

DISTRICT COURT OF GJILAN/GNIJILANE
P.nr.188/11
7th February 2012

IN THE NAME OF THE PEOPLE

The District Court of Gjilan/Gnjilane in the trial panel composed of EULEX Judge Dariusz Sielicki as presiding judge, and Kosovo Judges Afrim Shala and Rasim Rasimi as panel members, assisted by Recording Officer Joseph Hollerhead and Gjergj Zimaj as Interpreter, in the criminal case against:

Besim Tahiri, aka "Qeqeni", son of father Njazi, born on 18th August 1980 in Vranje, Republic of Serbia, residing in the village of Doberqan, Gjilan/Gnjilane municipality, currently in detention on remand since 24th September 2011;

Njazi Tahiri, son of father Sabri, born on 19th January 1960 in Suharne, Republic of Serbia, residing in the village of Doberqan, Gjilan/Gnjilane municipality, in detention on remand from 29th April 2011 until 29th July 2011.

Charged according to the Indictment PP No 106/11 with the criminal offence (committed in co-Perpetration) of Extortion in violation of Article 267 par.1 and 2 in conjunction with Article 23 of the Criminal Code of Kosovo ("CCK") committed on 29th April 2011 in Gjilan/Gnjilane,

Having held public main trial hearings on 26th January 2012 and 6th February 2012, and after the trial panel's voting and deliberation held on 7th February 2012, according to Article 391, paragraph (1) of the Kosovo Code of Criminal Procedure ("KCCP") on 7th February 2012, pursuant to Article 392 Paragraph (1) of KCCP pronounces in public and in the presence of the parties the following

VERDICT

Besim Tahiri and Njazi Tahiri

are

FOUND GUILTY

Of committing in Co-Perpetration the criminal offence of Extortion in violation of Article 267 Paragraph (1) in conjunction with Article 23 of the CCK;

because on 29th April 2011 in Gjilan/Gnjilane, acting jointly and with intent to obtain unlawful benefit, they used serious threats while demanding brothers Qani and Shemsi Xhelili pay them an amount of Euro 20.000, in such a way that Besim Tahiri in a parking lot near to BKT bank told Shemsi Xhelili that if otherwise Shemsi Xhelili could forget Kosovo, his work, and his family and Njazi Tahiri told Qani Xhelili in the brothers' office that if otherwise it would be bad for Qani Xhelili and his family, and as the result of this action Njazi Tahiri collected from brothers Qani and Shemsi Xhelili material benefit in the amount of Euro 2000 and subsequently the defendant Nijazi Tahiri was arrested by the Kosovo Police.

therefore, they are hereby

SENTENCED :

Besim Tahiri to three years of imprisonment for the criminal offence of Extortion committed in co-perpetration in violation of Article 267 Paragraph (1) in conjunction with Article 23 of CCK;

Njazi Tahiri to two years of imprisonment for the criminal offence of Extortion committed in co-perpetration in violation of Article 267 Paragraph (1) in conjunction with Article 23 of CCK;

The detention on remand in relation to Besim Tahiri is hereby extended until the Judgment becomes final because the risk of flight still exists as foreseen by Article 281, par. 1 subpar. 2 item i). The time spent by Besim Tahiri in detention on remand from 24th September 2011 onwards is to be credited against the punishment of imprisonment pursuant to Article 391 Paragraph (1) subparagraph 5 and Article 73, par.1 CCK;

The time spent by Nijazi Tahiri in detention on remand from 29th April 2011 until 29th July 2011 is to be credited against the punishment of imprisonment pursuant to Article 391 Paragraph (1) subparagraph 5 and Article 73, par.1 CCK;

The accused shall pay a lump sum in the amount of 30 EUR each, and reimburse the cost of criminal proceedings pursuant to Article 102, paragraph 1 of KCCP with the exception of the cost of interpretation and translation. A separate ruling on the amount of the costs shall be rendered by the court when such information is obtained pursuant to Article 100 Paragraph (2) of KCCP.

The injured parties are entitled to seek compensation for material damages, if any, in civil proceedings as per Article 112, par. 1 and 2 KCCP.

REASONING

Procedural Background

The indictment

On 20th October 2011 the Special Prosecution Office filed Indictment PP.nr.106/11 against the accused Besim Tahiri and Nijazi Tahiri for the criminal offence of Extortion committed in co-perpetration in violation of Article 267 par.1 and 2 in conjunction with Article 23 of the Criminal Code of Kosovo ("CCK") committed on 29th April 2011 in Gjilan/Gnjilane.

On 9th November 2011 the confirmation judge of the District Court of Gjilan/Gnjilane confirmed the aforementioned Indictment through ruling KA.nr. 181/11

During the confirmation hearing both the accused pleaded not guilty.

Competence of the Court and Panel Composition

The accused were charged with an offence punishable by imprisonment from one to ten years.

In accordance with Article 23 (1) of KCCP, District Courts shall have jurisdiction to adjudicate at first instance criminal offences punishable by imprisonment of at least five years or those offences punishable by long-term imprisonment.

The criminal offence, according to the Indictment, was committed in the town of Gjilan/Gnjilane which is in the territory of the District of Gjilan/Gnjilane. Therefore, in accordance with Article 27 (1) of CPC, this court has territorial jurisdiction to adjudicate the case.

No issue was raised by the parties regarding the jurisdiction of this Court, however the matter of the competence of the EULEX judge to preside in this case was contested by defense counsel for Besim Tahiri, Mr. Haxhi Millaku.

It is to be pointed out that pursuant to the Article 3.1 of the Law on Jurisdiction Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (hereinafter "the LoJ"), EULEX Judges assigned to criminal proceedings have the jurisdiction and competence over any case investigated or prosecuted by the Special Prosecutors of Republic of Kosovo. On 18th November 2011 the President of the Assembly of EULEX Judges ruled that the trial panel in this case should be composed of a majority of Kosovo judges and assigned Dariusz Sielicki as Presiding Judge. The ruling was based on Article 3.7 of the LoJ. Therefore, the trial panel was correctly composed as a mixed panel of one EULEX Judge as a Presiding Judge and two Local Judges.

Main Trial

The main trial was held in public on 26th January and 6th February 2012 in the presence of the Special Prosecutor Maarit Loimukoski, the accused Besim Tahiri and his defense counsel Haxhi Millaku, the accused Njazi Tahiri and his defense counsel Masar Morina. On 26th January there were also the injured parties Qani Xhelili and Shemsi Xhelili and their counsel Halit Azemi present at the main hearing. Neither the injured parties nor their authorized representatives appeared on the next hearing despite the fact that they were properly notified at the end of the last hearing day about the date, time and place of resumption.

In accordance with Article 15 of KCCP, international interpreters translated the court proceedings and all court

documents relevant to the trial from English into Albanian and vice-versa, as necessary.

Summary and evaluation of evidence presented

The trial panel based its factual finding on the following pieces of evidence which were found to be fully credible: testimonies of the injured parties Qani Xhelili and Shemsi Xhelili given in the court on 26th January 2012, testimonies of Lulzim Krasniqi and Ali Berisha given in the court on 6th February 2012 and on the content of a video recording provided by the injured party Qani Xhelili which was presented to the panel and the parties on 6th February.

Both Xhelili brothers gave a detailed and logical description of the events. They quoted verbatim the threats that were made to each of them by both of the accused and they described how they reacted to the threats. The trial panel paid attention to all of the differences and discrepancies between the versions presented by the Xhelili brothers. The most apparent one dealt with their exchange of information about the threats i.e. which one of them had initiated phone communication between them on this matter and at what time. There were also discrepancies between the description of facts directly related to the handover of an envelope presented by Qani Xhelili and of the video recording of this handover. After meticulous reciprocal comparison of both Xhelili brothers testimonies and all the remaining pieces of evidence that had been assessed as credible the trial panel came to the conclusion that the above mentioned divergences and disparities resulted from the time lapse and natural imperfection of human memory. In fact, these divergencies and disparities assured the trial panel that the testimonies were fully spontaneous and had not been concocted beforehand by the witnesses. In essential elements all the above mentioned pieces of evidence including the video record fully corroborated and confirmed each other.

There were no doubts in relation to the authenticity of the video recording. The following parts indexed with time stamps embedded into the recordings were played back on TV screens that the courtroom is equipped with: 29th April 2011: from 15:36:13 to 15:38:15, from 16:00:04 to 16:05:17, from 16:45:21 to 16:50:01, and 30th of April 2011 from 00:13:17 to 00:32:27. Its authenticity was established by

Qani Xhelili's testimony who described how it was obtained and stored. Moreover, the authenticity had not been challenged by any of the accused or their defense counsels. The recording shows a male identified by Qani Xhelili as Njazi Tahiri approaching the business premises of Xhelili's brothers in a vehicle and then entering their office. It also shows a handover of an envelope that according to the Xhelili brothers' testimonies contained the ransom. Again, neither the identification nor the fact that the envelope was handed over to Njazi Tahiri was contested by the defense.

The trial panel also found the testimonies of two Kosovo police officers, Ali Berisha and Lulzim Krasniqi, to be reliable and trustworthy. They presented the facts in a logical and spontaneous manner and there were no elements in the evidentiary material that was admitted during the trial that contradicted their versions. The only discrepancy between Lulzim Krasniqi's and the Xhelili brothers' testimonies related to the amount of money put in the envelope handed over to Njazi Tahiri. This discrepancy seems to be a mistake that can be explained by the attributes of human memory and does not impair the positive assessment of the witness's credibility adopted by the trial panel.

The trial panel has admitted into evidence the criminal report of 30th April 2011, indexed with case number 2011-CA-0749 however it served only as a basis for establishing the fact that the Xhelili brothers' reported the threats to the police and how they presented the events that time. An information gathered by one person from another person concerning some event, condition, or thing of which the first person had no direct experience when submitted as evidence is called hearsay evidence. The KCCP does not explicitly prohibit the admissibility of hearsay evidence. However, pursuant to Article 158, if there is a likelihood that a person may give information about a criminal offence, the perpetrator and important circumstances relevant to the criminal proceedings then he or she should be summoned as a witness. It is therefore clear that the KCCP gives priority to direct examination of the source of information rather than to repetition coming from other person, and it is obvious that such repetition could not be more convincing than testimony of the source witness. Therefore the report was used not as a basis for fact finding but rather to verify the credibility of the injured

parties. It is the opinion of the trial panel that the report contained no elements contradicting their testimony.

Moreover, in conformity with Article 375 of the KCCP information about previous convictions in relation to both accused was presented during the main trial. There were no reasons to contest its accuracy.

The trial panel has critically assessed Nazji Tahiri's statement given in the court on 6th February 2012. The accused acknowledged coming several times to Qani Xhelili's office and collecting an envelope from him and alleged that he had agreed a voluntary loan deal with him without using any threats. When confronted with the injured parties' statements and video footage these allegations were not convincing at all. It is against common sense to believe that a reasonable entrepreneur would voluntarily lease such an amount of money to a debtor without any reliable and verifiable source of income as Njazi Tahiri was. It is also unlikely that a person asking for a loan would behave in such an obviously intrusive way as demonstrated by the accused i.e. by coming many times to the creditor and calling him repeatedly by phone. The accused had not presented any convincing reasons for why the injured party would agree to such an unreasonable request.

The accused Besim Tahiri chose not to take the stand at the main trial.

Reconstruction of facts

The following facts have been established by the trial panel as the result of the above assessment of evidence:

Brothers Qani and Shemsi Thalili run a construction supplies wholesale business in Gjilan/Gnjilane. On the morning of 29th April 2011 between 11.000 and 13.00 hrs Besim Tahiri approached Shemshi Xhelili at the parking lot near the premises of BKT Bank in Gjilan/Gnjilane. He introduced himself as, "Commander Qeqen" and also with his full name and surname and demanded that Shemsi Xhelili pay him Euro 20000 within 2 hrs time or otherwise he could forget his business, Kosovo, and his family. Shemsi Xhelili did not respond and he walked to the bank. Besim Tahiri sat in a car and followed Shemsi Xhelili driving slowly until he entered the bank. Then Besim Tahiri drove away.

A few minutes after 15.00 hrs Njazi Tahiri came to Qani Xhelili's business office in Gjilan/Gnjilane and demanded Euro 20 000 from him. The same afternoon he came to Qani Xhelili a further three times with the same demand. He also contacted him by phone several times and repeated the demand. He told Qani Xhelili that failure to pay would be bad for him and for his family.

In the evening the Xhelili brothers contacted the police. While they talked to police officers in the police station Njazi Tahiri kept calling Qani Xhelili reminding him of the demand. Qani Xhelili, acting in cooperation with the police, told him that he was arranging the money and arranged a meeting at around 24.00 hrs in his office. Both brothers went to the office. Njazi Tahiri came there and collected from Qani Tahiri an envelope containing Euro 2.000. He left without checking the contents of the envelope. Shortly after that he was arrested by the police.

According to information from criminal registry:

by judgment P.Nr. 199/2003, dated 25th June 2004, issued by the District Court of Gjilan/Gnjilane, Besim Tahiri was found guilty of three counts of kidnapping and was sentenced to an aggregate sentence of seven years imprisonment. By judgment AP 470/2004, dated 27th March 2007, the Supreme Court of Kosovo affirmed this judgment in relation to two counts of kidnapping. The third count is awaiting re-trial and therefore neither it nor the aggregate sentence are yet final;

Njazi Tahiri is to be considered as having not been convicted for a criminal offence.

Legal classification of the accused' action

Although the trial panel's finding confirm the facts presented in the Indictment, the legal classification of accused actions applied by the panel differs from the one presented by the Prosecution because it has not been proven that accused obtained or that they attempted to obtain a great material benefit.

The actions committed by Njazi Tahiri and Besim Tahiri constitute a criminal offence of extortion which is defined in the Article 267 paragraph 1 of the CCK. They both used serious threat in order to compel Xhelili brothers to pay a ransom in detriment of their property. The threats made by them must be considered by serious not only because of the reaction of the injured parties but also generally, i.e. from the perspective of any reasonable observer. The perpetrators pointed out to the consequences without saying how it is going to be achieved. Besim Tahiri told Shemsi Xhelili that Shemsi Xhelili could forget Kosovo, his work, and his family and Njazi Tahiri told Qani Xhelili that it would be bad for Qani Xhelili and his family. There are no doubts that these consequences are referred to substantial danger and harm to injured parties or their families. The threats were likely to be carried out in a variety of ways as both perpetrators are physically and mentally fit for it and there are no indications that they are unable to do it.

It must be presumed up to the level of certainty that both accused acted in cooperation. Although they never acted together in the same place and time their actions were visibly coordinated in time and also as to the content of their unlawful demands. There can be no other explanation of this synchronization and similarity of their actions other than to conclude that they executed a jointly accepted plan which and therefore that they jointly committed the crime which is an essence of co-perpetration described in Article 23 of the CCK

Neither the amount the accused received from the Xhelili brothers nor the amount that was demanded reached a threshold of "great material benefit" indicated by Article 267 paragraph 2 presented by prosecution as a legal classification of the crime at hand. There is neither authentic interpretation nor jurisprudence directly explaining this element of the crime. However, the trial panel applied *mutatis mutandi* interpretation given by the Supreme Court of Kosovo in the opinion dated 21st October 2010 with relation to expression "great material damage" used in the wording of the CCK which was defined as a value exceeding an amount of Euro 20000.

Therefore, the trial panel came to the conclusion that the criminal act committed by the accused is to be classified as the criminal offence of Extortion committed in co-

perpetration in violation of Article 267 Paragraph (1) in conjunction with Article 23 of CCK

Determination of the Punishment

While determining the punishment for each of the accused the court has been obliged to evaluate all mitigating and aggravating factors, pursuant to Article 64 Paragraph (1) of the CCK.

In relation to both of the accused the trial panel considered the aggravating factors as follows:

Extortion in Kosovo appears to be a frequently committed crime nowadays. It seriously affects or even stops development of entrepreneurship in Kosovo; therefore the punishment for this kind of crime should serve as a general deterrent for all potential perpetrators.

The accused acted avowedly, flagrantly, boldly, and therefore showing gross disregard to the possibility of being exposed to law enforcement which shows that their level of respect for the law is low.

They both have no permanent occupation that would serve as a source of income which should be seen as a factor making them prone to disobey legal order in the future.

In relation to Njazi Tahiri the trial panel considered as an aggravating factor his persistence in carrying on the criminal action which manifested itself in the multiplicity of his visits to Qani Xhelili and the phone calls he made.

In relation to Besim Tahiri the trial panel focused also on his previous conviction on two counts of kidnapping which are already final (judgment P.Nr. 199/2003, dated 25th June 2004, issued by the District Court of Gjilan/Gnjilane, judgment AP 470/2004, dated 27th March 2007 of the Supreme Court of Kosovo) and in this aspect on the obvious conclusion to be drawn that the conviction did not result in preventing him from reoffending.

As mitigating factors the trial panel took into consideration that:

The criminal action performed by the accused did not result in significant and permanent damage to the injured parties;

Their *modus operandi* was not sophisticated at all and should be seen as a primitive one, and because of that easy to protect against, as a matter of fact.

Additionally in relation to Njazi Tahiri the trial panel kept in mind that the accused is a head of family and he also owns a farm. Despite the fact that he does not derive any income from this it leads to the conclusion that there are social and economic links which should prevent him from committing a crime in the future.

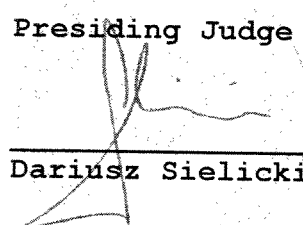
It was the duty of the court to credit the periods of time that the accused spent in detention on remand into the terms of imprisonment which were imposed respectively on each of them.

Costs

Since both Njazi Tahiri and Besim Tahiri were found guilty pursuant to Article 102, paragraph 1 of KCCP they shall pay a lump sum in the amount of 30 EUR each, and reimburse the cost of criminal proceedings with the exception of the cost of interpretation and translation.

A separate ruling on the amount of the costs shall be rendered by the court when such information is obtained pursuant to Article 100 Paragraph (2) of KCCP.

Presiding Judge



Dariusz Sielicki


Panel Member

Rasim Rasimi

Panel Member

Afrim Shala

Court Recorder



Joseph Hollerhead

LEGAL REMEDY:

Authorized persons may file an appeal in written form against this judgment through the District Court of Gjilan/Gnjilane to the Supreme Court of Kosovo, within fifteen days from the date the copy of the judgment has been served.