BASIC COURT OF PRISHTINA

Case number 721/12

The judgments published may not be final and may be subject to an appeal according to the applicable law.

(INTRODUCTION)

This judgment is dated 08/12/2014

JUDGMENT IN THE NAME OF THE PEOPLE

Pursuant to the Articles 359 *et seq.* of the Criminal Procedure Code of Kosovo (hereinafter C.P.C.K) *ex vi* Article 541, par. 1, C.P.C.K., the Basic Court of Prishtina in this case has a trial panel comprised of EULEX Judges Jorge Martins Ribeiro (as Presiding Judge) and Manuel Soares, together with the Kosovar Judge Aferdita Bytyqi, with David Hegarty assigned as legal officer.

This criminal case is against the defendants H. S., S. B. and A. M., accused by an amended indictment (initially PPS no. 01/2012, dated 14/02/2012), dated 07/11/2013, by the Special Prosecution Office of the Republic of Kosovo, S.P.R.K., in which the accused were charged of "*they have with the co-perpetration committed the criminal offence of attempted blackmail, from Article 268, paragraph 2 in conjunction with Articles 23 and 20 of the Criminal Code of Kosovo*" (Provisional Criminal Code of Kosovo, P.C.C.K., currently provided for in Article 28 par. 2 together with Article 341, par. 2, of the Criminal Code of Kosovo), charge that subsequently was addressed in an order dated 14/10/2013 (and discussed again during the initial hearing held on the 3rd December 2013), in which it has been stated that in the event the facts mentioned in the indictment are proved the Court would have to address as well the criminal offence of "unlawful recording" as provided for in Article 171 P.C.C.K (currently Article 205 C.C.K.) to

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assess whether such criminal offence has been committed or not and if all procedural requirements are met to be considered by the court.

After having held the initial hearing on the 03/12/2013 and the main trial hearings open to the public on the 17/01/2014, 25/02/2014, 26/03/2014, 15/04/2014, 15/04/2014/ 17/06/2014, 03/09/2014, 01/12/2014 and on 04/12/2014, the panel deliberated and voted on the 05/12/2014.

The deliberation and voting was made in accordance with the provisions set in Articles 365 and Articles 470 *et seq.*, to Article 473 of the Criminal Procedure Code of Kosovo, hereinafter C.P.C.K.

The judgment was announced (is being) orally on the 08 December 2014, in accordance with the provisions set in Article 366 C.P.C.K., in the presence, namely, of the S.P.R.K.'s prosecutor Reshat Millaku, the injured party, the defendants and their defence counsels, pursuant to the afore mentioned provisions, together with Article 470 *et seq.* C.P.C.K.

Also on the 08 December 2014, the Basic Court of Prishtina pronounces in public the following:

(ENACTING CLAUSE)

VERDICT

The accused are

1- H. S., nickname "D. i V." (L. U.), son of M. S. and A. T., male, born on the xx of xxxt xxxx in xxxxxx village, Municipality of xxxxx, resident on xxxx village, xxxx, Municipality of xxxx of Albanian ethnicity, citizen of Kosovo and of the United States of America, married, businessman, holder of the ID card no. RKS 000…. The defendant was assisted by the defence counsel B.B (as leading counsel) and Xh.M..

2 – S. B., nickname "P.", son of N. B. and D. S. B., male, born on the xxxx xxxx xxxx in xxxxx village, Municipality of xxxx, resident on xxxxx village,

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Municipality of xxxx, of Albanian ethnicity, citizen of Kosovo, married, tradesman, holder of the ID card no. RKS 000…. The defendant was assisted by the defence counsel B.M.

3- A. M., nickname "L.", daughter of I. M. and D. A., female, born on the xxx of xxx xxxx in xxxxx village, Municipality of xxxx, resident on xxxx village, Municipality of xxxx, of Albanian ethnicity, citizen of Kosovo, single, student at the law school, holder of the ID card no. RKS 000…. The defendant was assisted by the defence counsel A.B.

And, pursuant to Articles 362, par. 1, and 370, par. 3, C.P.C.K.:

The defendant H. S. is found not guilty of the charge that he has in "*co-perpetration committed the criminal offence of attempted blackmail, from Article 268, paragraph 2 in conjunction with Articles 23 and 20 of the Criminal Code of Kosovo*", because it has not been proven that the accused has committed the acts with which he has been charged (Article 364, par. 1.1.3, C.P.C.K.), namely, it has not been established that "*[i]n order to obtain for himself (...)the unlawful benefit, since the injured F. P., had not accepted the request (...), to sell him five hectares of land in Peja despite the requests being made, the defendants have agreed to compel the injured F. to transfer two hectares of land of the surface referred to through blackmail, in a way that defendant S. B. has provided a camera to the defendant A., (...)according to the agreement between the injured F. and the defendant A. M., they went at about noontime to the "Motrat Binjak" ("Twin Sisters") motel (...)and while they were in the room making love together, the defendant has with the remote control activated the camera which recorded, then (...)defendant S. B., who on 11.01.2012 (...) has requested from the injured F. to transfer to him two hectares of land in Peja , given that F. has rejected, they afterwards showed him through the phone the recording the defendant A. has made in the said motel, by threatening him that if he does not transfer the land within 48 hours, they will make the recording public through YouTube (...). Despite the threats, the injured F. has refused to transfer them two hectares of land in their name*".

And

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The defendants S. B. and A. M. are found not guilty of the charge that they have in "*co-perpetration committed the criminal offence of attempted blackmail, from Article 268, paragraph, 2 as charged with, in conjunction with Articles 23 and 20 of the Criminal Code of Kosovo*".

And instead, by a majority of votes, the defendants S. B.and A. M. are found guilty of the charge that they have in "*co-perpetration committed the criminal offence of attempted blackmail, from Article 268, paragraph 1, in conjunction with Articles 23 and 20 of the Criminal Code of Kosovo*", offense that is more lenient than the one they were charged with, which is the very same offense, blackmail, without the aggravating circumstances foreseen in paragraph 2, namely as members of a "group", and therefore the defence rights are not harmed by this decision.

They are found guilty in such way because it has been established that they have committed the acts with which they have been charged with (Article 365, par. 1.1.1 to 1.1.3 and 1.1.6, C.P.C.K.), namely, it has been established that: "*[i]n order to obtain for himself or the other the unlawful benefit (...),the defendants have agreed to compel the injured F. to transfer two hectares of land of the surface referred to through blackmail, in a way that defendant S. B. has given the telephone number of the injured F. 044/000-000, to now defendant A. M., who had in the beginning sent him an sms and afterwards, after telephone contacts between the defendant and the injured F., to go to a Motel to have sexual intercourse, and the defendant A. would without him being aware, record him with the camera. The defendant B. has provided a camera to the defendant A., which is activated with by remote control; on 07.01.2012 according to the agreement between the injured F. and the defendant A. M., they went at about noontime to the "Motrat Binjak" ("Twin Sisters") motel nearby the Prishtina-Ferizaj-Lipjan junction of the road and while they were in the room making love together, the defendant has with the remote control activated the camera which recorded, then gave the camera to the defendant S. B., who on 11.01.2012 (...) went to the "F. Café", owned by the injured F. P., located in front of the District Court of Prishtina; the defendant S. has requested from the injured F. to transfer to him two hectares of land in Peja , given that F. has rejected, «he» afterwards showed him through the phone the recording the defendant A. has made in the said motel, by threatening him that if he does not transfer the land within 48 hours, «he» will make the recording public*

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through YouTube in a way that «he» would damage his honour and authority . Despite the threats, the injured F. has refused to transfer (...) two hectares of land in «his» name".

Sentencing:

Pursuant to Articles 268, par. 1, 20, par. 2, 38, 64, par. 1, 42, 43, par. 2, and 44 P.C.C.K., the defendant B. is sentenced to 1 year and 6 months of imprisonment. This imprisonment will not be executed if the defendant does not commit another criminal offence for the period of 2 years.

Pursuant to Articles 268, par. 1, 20, par. 2, 38, 64, par. 1, 42, 43, par. 2, and 44 P.C.C.K., the defendant A. M. is sentenced to 6 months of imprisonment. This imprisonment will not be executed if the defendant does not commit another criminal offence for the period of 1 year.

Confiscation of objects: There are no objects listed in the indictment subject to forfeiture.

There is no property claim: nevertheless the injured party should be aware of the possibility of filing a civil lawsuit (apart from the ongoing cases, be it his decision).

The costs of the proceedings (as defined in Article 450 C.P..K.) shall be paid by the defendants S. B. and A. M. Pursuant to Article 450, par. 2.6, the scheduled amounts are 100 euros to each of the defendants mentioned in the previous paragraph.

The court sees no need, *ex officio*, of announcement of this judgment in the press or radio or television, Article 365, par. 1.1.6, C.P.C.K, to protect the values of Justice and Public Interest.

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(STATEMENT OF GROUNDS)

REASONING

A) Trial Panel and competence:

No objection was raised by the parties regarding the composition of the trial panel. Pursuant to Article 472, par. 1, C.P.C.K., the panel considered that the court is competent, as per Article 9, par. 1, of the Law on Courts (Law no. 03/L-199) the Basic Court shall be the court of first instance in the Republic of Kosovo, in this case (par. 2) the Basic Court of Pristina is the one with territorial jurisdiction and in accordance with Article 11, par. 1, of the same law the Basic Court is competent to adjudicate in the first instance all cases, except otherwise foreseen by Law.

B) The procedural background:

B.1- On 12 January 2012 S.P.R.K. initiated investigations against the defendants H. S., S. B. and A. M. which led to an indictment against them dated 12 September 2012. On 7 November 2013, following a previous order prior to scheduling the initial hearing, dated 22 October 2013, S.P.R.K. filed an amended (writing mistakes in names and numbers and other errors) indictment against the defendants H. S., S. B. and A. M.

B.2- In this indictment the S.P.R.K. accuses the defendants for the following facts: "In order to obtain for himself or the other the unlawful benefit, since the injured F. P., had not accepted the request of the defendant H. S., to sell him five hectares of land in Peja despite the requests being made, the defendants have agreed to compel the injured F. to transfer two hectares of land of the surface referred to through blackmail, in a way that defendant S. B., has given the telephone number of the injured F. 044/000-000, to now the defendant A. M., who had in the beginning sent an SMS and afterwards, after telephone contacts between the defendant and the injured F., to go to a Motel to have sexual intercourse, and the defendant A. would without him being aware, record him with the camera. The defendant S. B. has provided a camera to the defendant A., which is activated by

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remote control; on 07.01.2012, according to the agreement between the injured F. and the defendant A. M., they went at about noontime to the "Motrat Binjak" ("Twin Sisters") motel nearby the Pristina-Ferizaj-Lipjan junction of the road and while they were in the room making love together, the defendant has with the remote control activated the camera which recorded, then gave the camera to the defendant S. B., who on 11.01.2012 together with an unidentified person, went to the "F." Café, owned by the injured party F. P., located in front of the District Court of Prishtina; the defendant S. has requested from the injured F. to transfer to him two hectares of land in Peja , given that F. has rejected, they afterwards showed him through the phone the recording the defendant A. has made in the said motel, by threatening him that if he does not transfer the land within 48 hours, they will make the recording public through YouTube, in a way that they would damage his honor and authority. Despite the threats, the injured F. has refused to transfer them two hectares of land in their name".

B.3- Considering the facts above copied, S.P.R.K. charged the defendants with the criminal offence of attempted blackmail, 268, paragraph 2 in conjunction with Articles 23 and 20 of the Criminal Code of Kosovo" (- P.C.C.K., currently provided for in Article 28 par. 2 together with Article 341, par. 2, of the Criminal Code of Kosovo), allegedly committed in co-perpetration, Article 31 C.C.K.. In the order dated 22 October 2013 the court has stated that in the event such facts would be established, the existence or not of the criminal offence of "unlawful recording", as per Article 205, par. 1, C.C.K., would have to be addressed.

B.4- The initial hearing has been held on 3 December 2013 in which a deadline of 10 days has been granted to the parties in order to allow them to file any motions, objections or requests.

B.5- The defendant A. M. filed on 11 December a request to dismiss the indictment and on 13 December 2013 the defendants H. S. and S. B. filed other requests with the same purpose, although the reasoning for such requests was not the same. S.P.R.K. has not responded to any of the requests. By rulings dated respectively 17 December 2013 (in re. to the defendant A. M.) and 9 January 2014 (in re. to the defendants H. S. and S. B.) the requests were rejected. These ruling were appealed and on 4 February 2014 the Court of Appeals rejected the appeals and affirmed the contested rulings of the first instance.

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B.6- On 3 March 2014, pursuant to the Article 256 C.P.C.K. and 31 of the Constitution of Kosovo, the defendant H. S. proposed 6 witnesses to be examined as defense witnesses (H S., Halim S., M. S., M. H., M. Z. and I.Z.), explaining the circumstances for which they would testify and its relevance to the subject of the trial, and has joined documents relating to a previous deal of purchase of land in 2006, between him and the injured party, F. P., and to the ongoing proceedings related to such deals. In the course of the trial the English translations of these documents were joined to the case file.

B.7- As stated above, the initial hearing was held on the 3/12/2013 and the main trial hearings, open to the public, were held on the 17/01/2014, 25/02/2014, 26/03/2014, 15/04/2014, 15/04/2014/ 17/06/2014, 03/09/2014, 01/12/2014 and on 04/12/2014. The panel deliberated and voted on the 05/12/2014.

C) Statement of grounds pursuant to Articles 364, 365 and 370 C.P.C.K.:

C 1) - Facts proven which are relevant for the decision:

C.1.1 - On 11 September 2006 the injured party F. P. and the defendant H. S. entered into a contract of purchase of real property. According to the documentation exiting in the case file, it was about selling 15 hectares of land in Peja and the agreed price was 450000 euros. In this contract the seller of the land was F. P. and the buyer was H. S., who used a "*man of straw*" as buyer, his brother-in-law M. H., whose name is written down in the contract as buyer and the contract was prepared at the office of the lawyer the seller has chosen, Mr. M. S., lawyer from Prishtina. The contract was signed on 11/09/2006.

C.1.2 - There are ongoing disputes about the contract mentioned above:

C.1.2.1 - The defendant H. S., even though the civil claim was filed by his brother-in-law, M.H. (the buyer, in a formal perspective), claims that 5 hectares were not transferred to him as should have been, as they were under mortgage at the time. These "5 hectares" correspond to the surface of 4,847 hectares that initially was described in the geodesic department as plot 4102/7 and later on divided by the now injured party into 96 new plots, as per new registration

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numbers in the cadastral zone in Peja. These facts are described in the claim by M.H. against the now injured F., dated 30 May 2012, before the Municipal Court of Peja. The plaintiff asks the court to oblige the respondent (the now injured F.) to fulfill his contractual liabilities in a way that at the competent body signs the proper documentation for ownership conveyance from the name of the respondent to the one of the claimant and that if the respondent fails to do so, then the judgment will replace the document and be used as a ground for changes in cadastral office in Peja by registering the claimant as the owner of the property. By a ruling dated 15/06/2012, in the case number 472/12, the Municipal Court of Peja has granted the claim for a "provisional security measure to securing the claim, (…) the respondent F. (B.) P. from Pristina is prohibited to alienate, mortgage, lending or taken any construction works in the following cadastral parcels (…) totaling" 4,847 hectares until the conclusion of the civil case on its merits, C. nr. 472/12.

C.1.2.2 - On 30/09/2013 the now injured F. P. has filed before the Basic Court of Peja a civil claim against M.H. in which he argues to have entered the contract with the respondent, contract dated 01/06/2006, in which he was selling 15 hectares for the price of 450000 Euros and says that the respondent has not fulfilled his liabilities, that price corresponds to 30000 Euro per hectare and has paid in total only 200000 Euros, so he paid the surface of 6,6 hectares and 10 hectares are already transferred. Claims, amongst other things, that the respondent in complicity with his friends has blackmailed, threatened and coerced without his own will as to the possession of (…) the surface of 10,15 hectares (…) they coerced him to sign and authenticate the purchase contract at the Basic Court in Peja for money amount of 200000 Euros. Asks the court to render a judgment in which the respondent is obliged to compensate the damage in amount of 334000 Euros for surface of 3,34 hectares or is partially annulled the contract dated 11/09/2006 so to restitute to the claimant to the possession and use of the parcels correspondent to the surface of 2,96 hectares and "41,46" hectares.

C.1.2.3 - On 18/09/2013 in the case 472/12 of the Basic Court in Peja, it was ascertained that this criminal case is a "preliminary issue" and therefore the legal proceedings in the case were terminated due to the existence of a preliminary issue and the proceedings will commence after a final decision is rendered in this criminal case. The parties resigned from the right to appeal.

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C.1.3 - The defendant H. S. is uncle of the defendant S. B. and has borrowed money from this nephew, the defendant B., to enter the business of buying land in Peja to the injured F.. The amount borrowed ranges from 40000 euros, according to the defendant B., up to 45000 or 45500 euros, according to the defendant S.. The deal was that the defendant B. would, in the end, be paid not with cash but with part of the land subject to the deal, in Peja, as he had told his uncle to have interest for land in Peja. The land he would be paid with is comprised in the "5" hectares that are also subject to the pending civil disputes, namely in the civil case by M.H. against the injured F.

C.1.4 - The defendant B. was aware of the ongoing disputes about the land and in September or October of 2011 he tried to get in contact directly with F., by going to his Café, envisaging to resolve the problem as far as he was concerned, namely to what he considered already as the land that should belong to him, 2 hectares, as form of payment for the money he had lent. As he hasn't met F., asked one of his employees for his phone number and attempted to contact him several times over the 2 or 3 following days; this attempt to contact has never succeeded. As the defendant was worried about his reimbursement he addressed his uncle, the defendant S., asking how the things were going, what were the expectations of resolving the ongoing disputes, having been informed by his uncle that there would be other attempts of contacting F. to try to resolve the problems, otherwise a civil case would be started. The defendant B. ascertained that if a civil claim was filed it would take up to 2 or 3 years to get a final decision, which concerned him.

C.1.5 - The defendant B. has, in the meantime and before the New Year, with the knowledge of a third person, gone to his old friend A. M., now also defendant, telling that he was concerned and having a problem with the now injured F., to what she asked whether she might help him to resolve that problem, and then he proposed her to do so, by asking her to go out with the injured F. and sleep with him, recording it, in order to use the recording against the injured F.. After having rejected to do it at the first thought, and because the defendant B. insisted, she has finally agreed to it, to take part in the plan organised by the defendant B., as the defendant B. promised to compensate her, namely with a job offer.

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C.1.6 - The defendants S. B. and A. M., together with a non-identified third person, have agreed to compel the injured F. to transfer two hectares of land in Peja to S. B. through blackmail.

C.1.7 - In the execution of the plan, the defendant S. B., has given then the telephone number of the injured F. 044/200-385, to the defendant A. M. - who had in the beginning sent an SMS and afterwards, after telephone contacts between the defendant and the injured F. P. - to go to a motel to have sexual intercourse with the injured; the defendant A. would then without him being aware, record the event, with the camera.

C.1.8 -The defendant S. B. has gone to Skopje to buy a camera, camera that he has provided the defendant A. with, which was activated by remote control. On 07.01.2012, according to the agreement between the injured F. and the defendant A. M., they went at about noontime to the "Motrat Binjak" ("Twin Sisters") motel nearby the Pristina-Ferizaj-Lipjan junction of the road.

C.1.9 - While they were in the room engaged in sexual relations in bed, the defendant A. M., whom the injured party knew at the time by the name of "D.", has with the remote control activated the camera which recorded them, then gave the camera to the defendant S. B., who copied the recording to a mobile phone.

C.1.10 - S. B.on 11.01.2012, went to the "F." Café, owned by the injured party F. P., located in front of the District Court of Prishtina. The defendant S. B. requested from the injured F. to transfer to him two hectares of land in Peja.

C.1.11 - Given that F. P. has rejected, the defendant S. B. afterwards showed him through the phone the recording mentioned above, that the defendant A. M. had made in the said motel, when they were in bed. In the recording shown to the injured, only the upper back of the injured was visible as from the waist down the bodies were covered by the sheet or blanket.

C.1.12 - The defendant S. B. has threatened the injured F. P. that if he didn't transfer the land within 48 hours, he would make the recording public through YouTube.

C.1.13 - Despite the threat, the injured F. P. has refused to transfer to S. B. the two hectares of land.

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C.1.14 - The threats have not been repeated.

C.1.15 - At the time of the said acts the defendants were able to understand and control their actions, which they desired.

C.1.16 - The defendant S. B. and the defendant A. M. have been friends for years and had had business before, related to purchase and sell of ceramics.

C.1.17 - The defendant H. S. is rich, owns immovable property at least in Kosovo. Is immigrant, businessman in the United States of America. He is married, father of 6 children and has studied at the school of literature.

C.1.18 - The defendant S. B. is married, father of 4 children, he is a tradesman, owns a Café and has secondary school level education, although has attended the school of economics at the University, hasn't finished it. He supports the household, comprised of 6 persons.

C.1.19 - The defendant A. M. is single, has no children and studies at the law school in Prishtina.

C.1.20 - The defendants have a clean criminal record.

C.1.21 - In the court session the defendant B. while taking the stand has apologised everyone, including the injured, and has confessed the core of the facts.

Reasoning

The reasoning is not intended to be a repetition of the evidentiary material, its function is to enable the understanding of the decision concerning the establishment or not of the facts.

The existence of a contract has been stated by both the injured party and the defendant S., together with the witnesses proposed by the defendant S. who testified on it, namely the brother-in-law M.H. and the lawyer from Prishtina that was chosen by the injured and at whose office the contract was prepared, M. S. Also the defendant B. has made statements in relation to the contract. The versions are different and both parties presented inconsistencies in their versions. Apart from that, the case file contains documents related to the contract and pending civil

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cases related to it and the witnesses proposed by the defendant allowed the court to establish the existence of it.

To this issue some remarks will be made. In relation to the contract of purchase of land between the injured party and the defendant S., and although documents have been joined (by the defendant S. and by S.P.R.K. on 27/02/2014, tab 23 - admitted pursuant Article 244, par. 3, C.P.C.K.) and witnesses were examined, the court was not willing to determine the exact terms of the contract – and the court in this respect emphasises that there is a pending civil case in the Basic Court of Peja and this trial should not be used, or serve, to produce collateral evidence for that one, although this one has been considered there as "preliminary issue". It is paramount to say in this respect that the court didn't seek more proactively to establish the details of the previous business relations between the injured party and the defendant H. S. because from the criminal point of view it is irrelevant, as the commission of a criminal offense, or the attempt to commit it, cannot be justified upon an alleged breach or partial performance of a contract.

It is important to notice that the defendant S., as we will see below, denied the commission of the criminal offense, which makes even more redundant the "importance" of the contract. In relation to the fact that the real buyer was the defendant S. no logical evidence was presented as to the reason why in the contract was written with the name of M.H., as being in the United States is not a reason to prevent preparing in advance, before leaving, an authorization, just in case it is needed, not to mention that in the case ongoing in the court of Peja the defendant entitles himself as "co-owner", although the plaintiff is the formal owner - the witness M.H. confirmed to be H. S. brother's in law and that H. S. was the one involved in the negotiations and buying the land.

It is paramount too, as already stated, to take a clear stance in relation to the civil issues, as this case cannot be used to "produce evidence" to the ongoing civil disputes. In these regards many things could be said, however, this is a criminal case on blackmail, not a preliminary issue, so to say, to the civil case, as there are different requests from the civil parties, not to mention that the blackmail or coercion being discussed here relates to the year of 2012, not 2006 when the original contract was prepared at the F.'s lawyer office.

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The intercepts and metering of phone calls as listed in the indictment (which is admissible evidence) can be used to justify the court's decision in relation to the facts, as there was a match between the contents of their communications and the reality, events, taking place, which was confirmed by other means and, finally, the suspects were recognised by the injured, as the being the defendant B. and the defendant A..

The text messages exchanged between the defendants S. B. and A. (from 15/12/2011 to 08/01/2012 and from 10/01/2012 to 13/01/2012) are very clear and are confirmed by the events that took place, culminating with the record of the meeting in the motel and the film being shown to the injured, where he could recognise himself. The involvement of a third person stems from the context of the sms's namely "he promised that it doesn't matter if this has success or not", dated 13/01/2012, and from phone conversations intercepted, as the ones between S. B. and an unknown person on 12/01/2012 at 19.19.35h. and 22.13.21h. (in relation to the controversy pertaining the establishment of the defendant S.'s engagement in the plot, stemming from the phone intercept at 19.19.35 h., it's important to mention that the court finds that is not evident, as there's no reference to nephew in the English transcript and such reference was mentioned only in the court session held on 04/12/2014).

The court deems unnecessary to repeat the contents of all the evidence listed in the indictment, in this respect. It is lawful evidence that the court has taken into account.

The injured party confirmed the defendant B. went there to ask him to transfer (to him) the 2 hectares and that the term given was 48 hours and in relation to the defendant A. M. (although at the time she has told him her name was "D.") confirmed the facts as stated in the indictment and above. The only discrepancy was the fact that according to him there was a third person present at his Café on the 11/01/2012 when B. went there. Also confirmed that the contract with the defendant S. bears the name of M.H. upon H. S.'s request.

Nevertheless, the defendants S. and B. took the stand.

The defendant S. has denied any knowledge or engagement in the facts constituent of blackmail, presented his version on the contract referring to the land

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he bought to the injured F. and addressed other issues not relevant to this case, as this is not a civil case, as stated before. Also mentioned to have met the defendant A. M. for the first time in court, for the trial.

The defendant B. also addressed details that were not relevant. In relation to the core facts constituent of blackmail has confessed them, as well as having had organised the plan to blackmail and having provided the means to execute it. Claims that has destroyed the recording. Expressed his remorse and regret for what has been done to the injured. Drew the court attention to be the only who works at his household. Denied to have gone to the Café F., when went there to blackmail the injured party, together with a third person, as has insisted that went to the Café alone.

The identification of S. B. and A. M. by the injured party, through the photographic array, was lawfully conducted.

The witnesses proposed by the defendant H. S. have given statements related to the deal of buying land, as mentioned earlier.

The court's request for the criminal records of the defendants was answered on the 09/09/2014.

All the evidence produced during the sessions was recorded *verbatim*, being therefore available for reassessment, be it the case.

C 2) -Facts not established:

C.2.1 - Because F. P. had not accepted the request of the defendant H. S., to sell or transfer to him five hectares of land in Peja, despite the requests being made, the defendant H. S. has agreed with the defendants S. B. and A. M. to blackmail him.

C.2.2- The defendant B. was together with another person when he went to show the recording at F. Café to the injured F.

C.2.3 - The exact economic situation of the defendant A.

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Reasoning:

Only speculation, assumptions (namely based on the existence of previous business relations between the defendant H. S. and the injured party, on the fact that the defendant S. B.is his nephew), beyond the reasonable doubt, might lead to establish that the defendant H. S. was the other person involved; in this respect it is also important to note that although the defendants didn't know their conversations over the phone were being followed, his name has never been mentioned over the time.

The defendant A. used her right to remain silent and therefore some aspects of her life, namely the economic situation, remain unknown.

The absence of certainty to the panel in relation to any given fact, meaning, the reasonable doubt in relation to a fact, the so called *non liquet*, has to function in favour of the defendant. Also, to avoid erroneous conclusions, the court clarifies that the non establishment of a fact does not mean the establishment of the opposite fact or reality. Therefore, when a fact is not established it only means that it was not possible to establish in accordance with the rules on evaluating evidence in criminal proceedings, does not mean that it has not, at all, taken place.

D -The facts and the criminal liability of the accused (Articles 361 and 370, par. 7, C.P.C.K.):

Pursuant to Article 370, par. 10, C.P.C.K. "If the accused is acquitted of a charge, the statement of grounds shall state, in particular, on which of the reasons provided for in Article 364 of the present Code it is acting".

Out of the three situations foreseen in the Article the defendant H. S. would in any case be acquitted because "it has not been proven that the accused has committed the act with which he or she has been charged" (Article 364, par. 1.3, C.P.C.K.). It's evident that the established facts could only lead to such conclusion. The facts that might be considered as constituent of the criminal offense the defendant S. was charged with were not proven. When the constituent facts are not

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established it may be due to the positive evidence that the defendant has not committed the facts that would imply criminal liability or only because they have not been established, which would be the case in the present situation, as one of the basic principles in assessing the evidence, when there's doubt that can still be considered reasonable (the *non liquet*), is that the decision regarding the evidence and its assessment must be in the benefit, in favour, of the defendant, as said above, which leads then to the constitutional principle *in dubio pro reo*, Article 31, par. 5, Constitution of the Republic of Kosovo, "Everyone charged with a criminal offense is presumed innocent until proven guilty".

Pursuant to Article 365, the defendants S. B. and A. M. shall be addressed after.

The established facts and criminal liability

In this part the description of the criminal offense the defendants were charged with will be addressed first.

The criminal offense of blackmail is set in the Article *268*, par. 2*,* P.C.C.K., currently provided for in Article 341, par. 2, C.C.K.. The elements of the criminal offense itself are the same in both versions of the code, par.1, "Whoever, with the intent of obtaining an unlawful material benefit for himself, herself or another person, threatens another person to reveal something about him or her or about persons close to him or her which will damage their honour or reputation, and in this way compels such person to do or abstain from doing an act to the detriment of his or her property or another person's property".

This criminal offense protects the juridical values of liberty, property and right to private life and intimacy, together with the value of honour (it is a specific type of extortion, which protects only the values of liberty and property) and can be perpetrated only with intent, as usually happens with the criminal offenses (primarily) against property. The subjective element comprehends both the perpetrator and another person, as the criminal description of the offense reads "for himself or herself or another person" and the normative element is the intent of obtaining an unlawful benefit.

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With regards to this last element, so many times addressed in the closing statements, it is paramount to say that in this concrete case it is not up to this court to determine the juridical result of the ongoing civil disputes, meaning to know whether the envisaged transfer of land constitutes or not an unlawful benefit. Apart from this, one can say that without any direct contract between the injured and the defendant B. (not to mention the defendant A., which case would be even more blatant) it is fearless to engage in such controversy… In general, it is worth mentioning that even if there is a lawful underlying situation, as of the moment a threat is used (instead of legal remedies, namely civil proceedings) to enforce a "civil obligation", again there is the violation of the criminally protected values. A threat is incompatible with business conducted in a lawful manner. Anyway, and because the court assesses that no further elaboration on this is required, one could then ask the reason why have the (there civil) parties filed their cases in the court of Peja, and why the threat, then? – The court asks…

The descriptive elements are "threatens another person to reveal something about him or her or about persons close to him or her which will damage their honor or reputation", together with "and in this way compels such person to do or abstain from doing an act to the detriment of his or her property".

The aggravating circumstances foreseen in par. 2 of both versions have changed with the new criminal code, as the circumstance "or results in a great material benefit" has been replaced by "or the offense results in an unlawful material gain exceeding ten thousand (10000) euros". The element "member of group" implies the definition of "group of people" currently set in Article 120, par. 12, "3 or more persons", whereas in the previous version such element was not precisely described in the law, unlike other concepts (even if only for a given purpose), for instance "structured group" and "terrorist group" (Article 109, par. 4 and 5, P.C.C.K., respectively). In this case, however, it would be important to elaborate more on this definition, and possible consequences, only if the 3 defendants were found guilty, as the interpretation of the law enacted in the meantime would be more favourable.

Nevertheless, the panel has acquitted the defendants from that aggravating circumstance, and to the majority of the panel it is possible to punishment under Article 1.

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All members of the panel agree that all elements of the criminal offense of blackmail, set forth in Article 268, par. 1, P.C.C.K, are met and it is not against the procedural rules or rights of the defence to assess the criminal liability for a lesser offense, not to mention that the court is not bound by the legal classification of the facts made by the Prosecution.

The concept of group always implies a minimum of organisation, of structure and, somehow, continuation over time. Otherwise, it would overlap the concepts of co-perpetration, assistance, incitement, etc., as whenever 2 or 3 or more persons would take part in the same criminal offence would then be a group...

Considering what has been just said, it is now time to address the form of perpetration, co-perpetration:

The defendants are accused of having acted in co-perpetration. Considering the established facts and the definition of co-perpetration as per the Article 23 (nowadays 31) C.C.K., "When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense", the defendants S. B. and A. M. are co-perpetrators. The acts of the defendant A. M. go far beyond the concept of assistant, not only because she has taken part in different stages of the *iter criminis*, together with the defendant S. B., but also because even a "substantial contribution: (as provided for in the Article) is enough to distinguish the assistance from the co-perpetration, this taking into due account too the broad concept of assistance contained in Article 25 (nowadays 33) C.C.K., especially when the concept itself invites to an open interpretation by using the wording "Assistance in committing a criminal offense includes, but is not limited to: (…)".

Form of criminal offense, attempt:

The attempt, under the P.C.C.K., had its legal framework defined in Article 20, par. 1, P.C.C.K., "Whoever intentionally takes an immediate action toward the commission of an offence and the action is not completed or the elements of the intended offence are not fulfilled has attempted to commit a criminal offence" and currently it is defined in Article 28, par. 1, C.C.K., "Whoever intentionally takes action toward the commission of an offense but the action is not completed or the elements of the intended offense are not fulfilled has attempted to commit a

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criminal offense”. Apart from minor changes in the wording used by the lawmaker the definition remains the same. The same happens with the Inappropriate Attempt and Voluntary Abandonment (respectively Articles 21 and 22 P.C.C.K., currently Articles 29 and 30 C.C.K.).

Before moving on to the determination of the sanction another issued deserves being mentioned. As the court is not bound by the legal classification of the acts (Article 360, par. 2, C.C.K.), some references were made before to the criminal offense of unlawful recording as provided for in Article 171 C.P.C.K. (currently in Article 205 C.C.K., it is now time to address it. At the present time, the established facts would be constituent of such criminal offense as all elements currently laid down in its current description are met. Nowadays the criminal offense is prosecutable *ex officio* but at the time, pursuant to par. 3 of the said Article “Criminal proceedings for the offence provided for in paragraph 1 of the present article shall be initiated following a motion”. Therefore, in relation to this criminal offence it cannot be considered as there was no motion envisaging its prosecution.

In this case we are discussing the attempt, as the result envisaged by the defendants was not accomplished, they failed to compel the victim to do an act (in detriment of his property or to obtain “an unlawful benefit”, in this case).

Not all attempts are punishable, and this is where the undersigned, the president of the panel, disagrees with the two other members. This dissenting opinion will be explained in a dissenting vote that will be joined to this judgment. Pursuant to the provision set in Article 471, par. 4, of the Procedure Code of Kosovo, the subscriber didn’t vote the sentencing, for not being obliged to such, as kept in the minutes of the deliberation and voting session.

The majority of the panel agreed that this attempt is punishable, as the requirements to punish the attempt are met, pursuant to their understanding, interpretation, of the provision contained in Article 20, par. 2, P.C.C.K., deeming it is also the interpretation set by the Jurisprudence of Kosovo, namely to what the expression “punishable by imprisonment of at least three years” means, in the way that it is equivalent to the “expression in which an imprisonment of three years may be imposed”, this to say that this attempt will be punishable, even if not

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expressly provided for by law, being that it will be also punishable any attempt if the maximum of imprisonment foreseen for the criminal offense is over three years and, in abstract, in such way, an imprisonment of three years may be imposed.

Therefore, and accordingly to such understanding:

The attempt is this case in punishable because "an attempt to commit a criminal offence punishable by imprisonment of at least three years shall be punishable while with regard to other criminal offences, an attempt shall be punishable only if expressly provided for in the law" (Article 20, par. 2, P.C.C.K.).

Pursuant to Article 20, par. 3, C.P.C.K. a person who attempts to commit a criminal offence shall be punished more leniently than the perpetrator, in accordance with Article 65(2) of the present Code". This last provision reads: "The punishment imposed for attempt, assistance and criminal association shall be no more than three-quarter of the maximum punishment prescribed for the criminal offence (…)." Nowadays the similar provision (Article 28, par. 3, C.C.K.) only reads at the end "shall be punished as if he or she committed the criminal offense, however the punishment may be reduced".

The criminal offense of blackmail "shall be punished by imprisonment of three months to five years", Article 268, par, 1, P.C.C.K. (as it is not considered that the new criminal code into force as of 1 January 2013 would be more favourable), which leads to the conclusion, that pursuant to the provision set in Article 65, par. 2, P.C.C.K, the attempt is punishable from three months up to (5 years or 60 months:4 = 45 months or 3 years and 9 months) 3 years and 9 months.

Considering the general criteria to determine the punishment, as per Articles 38 and 64, par. 1, P.C.C.K., the court must consider not only the mitigating and aggravating circumstances but also, in particular, the degree of criminal liability, the motives for committing the act, the intensity of danger or injury to the protected value, the circumstances in which the act was committed, and these criteria must be assessed considering the established facts.

From the established facts it results that the main organiser was the defendant B., that kept his decision over the time while making the arrangements, namely acquiring the right device to record, insisted with the other defendant by

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offering a job, the motives although he was a third party (not a part in the land deal), the amount involved in the blackmail (the 2 hectares), that he was a creditor of his own uncle (who is a rich man and should rely on his own uncle that sooner or later, one way or the other, the debt would be paid), and that he is the support of a household comprising his wife and 4 children, it is decided that the adequate punishment to the defendant B. is 1 year and 6 months of imprisonment.

From the established facts, in relation to the defendant A. M., it results that she was not the main organiser, that she kept her decision over the time, namely insisting with the injured F. to have the meeting (by sms and phone calls), but also that has agreed upon promise of getting a job, that her family situation is not known, it is decided that the adequate punishment to the defendant A. M. is 6 months of imprisonment.

Pursuant to the criteria set in Articles 42 to 44 P.C.C.K., in particular 43, par. 2, the imprisonment time will be suspend for the period of 2 years for the defendant B. and for the period of 1 year to the defendant A. M., meaning that the imprisonment will not be executed if the defendants do not commit another criminal offence for the set period of 2 years and 1 year, respectively.

Confiscation of objects: There are no objects listed in the indictment subject to forfeiture.

There is no property claim: nevertheless the injured party should be aware of the possibility of filing a civil lawsuit (apart from the ongoing cases, be it his decision).

The costs of the proceedings (as defined in Article 450 C.P..K.) shall be paid by the defendants S. B. and A. M..

Pursuant to Article 450, par. 2.6, the scheduled amounts are 100 euros to each of the defendants mentioned in the previous paragraph.

The court sees no need, *ex officio*, of announcement of this judgment in the press or radio or television, Article 365, par. 1.1.6, C.P.C.K, to protect the values of Justice and Public Interest.

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Until the final conclusion of the proceedings, any change in the address of any participant has to be reported to the court, in accordance with Article 368, par. 3, C.P.C.K.

Proceed in accordance with the procedure provided for in Articles 474, par. 3, and 369, pars. 3 and 4, C.P.C.K.

Legal remedy: Pursuant to Articles 374, par. 1.1, and 380, par. 1, an appeal against this judgment may be filed within 15 days of the day its copy has been served.

Appointed recording officer to the deliberation and voting session:

Carla Gomes

____

Done in English (authorised language), in Prishtina on the 8 December 2014,

Presiding Trial Judge

____

Jorge Martins-Ribeiro

Recording Officer

____

Carla Gomes

LEGAL REMEDY:-

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Authorized persons may file an appeal in written form against this verdict through the Basic Court of Pristina to the Court of Appeals within fifteen (15) days from the date the copy of the judgment has been served, pursuant to Article 380 Par. 1 of the Criminal Procedure Code of Kosovo.

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