Healthcare has not hindered the impartial, objective and extensive clarification of the main facts and circumstances included in the subject of proof (article 14 Criminal Proceedings Code).

The appellate decision has responded to the rest of the arguments, reflected in the cassation claim, including regarding the exact characteristics of the puncture-incision injury of the victim A.H.M. The facts that have been stated have been accepted as established with the aid of the specialised knowledge of the experts in the relevant field, who have given an extensive and comprehensive explanation in writing and in a court hearing. The answer to the question, as to what has motivated the accused, is logically implicit from the established comprising indicators, included in the legal categorisation of the crime that the accused has been sentenced for. In relation to that, there have been sufficiently elaborate motives presented *[before the court]*, through which the generally formulated objection that the motives differ, is rejected by the court, as without grounds. In view of what has been stated so far, the Supreme Court of Cassation believes that there has not been a violation of the requirements as per article 339, paragraph 2 of the Criminal Proceedings Code. Therefore, there is no basis for revoking the appellate decision and returning the case for a new hearing.

In the frame of the established factual situations, lead by no strong grounds for procedural violations, the Court of Appeal lawfully has refused to categorise the *[incriminating]* act of the accused, as an inevitable defence, as per the interpretation in article 12, para.1 from the Criminal Code. The actions of the accused cannot be accepted as made in the act of inevitable defence, when the harm has been done, without

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continuous and actual attack of the unknown persons in the case, i.e. with the clearly void need for him to defend their rights and interests, guarded by the law. Just as lawfully, the Court of Appeal has stated in the established factual circumstance, at the place where the accused has appeared with the knife, there have been no persons whom he therefore has had to defend – the accused has gone through [Street name*] and has broken up the group of boys, he has started to wave a knife around with stabbing motions of the hand towards them and as a result he has first hit witness A.E.Z. while he had his back turned, then with a substantial force has stabbed the knife point (12.3cm) up to the handle in the chest on the left side of the deceased young man – A.H.M. The circumstance, as to whether the accused has had dirt and concrete tiles thrown at him after the crime has been done or before the crime has been finalised, doesn't affect the rightful categorisation of the *[incriminating]* act and cannot give grounds for the presence of inevitable defence, as it has been accepted by the court. It is not accepted, that it is an inevitable defence against a lawful act of defence by those under attack, and therefore it doesn't cross the limits of the inevitable defence, as per the interpretation of article 12, para.2, *[of the]* Criminal Code and the possibility of legal categorisation of the crime as per article 119 *[of the]* Criminal Code.

The objection of the defenders for the lack of hooligan motives has been a subject of careful investigation by the Court of Appeal. The court has clarified the motives representing a compulsory element of the composition of the crime in the raised accusation. After the lack of personal motive has been established, (the accused and the victims are complete strangers), the appellate court lawfully has accepted that the leading motive in the committed crime is hooliganism – clear demonstration of disrespect to society, of the generally accepted social behaviour, gross disregard of social norms and values with aim to openly show own superiority over others, imposing personal understanding for public justice. With that in mind the legal categorisation as per article 116, point 11 *[of the]* Criminal Code is lawful and a violation of the material law is not present and same *[the law]* has been applied correctly.

The arguments of the defender have been discussed by the Court of Appeal in the context of forensic-psychiatric expertise (line 12 of the motives) and the specific characteristics of the personality of the accused. Those objections in that respect are also without grounds because the experts cannot make decisions on legal issues, which is what are the motives of the accused for the committed crime.

There is also no ground for cassation, as per article 348, paragraph 1, point 3 *[of the]* Criminal Proceedings Code – apparent injustice of the imposed punishment. This complaint has been made alternatively by the defender.

The Supreme Court of Cassation finds that the punishment is correctly individual, where all requirements by the law have been adhered to and with a view of the established facts in the case. The exact circumstances of the committed crime, the

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persistent encroachment against the personality of the young men with the show of aggression towards other persons, apart from the victims, characterise the personality of the accused in an unfavourable light. Therefore, the Supreme Court of Cassation ascertains that the imposed punishment of 20 years imprisonment is just and that there is no need for amendments of that aspect of the appellate decision.

There is no violation of article 52 of the Law for Duties and Contracts, when deciding on the amount of charged compensations as a result of the crime for nonmaterial damages caused. These violations are not stated by the defender and have not been established by the Supreme Court of Cassation.

The defender has made an objection against the conviction of the accused, sentenced to pay the accrued costs for an Interpreter, appointed during the course of the trial before the Court of Appeal. The complaint has grounds. According to article 189, paragraph 2 *[of the]* Criminal Proceedings Code, the costs for an Interpreter/Translator are to be covered by the Court, therefore, the Sofia City Court has appointed them wrongfully to the accused and in that part the appellate decision is to be amended accordingly.

The Supreme Court of Cassation finds the cassation protest and the claims of the private prosecutors WITHOUT GROUNDS.

The arguments of the prosecutor and of the private prosecutors are similar in contents and therefore may be discussed jointly.

The main argument comes down to the statement that the act, committed by the accused J.P., represents an extremely grievous case in crime, as per article 116, paragraph 1 *[of the]* Criminal Code with an overview of the way it has been committed, the combination of two categorising circumstances and the degree of their committal, the danger that existed also to other persons, apart from the victims, therefore the aim of the Criminal Code, article 36 cannot be achieved by imposing punishment such as imprisonment.

While deciding on the type of punishment the Court of Appeal has established an especially high degree of public danger of the *[incriminating]* act, given the circumstances, emphasised in the protest and claims of the private prosecutors. Although, it *[the Court]* has not given grounds for an extremely grievous crime, as per the interpretation of article 38a Criminal Code. During determination of the punishment, Sofia Court of Appeal lawfully has ascertained the characteristics of the personality of the accused as mitigating the responsibility in the circumstances (clean legal record, positive characteristics, normal family environment, young age) and in addition to the mentioned category, it must be taken into account, the role of the conflict situation with the unidentified persons in the case before the *[incriminating]* act. These characteristics

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obviously allow us to come to the conclusion that as far as the accused is concerned, the goals of the punishment may also be achieved as per article 36 *[of the]* Criminal Code through the lower grade punishment – (i.e.) imprisonment.

On the basis of the arguments, the Supreme Court of Cassation based on article 354, paragraph 1, point 3 *[of the]* Criminal Proceedings Code

DECIDED:

AMEND decision No. 9 from 18.02.2011 of the Sofia Court of Appeal as per general punitive case No. 419/2010 the part where the accused J.P. is sentenced to pay costs for an Interpreter/Translator in the amount of 720 BG Lev, where it revokes its judgment in that part.

UPHOLDS the appellate decision as it is in its remaining entirety. The verdict cannot be appealed.

Chairman: (Signature)

Members: 1. (Signature)
2. (Signature)

** - Populated area and street name have not been specified in the source document.*

The above translation has been done on the basis of the original presented to me and is a true and accurate translation made to the best of my abilities as a NAATI-accredited professional translator.

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