SUPREME COURT OF KOSOVO
AP.-KŽ. No. 189/2012
23 October 2012
Prishtinë/Priština

IN THE NAME OF THE PEOPLE

THE SUPREME COURT OF KOSOVO, in a panel composed of
EULEX Judge Tore Thomassen as Presiding Judge,
Supreme Court Judge Marije Ademi and
Supreme Court Judge Nesrin Lushta as members of the panel,
in the presence of EULEX Legal Officer Holger Engelmann, acting in the capacity of the recording clerk, in a session held on 23 October 2012, in the criminal case against the defendants:

B.T. , nickname " Q. ", father's name Nj. , mother's name E. , born on in , Republic of Serbia, Kosovo Albanian, single, secondary school education, occupation , of average economic status, residing in village , Municipality of Gjilan/Gnjilane, Kosovo,
in detention on remand since 24 September 2011

and

Nj.T. , father's name S. , mother's name A. , born on in , Republic of Serbia, Kosovo Albanian, married with children, primary school education, occupation , of average economic status, residing in village , Municipality of Gjilan/Gnjilane, Kosovo,
in detention on remand from 29 April 2011 until 29 July 2011,

Charged according to Indictment PP. No. 106/11 with the criminal offense of **Extortion** in co-perpetration, committed on 29 April 2011 in Gjilan/Gnjilane in violation of Article 267 paragraph 1 and 2 in conjunction with Article 23 of the Criminal Code of Kosovo (hereafter "CCK") and found guilty of the mentioned criminal offense by Judgment of the District Court of Gjilan/Gnjilane, P. No. 188/2012, dated 7 February 2012 and sentenced as follows: B.T. to three (3) years imprisonment and Nj.T. to two (2) years imprisonment;

Deciding upon the appeals of Defence Counsel H.M.H. filed on behalf of the defendant B.T. and the appeal filed by Defence Counsel M.M. on behalf of the defendant Nj.T. against the aforementioned Judgment of the District Court of Gjilan/Gnjilane, while also taking into consideration the Response to the appeals filed by the Special Prosecutor of the Republic of Kosovo (SPRK) on 21 March 2012, the Opinion filed by the Office of the State Prosecutor of Kosovo (OSPK) on 21 June 2012 and the oral submissions made by the parties during the session on 23 October 2012,

Issues the following:

JUDGMENT

1. **The appeal filed on behalf of the defendant Nj. T. against the Judgment P. No. 188/2011 of the District Court of Gjilan/Gnjilane is PARTIALLY ACCEPTED. The Judgment is MODIFIED in regard to the punishment as follows:**

   The defendant Nj. T. is sentenced to one (1) year of imprisonment for the criminal offence of Extortion committed in co-perpetration in violation of Article 267 paragraph 1 in conjunction with Article 23 of the Criminal Code of Kosovo (CCK).

   The remaining part of the appeal is REJECTED AS UNFOUNDED.

2. **The appeal filed on behalf of the defendant B. T. against the aforementioned Judgment is REJECTED AS UNFOUNDED.**

REASONING

1. **Procedural History**

The alleged criminal offense was committed on 29 April 2011.

With Ruling PPH no. 106/2011, dated 1 May 2011 the District Public Prosecutor in Gjilan/Gnjilane initiated the investigation against both defendants.

On 20 October 2011 the Special Prosecution Office of the Republic of Kosovo (SPRK) filed the Indictment PP. No. 106/11 against B. T. and a co-defendant for the criminal offense of Extortion committed in co-perpetration in violation of Article 267 paragraph 1 and 2 in conjunction with Article 23 of the CCK.

On 9 November 2011, with Ruling KA No. 181/2011, the District Court of Gjilan/Gnjilane confirmed the indictment. Both defendants pleaded not guilty.

The Main Trial commenced through 3 sessions on 26 January and 6 and 7 February 2012, in the presence of SPRK Prosecutor, both accused and their respective Defence Counsels.

On 7 February 2012, the District Court of Gjilan/Gnjilane pronounced the verdict, finding B. T. and Nj. T. guilty for having committed the criminal offense of Extortion committed in co-perpetration pursuant to Article 267 paragraph 1 in conjunction with Article 23 of the CCK and sentenced B. T. to a punishment of three (3) years imprisonment and Nj. T. to two (2) years of imprisonment.

By separate Ruling P. No. 188/2012, rendered on the same day, the Presiding Judge of the District Court Gjilan/Gnjilane extended detention on remand against the defendant until the Judgment became final.

On 8 February 2012 the Defense Counsel of Nj. T. , Av. M. M. , announced an appeal.

The Defense Counsel of the accused Nj. T. , Av. M. M. , on 5 March 2012 and the Defence Counsel H. M. on behalf of the accused B. T. on 13 March 2012 timely filed appeals against the 1st Instance Judgment.

On 21 March 2012 the Special Prosecutor of the Republic of Kosovo (SPRK) filed a response to the appeals of the defense counsels.

On 21 June 2012 the Office of the State Prosecutor of Kosovo (OSPK) filed its opinion with the Supreme Court of Kosovo, proposing to dismiss the appeal filed on behalf of the accused B. T. as inadmissible, to reject the appeal filed on behalf of Nj. T. as unfounded and to extend detention on remand against T. until the Judgment becomes final if this is necessary for eventual further stage of the proceedings.

2. Submissions of the Parties

a) The Appeals

Defense Counsel H. M. on behalf of the defendant B. T. bases his appeal on essential violations of the provisions of criminal procedure, on violations of the criminal law, on erroneous and incomplete determination of the factual situation and on the decision on punishment. He proposes to annul the challenged Judgment and return the case for retrial or, alternatively, modify the Judgment, acquitting the defendant from the charges or, alternatively, to pronounce a more lenient punishment. In addition, he requests detention on remand to be terminated or, alternatively, to replace it with a more lenient measure pursuant to Article 268 of the KCCP.

In particular he claims that the conviction of his client exceeds the limits of the indictment since in his final speech in the session on 6 February 2012 the prosecutor re-qualified the offense as attempted Extortion pursuant to Article 267 paragraph 1 and 2 in conjunction with Article 20 of the CCK. Also, the Indictment does not specify individual actions of his client by which he had committed the criminal offense. He further claims that the enacting clause of the contested Judgment is incomprehensible, internally contradictory and in contradiction with the reasoning. He also submits that the court of first instance had violated the provisions of Article 7, Article 46 paragraph 3 and Article 156 paragraph 2 of the KCCP[1] by not giving the defense the opportunity to challenge the statements of the injured parties during the phase of investigation. There were no reasons that could justify the ordering of detention on remand against B. T. The court failed to take into consideration mitigating circumstances like his previous life, behaviour and family situation of his client when determining the punishment.

During the appeal session the Defense Counsel additionally requested to obtain and review the video recording of the premises of the BKT Bank in Gjilan/Gnjilane where B. T. allegedly threatened the injured Party, SH. XH. and made the alleged demand. Apart from that he stood by his written submissions made in the Appeal.

[1] Hi mentioning of 'CCK' is apparently a clerical error.

The defendant B.T. during the session supported the arguments made by his defense counsel. He regrets that there had been a misunderstanding between his father and the injured parties. Asking for a loan is a common behaviour amongst Albanians in Kosovo. He would never have allowed his father to ask for a loan from the injured parties had he known about that in advance.

Defense Councel H.M. on behalf of the defendant Nj.T. challenges the Judgement P. No. 188/2011 of the District Court of Gjilan/Gnjilane on the grounds of substantial violation of provisions of criminal procedure, violation of criminal law, erroneous and incomplete determination of factual situation and also the decision on criminal sanctions. He proposes to annul the contested Judgement and acquit the defendant or, alternatively, return the case to the court of first instance for retrial or alternatively reduce the punishment.

In particular he claims that in the closing statement the SPRK had amended the Indictment in a way that the alleged offence remained in the stage of attempt and was not completed. Hence the court was not authorized to convict the accused for a completed offence.

He also submits that the enacting clause is incomprehensible, contradictory in itself and in contradiction with the reasoning. He contests that the court did not establish the factual situation in a complete manner. Specifically, in his opinion, the court failed to establish his client's alleged contribution to the joint plan since he had explained in a convincing manner that he had received the 2,000 Euro from the injured party, Q.Xh., only as a loan and no threats were made to extort the money. This is proven by the video recording showing the accused greeting the injured party in a nice manner and showing no signs of any unlawful action. No evidence was presented proving that the accused had ever contacted B,T. in order to plan an alleged extortion. The conviction is only based on the statement of the injured parties while evidence in favour of the accused was not considered by the court.

The criminal law was violated since the action of the accused – the asking for a loan – do not represent a criminal offence. Consequently the pronounced punishment is unlawful. The accused was never convicted before either.

The **defendan** Nj.T. in the Supreme Court session explained that he had asked the injured party for a loan because they are actually his in-laws since his aunt's daughter is married with one of family members.

b) The SPRK's Response to the Appeals

EULEX Special Prosecutor Maarit Loimukoski in his Response to the appeals of the defence argues that the court completely and correctly established the factual situation. The court has accurately assessed the credibility of the testimonies and based its factual findings on the statements given by the injured parties.

The appeals' claims that the Judgment exceeds the scope of the Indictment is unfounded. The Indictment clearly describes the incriminating actions of both accused. These actions were verified by the court when determining the factual situation.

The prosecution did not change the legal qualification of the criminal offence into an Attempted Extortion during its final statement, but was arguing that if the court would not consider the obtained 2,000 Euro as 'great material benefit' in the meaning of Article 267 paragraph 2 of the CCK, it should consider a conviction for an attempt of the qualifying provision of Article 267 paragraph 2 of the CCK since the accused had demanded an amount of 20,000 Euros. However, the court, as stated in the reasoning, did not even consider 20,000 Euros as a 'great material benefit' in that sense. This ruled out the possibility of a conviction for attempt of the qualifying provision of Article 267 paragraph 2 of the CCK. The claim that the defence was not given opportunity to challenge the statements of the injured party is incorrect since this opportunity was given to them during the main trial.

The prosecution denies that the enacting clause of the Judgment is contradictory in itself or with the reasoning. The defence did not substantiate its allegations in that regard.

The court also correctly determined the punishments in proportion to the gravity of the offence and the respective conduct and personal circumstances of each perpetrator.

c) The OSPK Opinion

The OSPK proposes to dismiss the appeal filed on behalf of the accused B.T. as inadmissible, to reject the appeal filed on behalf of Nj.T. as unfounded and to extend detention on remand against B.T. until the Judgment becomes final if this is necessary for eventual further stage of the proceedings.

It finds that the Defense Counsel of has failed to announce his appeal in time within eight days of the announcement of the Judgment and consequently has waived its right to appeal.

The material facts of the Indictment remained unchanged during the main trial. Therefore the Judgment does not exceed the scope of the Indictment. The enacting clause does not contain ambiguities or internal contradictions or contradictions with the reasoning. It contains all required elements and data and is clear and comprehensible. The OSPK finds no substantial violations of the criminal procedure. The defense was given opportunity to question the injured party during the main trial.

The Indictment never alleged that the person on the videotape was B.T. , nor has the Judgment in its factual findings come to such a conclusion. Therefore the court has correctly ascertained the factual situation. The court correctly and completely determined the factual situation based on its first-hand impression of the presented evidence. The court of appeal should not replace this assessment with its own. Therefore the allegation that the evidence was interpreted in disfavour of the accused does not serve as valid reasoning for an appeal.

The court correctly determined the punishments in proportion to the gravity of the offence and the individual conduct and the personal circumstances of each defendant.

In regard to the request to terminate detention on remand against B.T. or replace it with a more lenient measure, the OSPK refers to the Ruling Pn.-Kr. 99/12, dated

February 2012, of the Supreme Court of Kosovo where the same arguments presented by the defense were rejected as unfounded.

In the session the State Prosecutor added that in case the Supreme Court finds the Appeal of T. admissible, it is proposed that it should be rejected as unfounded. In reply to the request of Defense Counsel H.M. she pointed out that the CCTV recording is unlikely to contribute relevant evidence since such recordings mostly don't contain audio recordings and even if they would do so, it would most likely not be understandable since the threats were made in a busy parking lot during the daytime where the background noise would interfere with any recording. It is also legally superfluous since the respective element of the criminal offense was proven by other evidence.

3. Findings of the Court

The Supreme Court of Kosovo finds the appeals of both defendants admissible but without merits.

a) Admissibility

The case file contains no evidence that B.T had announced his appeal in advance. Article 400 paragraph 1 of the KCCP obliges persons entitled to appeal to announce the appeal no later than eight days after the announcement of the judgment and paragraph 2 of the same Article determines that a person who fails to announce the appeal within the legally stipulated period of time shall be deemed to have waived the right to appeal, except in instances from paragraph 4 of the same article. Paragraph 4 concerns cases where the accused has been punished by imprisonment. Since both defendants had received imprisonment sentences by the court of first instance the lack of announcement of the appeal did not lead to the waiver of the right to appeal, as described in Article 400 paragraph 2 of KCCP.

b) Determination of Factual Situation

Both Appeals claim that the contested verdict had not established the individual actions of the respective defendants by which they committed the alleged criminal offense.

The court finds that the contested verdict sufficiently specific has described the actions of both defendants and all the elements of the criminal offence committed, in the enacting clause as well as in detail in the reasoning, as required by Article 391 in conjunction with Article 396 of the KCCP. The court of first instance has considered the testimonies of the witnesses, the injured parties and the statements of both defendants. It assessed the credibility of the sources in instances of contradictory claims and came to a correct conclusion.

NjT's contribution to the joint plan – his phone calls, the visit to the office of Q.Xh. and the acceptance of the envelope with the money – are proven by the testimony of the injured party, Q.Xh. as well as the video recordings and were corroborated by the criminal report of the 30 April 2012 and the witness statements of L.K and A.B.

The defendant's claim that he had only asked for a loan is not logically substantiated. The defense fails to explain why the injured parties would try to accuse them for a criminal offense despite an alleged family relation and why, if indeed only a loan was requested, they acted with such an insistence and sense of urgency, contacting the injured party several times during one afternoon.

In respect to the motion by Defense Counsel H.M. to review and assess CCTV recordings of the BKT Bank in Gjilan/Gnjilane, the court finds it unlikely that it will have any probative value in relation the criminal charge for the reasons mentioned by the OSPK. Apart from the technical reasons mentioned, which indicate it as unlikely that they will contain any useful audio records, the suggested evidence is inappropriate to exculpate the defendants. Even in the case that there was CCTV coverage over the whole period in question when the iniured Party, SH.Xh., claims to have been threatened by the defendant B.T. and the defendant would not show on the recording, this would be insufficient to prove that that the defendant had not been there and had not made the described threats. The described contact could have happened also in another part of the parking, out of the range of the cameras. That the defendant B.T. had in fact threatened the injured party in the described place and at the described place was sufficiently substantiated by the injured party and, in weighing the credibility of SH.Xh. testimony against the defendant B.T. statements, the District Court correctly assessed it as proven.

c) Alleged Substantial Violations of Provisions of the Criminal Procedure

Both defendants claim that the convictions exceed the limits of the charges. The court finds this allegation unfounded. Article 386 paragraph 1 of the KCCP determines that a judgment may relate only to the accused and only to a charge contained in the indictment. Both appeals claim that the initial charges of Extortion committed in co-perpetration contrary to Article 267 paragraphs 1 and 2 in conjunction with Article 23 of the CCK against both defendants had been amended in the session on 6 February 2012 by the prosecution, changing it into a mere Attempted Extortion.

The court in that respect fully follows the argumentation submitted in the Reply to appeals by the SPRK and the Opinion of the OSPK. The minutes of the main trial session on 6 February 2012 clearly show that the material facts of the indictment remained unchanged. The prosecutor in her closing argument only proposed that if the court of first instance did not find the qualifying provision Article 267 paragraph 2 of the CCK applicable, due to the fact that the 2,000 Euros handed over to the defendants did not represent a 'great material benefit', it alternatively could consider an attempt of the mentioned provision since the defendants had asked for the larger sum of 20,000 Euros. The court is not bound by the legal classification of the criminal act by the prosecution. The court found both defendants guilty of Extortion pursuant to Article 267 paragraph 1 of the CCK only while it did not find them guilty of the qualifying provision of paragraph 2 of the same Article. Consequently the convictions are within the scope of the charges.

The Appeals also allege that the enacting clause is incomprehensible, internally inconsistent or inconsistent with the grounds.

The defense failed to substantiate the claims with specific arguments. The court finds that the enacting clause contains all elements required by Article 396 paragraph 3, 4 and 5 of the KCCP. The court of first instance has specified in the enacting clause the personal data of the defendants, a description of the criminal acts committed the legal classifications and the sentencing. The court has pointed out the individual contributions by the both defendants to the joint plan. The court finds no contradiction between the enacting clause and the reasoning either.

The Appeal on behalf of B.T. I claims a violation of Article 403 paragraph 2 items 1 and 2 of the KCCP since the defense was allegedly not given opportunity to challenge the statements of the injured parties during the phase of investigation. The court finds this allegation unfounded and points out that the law knows no such obligation. Article 156 paragraph 2 of the KCCP only requires that the defense is given the opportunity to challenge a witness '*...during some stage of the criminal proceedings.*' The defense had been given this opportunity during the main trial.

d) Alleged Violations of the Criminal Law

The defense appeals also challenge the Judgment on the basis of violations of the criminal law. This claim is based on the argument that the actions of Nj.T. do not constitute a criminal offense while B.T.'s conviction is based only on the testimony of the injured parties.

The court refers to the findings under Chapter 3. b) Determination of Factual Situation. The court has considered all necessary evidence and assessed each piece thoroughly, as required by Article 387 paragraph 2 of the KCCP. The Supreme Court finds no reason to doubt the court of first instance's reconstruction of facts based on this evaluation and assessment of evidence.

e) Decision on Punishment

The Verdict was contested by both appeals on the ground of wrongful decision on criminal sanctions.

In respect to B.T. the court fully concurs with the considerations and the decision of the court of first instance.

In relation to the determination of punishment for Nj.T. the court finds that, based on the range of punishment of Article 267 paragraph 1 of the CCK between three months and five years imprisonment, more weight should have been given to the mitigating circumstances. The court also notes that the defendant has no known record of previous convictions. Pursuant to Article 64 paragraph 1 of the CCK the panel finds that imprisonment of one (1) year is proportionate to his contribution to joint criminal act and the gravity of the offense.

In the light of the mentioned arguments, the Supreme Court of Kosovo decides as in the enacting clause.

Presiding Judge:

Tore Thomassen
EULEX Judge

Recording Officer:

Holger Engelmann
EULEX Legal Officer

Members of the panel:

Marije Ademi
Supreme Court Judge

Nesrin Lushta
Supreme Court Judge

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