SUPREME COURT of KOSOVO

Supreme Court of Kosovo
AP.-KŽ. No. 62/2012
Prishtinë/Priština
08 May 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 27 March 2012 in the Supreme Court building in a panel composed of EULEX Judge Gerrit-Marc Sprenger as Presiding Judge, EULEX Judge Anne Kerber and Kosovo Supreme Court Judge Marije Ademi as panel members

And with Legal Officer Holger Engelmann as Court Recorder,

In the presence of the

Defense Counsel Av. Xh[redacted] for the defendant **Xh[redacted]**
Defense Counsel Av. A[redacted] for the defendant **B[redacted]**
Defense Counsel Av.A[redacted] for the defendant N[redacted],
Defense Counsel Av. A[redacted] for the defendant A[redacted]

And the defendants **Xh[redacted] and N[redacted]**

In the criminal case number AP.-KŽ. No. 62/2012 against the defendants:

Xh[redacted]

A[redacted]

[redacted]

In accordance to the Verdict of the first instance District Court of Prishtinë/Priština in the case no. P. Nr. 57/10, dated 21 April 2011 and registered with the Registry of the District Court of Prishtinë/Priština on the same day, **the defendants were found guilty of the following criminal offenses:**

The defendants Xh[redacted] ZH[redacted] A[redacted] K[redacted], B[redacted] H[redacted] and N[redacted] C[redacted]

Of committing the criminal offence of **Extortion**, contrary to Article 267 paragraphs 1 and 2 of the Criminal Code of Kosovo (CCK) as read in conjunction with Article 23 of the CCK, because acting in co-perpatration as part of a group on various dates between, on or about the 26th June 2006 and the 01st August 2006, with the intent to obtain an unlawful material benefit for himself or another, used serious threats to compel another to do or abstain from doing an act to the detriment of his property; specifically the defendants threatened to kill the injured parties if they did not withdraw from their winning tender with the KTA (16th wave) for a 32 hectare sheep farm in R[redacted] village, Municipality of F[redacted] Over the course of several days from, on or about 27th July 2006 until 01st August 2006 the defendants coerced the winning parties to withdraw from the tender by use of direct and indirect death threats. As a result of these threats the victims Sh[redacted] L[redacted] Xh[redacted] S[redacted] and A[redacted] S[redacted] agreed to withdraw from the tender and thereby handed over their interest to A[redacted] K[redacted] the second highest bidder. On or about the 08 August 2006, B[redacted] H[redacted] and N[redacted] C[redacted] accompanied Sh[redacted] L[redacted] to the KTA offices in ,Prishtinë/Priština when the injured party actually filed the withdrawal from the tender, thereby bestowing great material benefit to the defendants;

The defendantXh[redacted] ZH[redacted] alone:

Of committing the criminal offence of **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 paragraph 2 of the CCK, because on the 04th November 2008, during a search at the home of Xh[redacted] XH[redacted] in K[redacted] police found that he was in possession of a quantity of fire arms, ammunition and explosives without a valid weapons authorization card or any proper form of licensing. Xh[redacted] ZH[redacted] had automatic weapon "MPT-9" of the caliber 9x19 mm, its serial number is written in Persian alphabet deciphered as 73-23328, automatic weapon "MPT-9" of the caliber 9x19 mm, its serial number is written in Persian alphabet deciphered as 732322, automatic rifle "AK-47" caliber 7.62x39 mm with serial number E-75572, pistol "Crvena Zastava" model 99, caliber 9x19 mm with serial number 72915, six magazines, quantity of bullets, an unexploded ordinance "Mortar 88 mm" and quantity of explosives;

The defendant A[redacted] K[redacted] alone:

Of committing the criminal offence of Unauthorized Ownership, Control, Possession or Use of Weapons contrary to Article 328 paragraph 2 of the CCK, because on the 04th November 2008, when police were excuting a search warrant at the home of A[redacted] K[redacted] it was found that A[redacted] K[redacted] was in possession of a pistol "Ekol Special" model 99, with serial number V760928, which pistol has been redesigned manually and was converted into a firearm of the caliber 7.65x17 mm.

Therefore, the defendants were found guilty as follows:

A[redacted] K[redacted] was sentenced with three years of imprisonment for Count 1 of the Indictment and 1,500 Euros fine for the charge of Unlawful Possession of Weapons. The time spent in detention on remand and house arrest was decided to be included in the punishment to be served when the Judgment would become final;

Xh[redacted] XH[redacted] was sentenced with three years of imprisonment for Count 1 of the Indictment and 1,500 Euros fine for the charge of Unlawful Possession of Weapons.

B[redacted] H[redacted] was sentenced with one year and two months of imprisonment;

N[redacted] C[redacted] was sentenced with one year and two months of imprisonment.

It was ruled by the Court of 1st Instance that the fine shall be paid by the defendants within three months after the Judgment has become final. In case the fine cannot be collected by compulsion, the payment of the fine shall be substituted with one day of imprisonment for each fifteen Euro of the fine.

The defendants **Xh[redacted] ZH[redacted], A[redacted] K[redacted] B[redacted] H[redacted]** and **N[redacted] C[redacted]** were found not guilty for the commission of the criminal offense of Threats contrary to Article 161 paragraph 4 of the CCK.

The Defense Counsels of the defendants timely filed their appeals against the Verdict. Defense Counsel Av. A[redacted] V[redacted] filed his appeal on behalf of the defendant N[redacted] C[redacted] on 07 October 2011, Defense Counsel Av. A[redacted] K[redacted] filed his appeal on behalf of the defendant B[redacted] H[redacted] on 14 August 2011, whilst the Defense Counsel Av. A[redacted] A[redacted] filed his appeal on hehalf of defendant A[redacted] K[redacted] on 26 September 2011 and Defense Counsel Av.Xh[redacted] Sh[redacted] filed his appeal on behalf of defendant **Xh[redacted] ZH[redacted]** on 07 October 2011. It was asserted through all four appeals that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. The Defense Counsel of the defendant **Xh[redacted] ZH[redacted]** has proposed to either annul the challenged Judgment and sent the case back to the 1st Instance Court for re-trial or to acquit his client from all charges, the Defense of **B[redacted] H[redacted]** has proposed to either annul the challenged Judgment and send the case back to the 1st Instance for re-trial or to impose a more lenient punishment against his client, the Defense of **N[redacted] C[redacted]** has proposed to acquit his client from all charges and the Defense Counsel of **A[redacted] K[redacted]** has proposed to either annul the challenged Judgment and sent the case back to the 1st Instance Court for re-trial or to acquit his client from the charges under Count 1 of the Indictment and to reduce the punishment regarding Count 4 of the Indictment

The Special Prosecutor of Kosovo (SPRK) did not appeal the District Court Judgment.

The Office of the State Prosecutor of Kosovo (OSPK), with an opinion dated 23 March 2012 proposed to partially approve the appeal filed by Defense Counsel Xh[redacted] Sh[redacted] on behalf of defendant Xh[redacted] ZH[redacted] so that on the sentencing part of the Judgment the period spent by Xh[redacted] ZH[redacted] in detention on remand is credited to the defendant; but to reject all the other grounds of the appeals as unfounded and to affirm the challenged 1st Instance Judgment

The appeal session commenced on 08 May 2012 in the presence of the defendants Xh[redacted] Zh[redacted] and N[redacted] C[redacted] and all the Defense Counsels as pointed out before. All parties had been timely notified about the appeal session. Defense Counsels in their final speeches and the defendants in the course of their respective final word made full reference to the proposals as submitted with the appeals in writing aforehand.

Based on the written Verdict in case P, Nr. 57/10 of the District Court of Prishtinë/Priština dated 21 April 2011 (filed with the Registry of that Court on the same day), the submitted written appeals of the defendant, the relevant file records and the oral submissions of the parties during the hearing sessions, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on 08 May 2012, hereby issues the following:

JUDGMENT

(1) The appeal of the defense counsel filed on behalf of the defendant Xh ZH against the judgment of the District Court of Prishtinë/Priština P. No. 57/2010, dated 21 April 2011, is PARTIALLY GRANTED. The first instance judgment is modified as follows: The period of time the defendant Xh ZH spent in detention is credited towards the pronounced punishment of imprisonment.
For the remaining part the appeal is REJECTED AS UNGROUNDED.

(2) The appeals of the defense counsels filed on behalf of the defendants A K, B H and N C against the mentioned judgment are REJECTED AS UNGROUNDED.

(3) EX-OFFICIO the enacting clause of the judgment is MODIFIED as follows:

The defendant A K possessed the pistol "Ekol Special" model 99, serial no. V760928, which had been redesigned and converted into a firearm of the caliber 7.65x17mm without a valid weapons authorization card or any form of licensing.

The unauthorized weapons and ammunition seized at the home of the defendant Xh ZH, namely: two automatic weapons MPT-9 caliber 9x19mm, serial numbers in Persian alphabet 73-23328 and 732322, an automatic rifle AK-47 caliber 7.62x39mm, serial no. E-75572, a pistol "Crvena Zastava" model 99, caliber 9x19mm, serial no. 72915 as well as six magazines, a quantity of ammunition, a quantity of explosives and an unexploded ordinance mortar 88mm and
the unauthorized weapons and ammunition seized at the home of the defendant A K, namely: 3 hand grenades, an automatic rifle AK-47 caliber 7.62x39mm, serial no. 0120114-91, a pistol "Ekol Special" model 99, serial no. V760928, which had been redesigned and converted into a firearm of the caliber 7.65x17mm and a quantity of ammunition are confiscated.

(4) The judgment of the District Court is AFFIRMED IN THE REMAINING PARTS.

REASONING

Procedural History

On 01 March 2010 the Special Prosecutor of Kosovo (SPRK) filed an Indictment against Xh[redacted] ZH[redacted], A[redacted] K[redacted], B[redacted] H[redacted] N[redacted] C[redacted], F[redacted] H[redacted] N[redacted] C[redacted] and A[redacted] D[redacted], charging the defendants with Extortion, Threats, and for the defendants Xh[redacted] ZH[redacted] and A[redacted] K[redacted] also with Unlawful Possession of Weapons. The Indictment alleges that the defendants acting in co-perpetration as part of a criminal group, on various dates between the 26th July 2006 and the 1st August 2006 committed the criminal offenses of Extortion by use of threats against Sh[redacted] L[redacted] Xh[redacted] S[redacted] and A[redacted] S[redacted], in order to materially gain from these activities. In that, on or about 27th July 2006 they threatened to kill the injured parties if they did not withdraw from their winning tender with the KTA (16th wave) for a 32 hectares sheep farm in R[redacted], F[redacted] Municipality. The defendants further allegedly threatened the victims on or about 28th July 2006, telling them that if they did not withdraw there will be bloodshed. On the same day, 28th July 2006, Xh[redacted] ZH[redacted] called Xh[redacted] S[redacted] and threatened him and later there was a meeting at the home of Xh[redacted] S[redacted] attended by N[redacted] C[redacted] were the victims were told again to withdraw. On or about 29th July 2006, the victims were told by N[redacted] C[redacted] to withdraw or there will be bloodshed. At a meeting in S[redacted], on a date between 30th July and 03rd August 2006, as a result of these threats the victims Sh[redacted] L[redacted] Xh[redacted] S[redacted] and A[redacted] S[redacted] agreed to withdraw from the tender and thereby handed over their interests to A[redacted] K[redacted] the second highest bidder.

Furthermore, the Indictment charges A[redacted] K[redacted] and Xh[redacted] ZH[redacted] with Unlawful Possession of Weapons, because during searches performed at the home of Xh[redacted] ZH[redacted] the police found and confiscated automatic weapon "MPT-9" of the caliber 9x19 mm, its serial number is written in Persian alphabet deciphered as 73-23328, automatic weapon "MPT-9" of the caliber 9x19 mm, its serial number is written in Persian alphabet deciphered as 732322, automatic rifle "AK-47" caliber 7.62x39 mm with serial number E-75572, pistol "Crvena Zastava" model 99, caliber 9x19 mm with serial number 72915, six magazines, quantity of bullets, an unexploded ordinance "Mortar 88 mm" and quantity of explosives. Likewise, police searched the house of A[redacted] K[redacted] and found quantity of firearms, ammunitions and explosives without a valid weapons authorization card or any proper form licensing. They namely found and confiscated a pistol "Ekol Special" model 99, with serial number V760928, which pistol has been redesigned manually and was converted into a firearm of the caliber 7.65x17 mm, three hand grenades and an automatic rifle AK-47 caliber 7.62x39 mm, serial number 0120114-91.

Confirmation Hearing was held on 07 July 2010 before EULEX Confirmation Judge, within which the SPRK Prosecutor amended the first Count of the original Indictment, as to read that the defendants were part "of a criminal group", as opposed to "part of an organized criminal group" as initially mentioned in the Indictment.

On 19 July 2010, the Confirmation Judge confirmed the Indictment in its entirety.

The Main Trial commenced through together 15 sessions on 17 and 18 November, 06 and 08 December 2010, 14, 15, 16, 18, 21, 22, 23, 24 February, 13, 14 and 15 March and on 21 April 2011, when the latter the challenged Judgment was publicly announced.

The following witnesses appeared and testified at trial: Xh S, Sh L A S, E S, S Z, D V, R R L and G S. The defendants themselves decided to defend themselves by testifying, thus their testimony has been heard by the panel.

In addition to the testimony of the witnesses, the trial panel admitted the following evidence: investigative notes of S T dated 10 April 2008, regarding the telephone numbers E S had at the relevant time; investigative notes of S T dated 09 April 2008, informing that PTK do not have any information on metering at all for period July 2006 – August 2006; investigative notes of S T dated 03 April 2008 with regards to meeting Xh S in order to obtain further information on telephone numbers, also asking the witness to provide a list of threats; investigative notes of S T dated 04 April 2008 regarding a meeting with Xh S who brought the list of threats he received on his mobile phone with the number, and on his son's mobile phone with the number; SMS messages received on mobile phone number; details of threatening calls received by Xh S son D S; investigative notes of S S dated 24 March 2008, informing that the Kosovo Trust Agency (KTA) had destroyed all the visitor entry logs for 2006; letter of the KTA dated 20 March 2008, informing that deposit was returned to witness Sh L; CBAK money transfer of 50.000 Euros from KTA to Interkos, return of deposit; investigative notes of S S interview with Sh B, informing that KTA had destroyed all the visitor entry logs from 2006; investigative notes of S S dated 15 March 2008; Memo to KTA from S S dated 13 March 2008; investigative notes of S S dated 12 March 2008; diary entries of Sh L listing the threats; investigative notes of S S dated 12 March 2008; further threats listed by Sh L investigative notes of S S; dated 10 March 2008; details investigative actions; police report of Th Ch dated 10 March 2008; investigative notes of S S dated 06 March 2008; photo identification by A S and photographs; investigative notes of S S dated06 March 2008; photo identification by Xh S and photographs; police report of Th Ch dated 05 March 2008; review of KTA documents; police report of Th Ch dated 05 March 2008; photo lineup Sh L; police report of Th Ch dated 01 March 2008; police report of Th Ch dated 19 February 2008; police report of V M dated 15 February 2008; police report of S S dated 15 February 2008; police report of Th Ch dated 14 February 2008; search records regarding A K house; search record regarding Xh ZH house; police report Sgt. A R dated 04 November 2008 regarding the arrest and search of A K, investigative notes of S T dated 20 October 2008; report of Explosive Ordinance Disposal

Haddock SFC Chebahtah P99, incident number 753-116-07, dealing with the disposal of the device found by Sh[redacted] L[redacted] at his home on the 02 October 2007 and identified as a "Mortar Yugoslav M57 60mm"; memorandum of Sgt. D[redacted] V[redacted] dated 04 November 2008, notes from the diary of Sh[redacted] L[redacted] (undated); report from S[redacted] T[redacted] dated 04 August 2008; request to PTK for telephone metering dated 23 May 2008; report from S[redacted] T[redacted] dated 23 May 2008; metering of telephone calls and SMS messages; report from S[redacted] T[redacted] dated 29 April 2008 about a prospective bid bu G[redacted] S[redacted] sale of property agreement of Xh[redacted] S[redacted] dated 14 June; police report of H[redacted] B[redacted] dated 08 April 2009, detailing police activities in getting a KFOR report regarding the explosives found during the search; M[redacted] G[redacted]; inventory of items seized, which were handed over to EULEX; police report of J[redacted] K[redacted] dated 16 February 2009; police report of J[redacted] K[redacted] dated 10 March 2009; Tenenacy Agreement for the sheep farm between B[redacted] M[redacted] and M[redacted] R[redacted] and B[redacted] A[redacted] for A[redacted] K[redacted] dated 14 August 2008; Ballistics examination; police report of J[redacted] K[redacted] dated 20 January 2009; CD recorded at the Skopje meeting and handed over by Xh[redacted] ZH[redacted] to S[redacted] D[redacted], the brother of A[redacted] D[redacted] summary of the CD; police report of S[redacted] S[redacted] dated 10 March 2008; police report of S[redacted] S[redacted] dated 10 March 2008, on getting the telephone numbers from victim Xh[redacted] S[redacted] regarding the threats; house search report from Sgt. D[redacted] V[redacted] regarding Xh[redacted] ZH[redacted] dated 04 November 2008; police report of A[redacted] F[redacted] dated 04 November 2008; police report of V[redacted] M[redacted] dated 15 February 2008; police report of S[redacted] S[redacted] dated 12 November 2008 on seizure of a laptop HP S/N CNF7050PDF from Xh[redacted] ZH[redacted]; police report of A[redacted] F[redacted] dated 07 November 2008 regarding contacts with Xh[redacted] ZH[redacted] following the arrest of the defendants; search records B[redacted] H[redacted]; search record Xh[redacted] ZH[redacted]; police report of S[redacted] K[redacted] regarding the search of B[redacted] H[redacted], search and arrest records regarding N[redacted] C[redacted]; search and arrest records regarding A[redacted] K[redacted].

During the Main Trial session on 18 February 2011 the Public Prosecutor withdrew the Indictment against F[redacted] H[redacted] and A[redacted] D[redacted] and during the Main Trial session on 24 February 2011 the Public Prosecutor withdrew the charges against the defendant N[redacted] C[redacted]

Based on its findings, on 30 March 2009, the District Court announced the verdict and found the defendants guilty of the criminal offences as listed above. Consequently, the Court imposed on the defendants the punishments as also specified above.

The Defense Counsels of the defendants timely filed their appeals against the Verdict as outlined before and asserted that the Verdict contains essential violations of the criminal procedure, erroneous and incomplete establishment of the factual state, violation of the criminal code and that the punishment imposed upon the accused was to be challenged. It was proposed to either annul the challenged Judgment and sent the case back to the 1st Instance Court for re-trial or to acquit the defendant **Xh[redacted] ZH[redacted]** from all charges, to either annul the challenged Judgment and send the case back to the 1st Instance for re-trial or to impose a more lenient punishment against the defendant **B[redacted] H[redacted]**, to

acquit the defendant N[redacted] C[redacted] from all charges and to either annul the challenged Judgment and sent the case back to the 1st Instance Court for re-trial or to acquit the defendant A[redacted] K[redacted] from the charges under Count 1 of the Indictment and to reduce the punishment regarding Count 4 of the Indictment.

The SPRK did not file an appeal against the 1st Instance Judgment.

The OSPK, in its opinion proposed as outlined before.

FINDINGS OF THE COURT

A. Substantial violation of the provisions of the Criminal Procedure

All four Defense Counsels have challenged the 1st Instance Judgment for substantial violation of the Criminal Procedure, since the Judgment would be contradictory in its content; in particular the enacting clause would be in contradiction with the reasoning. The Defense of Zh[redacted] XH[redacted] has stressed that the criminal offense of Extortion pursuant to Article 267 paragraphs 1 and 2 of the CCK as referred to by the challenged Judgment cannot be given in the case at hand due to the fact that the defendant was found not guilty for the criminal offense of Threat as per Article 161 of the CCK and that no evidence was presented for the use of violence instead. Moreover, the time of the defendant spent in detention had not been included into the sentence, which would violate Article 391 paragraph 1 item 5 of the KCCP and thus Article 403 paragraph 2 of the KCCP would be concerned. The Defense of B[redacted] H[redacted] has asserted that – although B[redacted] H[redacted], N[redacted] C[redacted], A[redacted] K[redacted] and Zh[redacted] ZH[redacted] have been found guilty for Extortion in co-perpetration and acting as part of a group – the Judgment would lack clear descriptions of the actual incriminating actions of the criminal offense and would not sufficiently consider the fact than none of the witnesses ever had stated that B[redacted] H[redacted] ever had threated somebody. The Defense Counsel of N[redacted] C[redacted] has stressed that his client just is treated a 'part of a group' and solely there equates in guilt, whilst in fact it was never proved that he ever has threatened the injured parties. Last but not least the Defense Counsel of A[redacted] K[redacted] challenged that the enacting clause of the 1st Instance Judgment is unclear and in contradiction with the reasoning under its point (I), since his client continuously has denied the commission of the respective criminal offense and therefore the Judgment would not be based upon relevant facts.

I. THREAT AS PER ARTICLE 161 CCK AS ALLEGED PRECONDITION FOR EXTORTION AS PER ARTICLE 267 CCK:

With regards of the respective argumentation of the Defense of Xh[redacted] ZH[redacted] the Supreme Court of Kosovo finds that indeed the enacting clause of the challenged Judgment shows some contradiction regarding the guilty find of the defendants. Xh[redacted] ZH[redacted], A[redacted] K[redacted], B[redacted] H[redacted] and N[redacted] C[redacted] for Extortion contrary

to Article 267 paragraphs 1 and 2 of the CCK and the four of them being found not guilty for the criminal offense of Threat contrary to Article 161 of the CCK. However, these contradictions are based solely upon an unskilled wording of the enacting clause, when it comes to the defendants being found not guilty for the criminal offense of Threat. Moreover, even considering the possibilities of amending the challenged Judgment as per Article 426 paragraph 1 of the KCCP, the Supreme Court in the case at hand is bound by the principle of *reformatio in pejus* due to the fact that the Prosecutor has not appealed the 1st Instance Judgment. Therefore, the findings of the Supreme Court can be of declaratory character only.

Whilst Article 161 paragraph 1 of the CCK stipulates that the criminal offense of Threat requires that the perpetrator *"seriously threatens to harm another person in order to frighten or cause anxiety to such person"*, Article 267 paragraph 1 of the CCK requires for the criminal offense of Extortion that the perpetrator *"uses force or serious threat to compel another person to do or abstain from doing an act to the detriment of somebody's property"*. Although in the case at hand no evidence was found for any kind of direct physical force, the District Court has established with regards to Count 1 of the Indictment on commission of the criminal offense of Extortion that *"on various dates between, on or about the 26 June 2006 and the 01 August 2006, with the intent to obtain unlawful material benefit"* the defendants acting in co-perpetration as part of a group (and thus based upon a joint plan) have *"used serious threats to compel another to do or abstain from doing an act to the detriment of his property"*. In particular, the defendants by use of direct and indirect death threats *"threatened to kill the injured parties if they did not withdraw from their winning tender with the KPA"*.

It is therefore clearly established that the four defendants Xh[redacted] ZH[redacted], A[redacted] K[redacted], B[redacted] H[redacted] and N[redacted] C[redacted] have been found guilty for threatening the injured parties, either directly or indirectly. With regards to the defendants B[redacted] H[redacted] and N[redacted] C[redacted], the challenged Judgment in its reasoning points out that *"there is no evidence that B[redacted] H[redacted] and N[redacted] C[redacted] made direct threats to Sh[redacted] L[redacted] or his partners. B[redacted] and N[redacted] were investors with A[redacted] and were present when when A[redacted] made coercive threats towards Sh[redacted]" (p.14 of the challenged Judgment in its English version)*. This is reflected as well in the enacting clause, which the latter stipulates that "[o]*n or about 08 August 2006, B[redacted] H[redacted] and N[redacted] C[redacted] accompanied Sh[redacted] L[redacted] the KPA offices in Prishtina, when the injured party actually filed the withdrawal from the tender, thereby bestowing great material benefit to the defendants"*. It was also argued in the reasoning of the challenged Judgment the B[redacted] H[redacted] who at that time was still Kosovo Police Officer, was wearing his police uniform and weapons, at least during a meeting with the injured parties on 28 July 2006 *(p.11 of the challenged Judgment in its English version)*, thus automatically creating psychological pressure to the injured parties.

It deems clear to the Supreme Court that the requirements of threat in both provisions of the CCK are of identical content. Therefore, the enacting clause of the challenged Judgment contains a contradiction when it comes to the four defendants being found not guilty for the criminal offense of Threat as per Article 161 of the CCK. However, it is

disclosed in the reasoning to the Judgment that the *"defendants' acts fall well within the boundaries of conduct recognized as Extortion"* and that *"the allegations in Count 2* [of the Indictment, which is the criminal offense of Threat as per Article 161 of the CCK] *are wholly incorporated in the offense of Extortion"*.

Although the challenged 1st Instance Judgment in its enacting clause in an unskilled wording has found the four defendants "not guilty for the commission of the criminal offense of Threat contrary to Article 161 paragraph 4 of the CCK, as charged in the Count 2 of the Indictment" and in the corresponding part of the reasoning has stipulated that Count 2 of the Indictment is "dismissed" (p. 14 of the challenged Judgment in its English version), it is beyond all doubts that also the 1st instance Court was of the opinion that the requirements and the criminal content of the criminal offense of Threat as per Article 161 paragraph 4 of the CCK is consumed by the criminal offense of Extortion as per Article 267 paragraph 1 and 2 of the CCK.

Considering that the District Court has established all relevant facts with regards to the two criminal offenses in question, the outlined contradiction would lead the Supreme Court of Kosovo to amend the enacting clause according to Article 420 paragraph 1 item 4 as read with Article 426 paragraph 1 of the KCCP in the way that the four defendants would have to be found guilty also for the commission of the criminal offense of Threat as per Article 161 paragraph 4 of the CCK, which the latter only is consumed by the defendants being found guilty for Extortion as per Article 267 paragraphs 1 and 2 of the CCK. Although such constellation does not lead to a higher punishment for the defendants, an additional guilty find in difference to the challenged 1st Instance Judgment would consist in an additional penal burden for the four defendants. After the Prosecutor has not appealed the challenged Judgment, the situation in the case at hand falls under the principle of *reformatio in pejus* as stipulated in Article 417 of the CCK. Therefore, the Supreme Court in the case at hand is prevented from amending the enacting clause to the detriment of the defendants, which is why the respective establishments of the Supreme Court are of declaratory character only. Nevertheless, it needs to be underlined that although the issue was challenged only by the Defense of Xh[redacted]ZH[redacted], all other co-defendants need to enjoy the same protection as per Article 419 of the CCK.

II. ALLEGED VIOLATION OF ARTICLE 403 PARAGRAPH 2 OF THE KCCP BY NON-CREDITING OF DETENTION ON REMAND:

As to the Defense Counsel of Xh[redacted]ZH[redacted] challenging the 1st Instance Judgment for non-crediting of detention on remand as spent by the defendant, the Supreme Court finds that the appeal in this regard is well grounded. Crediting detention times is obligatory to the Court pursuant to Article 391 paragraph 1 item 5 of the KCCP and Article 73 paragraph 1 of the CCK, but was not taken into consideration in the case at hand, which leads to a violation of Article 403 paragraph 2 of the KCCP.

However, this violation does not cause the annulment of the challenged Judgment and its sending back to the 1st instance Court for re-trial. The failure of the 1st Instance Court can

be healed by modification of the challenged Judgment by the Supreme Court panel as per Article 420 paragraph 1 item 4 of the KCCP.

III. DESCRIPTION OF REQUIREMENTS REGARDING INCRIMINATING ACTIONS OF A CRIMNAL OFFENCE IN THE ENACTING CLAUSE

As to the allegations of the Defense of B[redacted] H[redacted] that the challenged Judgment would lack clear descriptions of the actual incriminating actions of the criminal offense regarding his client, the Supreme Court finds that the enacting clause fulfills all requirements of the law as laid down in Articles 396 paragraphs 3 and 4 as read with Article 391 of the KCCP. In particular Article 391 paragraph 1 item 1 of the KCCP stipulates that the enacting clause needs to contain *"the act of which* [the defendant] *has been found guilty, together with facts and circumstances indicating the criminal nature of the act committed, and facts and circumstances on which the application of pertinent provisions of criminal law depends"*.

Reference is made to the enacting clause regarding Count 1 of the Indictment, finding B[redacted] H[redacted] guilty for Extortion as co-perpetrator and member of a group together with the other three defendants. The enacting clause clearly points out that the defendants *"used serious threats"* and *"specifically ... threatened to kill the injured parties if they did not withdraw from their winning tender with the KTA (16th wave) for a 32 hectare sheep farm in R[redacted] village, F[redacted] Municipality. Over the course of several days from on or about 27 July until 01 August 2006 the defendant coerced the winning parties to withdraw..."* As to the activities of B[redacted] H[redacted], who also according to the findings of the District Court never has mentioned any direct threats against the injured parties, the enacting clause of the challenged Judgment makes clear that as a result of these threats "[o]*n or about 08 August 2006, B[redacted] H[redacted] and N[redacted] C[redacted] accompanied Sh[redacted] L[redacted] to the KTA offices in Prishtina, when the injured party actually filed the withdrawal from the tender...*".

For the abovementioned reasons the Supreme Court finds that the enacting clause is clear enough and in compliance with the requirements of the Law. It is not needed that the enacting clause in advance repeats all details as later are pointed out in the reasoning of a Judgment.

IV. CRIMINAL RESPONSIBILITY OF DEFENDANT N[redacted] C[redacted] AS MERELY PASSIVE 'PART OF A GROUP':

Regarding the allegations of the Defense of N[redacted] C[redacted] that the defendant had only a passive role in all meetings, thus not mentioning any threats nor accompanying the victim Sh[redacted] L[redacted] later into the office rooms of the KTA in Prishtinë/Priština, for the withdrawal from the winning tender but that the defendant nevertheless was found criminally responsible together with the others, reference is made to the enacting clause of the challenged Judgment. There it is clearly stated that N[redacted] C[redacted] together with

A[redacted] K[redacted] Xh[redacted] XH[redacted] and B[redacted] H[redacted] has acted in co=perpetration and thus based upon a joint plan and that all defendants belonged to a criminal group. This is also reflected in the reasoning of the Judgment *(in particular p. 9 and 10 of the challenged Judgment in its English version)*. Therefore, the Supreme Court finds that the enacting clause is not internally inconsistent and does not contradict to the reasoning of the Judgment either.

V. CRIMINAL RESPONSIBILITY OF DEFENDANT A[redacted] K[redacted] ACCORDING TO HIS DEFENSE:

As to the Defense Counsel of A[redacted] K[redacted] challenging the enacting clause of the 1st Instance Judgment to be unclear and in contradiction with the reasoning under its point (I), since his client continuously has denied the commission of the respective criminal offense, reference is made to the elaborations of the Supreme Court under point B. of this Judgment below. The District Court has based its findings and opinions upon a thorough assessment of all available and admissible evidence and has come to the conclusion that the defendant A[redacted] K[redacted] although he has denied all kinds of criminal responsibility and activities in the case at hand, has acted together with the others in co-perpetration and as a member of a criminal group. Therefore, no contradictions within the enacting clause or between the latter and the reasoning could be established. Reference is made also to what was already stated under point A.IV. with regards to the defendant N[redacted] C[redacted]

B. Erroneous and incomplete determination of the factual situation

All four Defense Counsels stress as well erroneous and incomplete determination of the factual situation by the challenged Judgment. In particular, the Defense of Zh[redacted] ZH[redacted] has pointed out that the challenged Judgment erroneously had established partnership links between the injured parties, and that in difference to the assessments of the District Court the offer had been made by the company 'Interkos', whose owner Sh[redacted] L[redacted] had been. Whilst it could not be found in the statements of the injured parties that they ever had celebrated 'winners of the bid' as alleged by the 1st Instance Court, all meetings between the injured parties and the defendants except the one in S[redacted] had be conducted without the defendant being present. With regards to alleged threats, the Judgment would make reference to meaningless words such as "Life is too valuable and life must be given only for the freedom of one's country and for nothing else". The Defense of B[redacted] H[redacted] N[redacted] C[redacted] and A[redacted] K[redacted] underline that their respective clients never ever had threated anybody or had been involved into any criminal activity.

I. ALLEGED WRONG ESTABLISHMENT OF LINKS BETWEEN THE INJURED PARTIES AND OTHER FACTS REGARDING THE VICTIMS:

With regards to the allegations of the Defense Counsel of Xh[redacted] ZH[redacted] that the assessment of the District Court on partnership relations between the injured parties Sh[redacted] L[redacted], Xh[redacted] S[redacted] and A[redacted] S[redacted] are false and that in fact the offer in question was made by the company 'I[redacted]' with the owner Sh[redacted] L[redacted], the Supreme Court finds that these details are of no relevance for the case at hand and the charges brought against the defendants. The same applies to the question, whether or not the injured parties ever have celebrated being 'winners of the bid' as established by the District Court.

Moreover, the Defense of Xh[redacted] ZH[redacted] has stressed that the defendant, who was present only during one meeting, on that occasion had mentioned only some 'meaningless words' such as "Life is too valuable and life must be given only for the freedom of one's country and for nothing else", which cannot be interpreted as threat against the injured parties at all.

In this regard reference is made to the assessment of evidence by the District Court as in particular laid down at p. 10 through 12 of the challenged Judgment (in its English version). The Supreme Court finds that the District Court – although the reasoning of the Judgment is quite short – has made a very thorough and careful assessment of all available and admissible evidence as listed above in this Judgment. Based upon this assessment of evidence, the District Court has in particular established that during a meeting at the 'R[redacted]' on the 27 July 2006 the defendant Xh[redacted] ZH[redacted] has told the injured parties Sh[redacted] L[redacted], Xh[redacted] S[redacted] and A[redacted] S[redacted] that "you cannot take this tender, otherwise graves will be opened" (p.10 of the challenged Judgment in its English version). The words of Xh[redacted] ZH[redacted] as mentioned on 01 or 02 August 2006 during a meeting with the injured parties in S[redacted] on the value of life as addressed by the Defense in the context given need to be interpreted in the lights of the previous approach of the defendant as well as on the background of all other threats directed against the injured parties during the referred time period and mentioned by other members of the group the four defendants belonged to.

Full reference is made to the assessment of the District Court. Moreover, the Supreme Court of Kosovo has decided many times it is neither under the competence of the appeal panel nor possible in fact to replace the findings of the First Instance Court by its own, especially not without taking all the evidence again. In this regard, in the case *Runjeva, Axgami and Dema (Supreme Court of Kosovo, AP-KZ 477/05 dated 25 January 2008, page 20)*, as well as – amongst others – in the case against *Jeton Kiqina (Supreme Court of Kosovo, P.no. 84/2009 dated 03 December 2009)* the Supreme Court of Kosovo in this context has pointed out that *"appellate proceedings in the PCPCK rest on principles that is for the trial court to hear, assess and weigh the evidence at trial [...]. Therefore, the appellate court is required to give the trial court a margin of the deference in reaching its factual findings. It should not disturb the trial court's findings to substitute its own,*

unless the evidence relied upon by the trial court could not have been accepted by any reasonable tribunal of factor where its evaluation has been 'wholly erroneous' ".

II. RELEVANCE OF DENIAL OF CRIMINAL ACTIVITIES BY DEFENDANTS B[redacted] H[redacted], N[redacted] C[redacted] AND A[redacted] K[redacted]:

As to the Defense Counsels of B[redacted] H[redacted], N[redacted] C[redacted] and A[redacted] K[redacted] stressing that their respective clients never ever had threated anybody or had been involved into any criminal activity, full reference is made again to the assessment of evidence as carried out by the District Court. Since the 1st Instance Court has based its opinion on what has happened on a very thorough assessment of evidence as pointed out before, it cannot be said that its evaluations have been 'wholly erroneous', which is why there is no reason for the Supreme Court to replace the assessment of the District Court.

C. Substantial violation of the Criminal Law

All four Defense Counsels assert that as a consequence of the alleged erroneous and incomplete determination of the facts also the criminal law was violated with regards to the guilty finds of their respective clients. In particular the Defense of Zh[redacted] XH[redacted] stresses that Article 404 paragraph 1 of the KCCP would be violated due to the fact that the time of his client spent in detention was not credited. The Defense of N[redacted] C[redacted] and A[redacted] K[redacted] both challenge the Judgment finding their respective clients guilty for Extortion although neither threats nor violence had been established as required by the law.

The Supreme Court finds that these allegations of the Defense are without merits and ungrounded, in particular since they are not substantiated at all. Reference is made to what was said under points A. and B. of this Judgment. As a consequence, no need is seen to further elaborate on the allegations of the Defense in the context given.

D. Decision on the punishment

As a further consequence, all Defense Counsels are of the opinion that the punishment as imposed upon their respective clients is too high. In particular the Defense of Zh[redacted] ZH[redacted] and N[redacted] C[redacted] have asserted that their clients are completely innocent and therefore need to be acquitted, whilst the Defense Counsels of B[redacted] H[redacted] and A[redacted] K[redacted] propose to at least impose a more lenient punishment upon their clients.

The decision on the punishment is more than fair as to the imprisonment terms imposed to each of the defendants.

The First Instance Court in accordance with the framework of possible punishments given by the relevant laws, has imposed for the criminal offense of Extortion pursuant to Article 267 paragraphs 1 and 2 of the CCK a separate punishment of three years of imprisonment for each A[redacted] K[redacted] and Xh[redacted] ZH[redacted] and of one year and two months for each B[redacted] H[redacted] and N[redacted] C[redacted], whilst the maximum imprisonment as allowed by the law is between one and of up to 10 years.

For the criminal offense of Unlawful Possession of Weapons pursuant to Article 328 paragraph 2 of the CCK the District Court has imposed a punishment of 1500 Euros against each the defendants Xh[redacted] ZH[redacted] and A[redacted] K[redacted], whilst the law allows a punishment of fine up to 7,500 Euros or imprisonment of one to eight years.

The Supreme Court of Kosovo considers that the First Instance Court correctly and completely has taken into consideration all the circumstances that influence in severity of punishment and has fairly evaluated those circumstances.
Nonetheless, it deems almost regrettable that the SPRK has not appealed the District Court Judgment, at least with regards to the criminal offense of Unlawful Possession of Weapons pursuant to Article 328 paragraph 2 of the CCK as committed by defendants A[redacted] K[redacted] and Xh[redacted] XH[redacted] Both of them have possessed illegally a whole arsenal of heavy war weapons, enough to equip a private army, but have been sentenced with 1.500 Euros each only, whilst the *status quo ante* in Kosovo in this regard is imprisonment for at least one year, even in much less severe cases. However, due to the fact that the SPRK has not appealed, the Supreme Court is bound by the principle of *reformatio in pejus* and thus is prevented to increase the punishment in this regard.
At least no reason can be seen to lower the punishment against one of the defendants. Taking also into consideration the intensity of threats uttered against the injured parties as well as the level of social risk of the commission of the respective criminal offenses and the level of responsibility of the defendants, the latter are very well served with the aggregate sentence as imposed. It needs to be stressed that a behavior as shown by the defendants in the case at hand is one of the main obstacles for the Kosovo society to find their way into a stable and reliable, thus peaceful social life and fair conduct, suitable for the development of a stable economy as guarantee for a wealthy and good life for the majority of the Kosovo population.

E. Confiscation of Weapons

The weapons as illegally possessed by the defendants Xh[redacted] ZH[redacted] and A[redacted] K[redacted] had to be confiscated ex officio in accordance with Article 328 paragraph 5 as read with Article 54 paragraph 2 and Article 60 paragraphs 2 and 3 of the CCK. Since the confiscation of illegally possessed weapons which have been used or could be used to commit criminal offenses is mandatory according to the law, the respective decision of the Supreme Court does not violate the principle of *reformatio in pejus*. Article 417 of the KCCP only restricts a modification to the detriment of the accused with respect to the classification of the criminal offence and the criminal sanctions imposed, while the measure of confiscation belongs to either of these two categories. Confiscation is

mandatory ordered by Article 328 paragraph 5 of the CCK and serves the protection of the society. Consequently it takes precedence over the offender's right to possession or ownership.

For the foregoing reasons the Supreme Court decided as in the enacting clause.

Panel Member

Anne Kerber
EULEX Judge

Panel Member

Marije Adami
Supreme Court Judge

Presiding Judge

Gerrit-Marc Sprenger
EULEX Judge

Recording Clerk

Holger Engelmann
EULEX Legal Officer

Supreme Court of Kosovo
AP.-KŽ. No. 62/2012
Prishtinë/Priština
8 May 2012