BASIC COURT OF PRISHTINA

Case number 721/12

DISSENTING OPINION

This dissenting opinion is dated 08/12/2014 and will be joined to the judgment.

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.

This criminal case is against the defendants H.S., Sh.B. and A.M., in which they are accused of blackmail, as "*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).

The 3 members of the panel agreed on the facts established and not established, as well as on the elements constituent of the criminal offense (attempt blackmail, Article 268, par. 1, P.C.C.K., without the aggravating circumstance of acting as member of a group, set in par. 2 – as charged with). Pursuant to Article 471, par. 4, the subscriber has not voted in the sentencing, for not being obliged to do so.

The defendants are being sentenced as follows:

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.

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Before addressing directly the core of this dissenting opinion, the subscriber wishes to notice also that the dissenting opinions are not expressly foreseen in the Law, for the first and second instance courts, only for the Supreme Court, in Article 407, par. 3, C.P.C.K.

The fact that the dissenting opinions are not expressly foreseen in the law for all instances does not mean they are prohibited. Actually, this issue has even been addressed in the final document of the Working Group on Criminal Judge in which the proposal of future amendments to the code were discussed, and approved by the Assembly of Eulex Judges, in March 2013.

Apart from that, it is worth mentioning that the practice of closing the dissenting opinions in an envelope is being abandoned, namely based upon the practice at the level of the Supreme Court, in which the dissenting opinions are joined to the judgment, and in one Judicial System, in One Country, should not be different practices in relation to the same issue.

Actually, the publicity of dissenting opinions corresponds to materializing the principles of transparency and accountability in Justice, not to mention the individual responsibility and independence of judges in adjudicating. In this regard it is paramount to highlight the Opinion no.11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, dated 18 December 2008, done in Strasbourg, namely points 51 and 52 (“51. In some countries judges can give a concurring or dissenting opinion. In these cases the dissenting opinion should be published with the majority’s opinion. Judges thus express their complete or partial disagreement with the decision taken by the majority of judges who gave the decision and the reasons for their disagreement, or maintain that the decision given by the court can or should be based on grounds other than those adopted. This can contribute to improve the content of the decision and can assist

both in understanding the decision and the evolution of the law. 52. Dissenting opinions should be duly reasoned, reflecting the judge's considered appreciation of the facts and law").

In the same Opinion by CCJE, final part "recommendations", in o), one can read "Dissenting opinions of judges, where allowed, can contribute to improve the content of decision and can assist both in understanding the decision and the evolution of the law. These opinions should be duly reasoned and should be published".

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Having said this, it is now explained why the subscriber is joining to the judgment, and making public, the dissident opinion.

The attempt, itself, 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 criminal offense". Apart from minor changes in the wording used by the lawmaker the definition remains the same.

But if one can say the wording in the definition of attempt has remained, essentially, the same from the Provisional Criminal Code of Kosovo (Article 20) to the current Criminal Code of Kosovo (Article 28), it is not any longer the case when it comes to the wording chosen by the legislator in relation to the requirement to punish an attempt.

In the view of the subscriber they should not have been sentenced because, with all due respect for different opinion, there is a misinterpretation of Article 20, par. 2, P.C.C.K. The dissenting arose from the interpretation of Article 20, par. 2. C.P.C.K., namely whether this attempt can be considered punishable, taken into consideration the provision set in the aforementioned Article but also the fact that the minimum of imprisonment foreseen for the criminal offense is from 3 months

of imprisonment up to 5 years, Article 268, par. 1, P.C.C.K. which is the relevant sentencing frame for this issue.

The other panel members have based their stance on the Jurisprudence of Kosovo, namely (in relation to Article 20, par. 2, P.C.C.K.) "how Kosovo interprets this provision and the it is that if it is possible to convict someone for three years of imprisonment; this is the jurisprudence of the Court of Appeals and the understanding in Kosovo" and "that is how it is accepted in Kosovo practice, three years is not the minimum of the punishment, but if it is possible to convict someone for three years, and in this case we have up to five years, so according to Kosovo practice is possible". As said, pursuant to the provision set in Article 471, par. 4, the subscriber didn't vote the sentencing, for not being obliged to such.

In relation to the evoked Jurisprudence, the majority of it by the CoA has been produced under the new Code, not before, but the purpose of this dissenting opinion is to explain why the understanding should be changed, as the Jurisprudence is itself subject to evolution, which requires that it is challenged if deemed necessary.

It is mentioned under the new code because the wording used by the legislator in relation to the cases in which an attempt is punishable has been changed.

As stated, before it read (Article 20, par. 2, P.C.C.K.), "punishable with imprisonment of at least three years". Now the legislator has used a different wording "a criminal offense for which a punishment of three or more years may be imposed shall be punishable" (Article 28, par. 2, C.C.K.).

It is paramount to notice that the lawmaker has changed the wording:

A) from an abstract "punishable", to a more concrete "for which a punishment of three or more years may be imposed", from the foreseen abstract punishment has moved to the punishment that can be imposed;

B) the expression "at least" is no longer used – which is typically connected with an abstract provision, as it was, punishable at least.

The words have a precise meaning.

The change in the wording of the law has changed and the expression “at least” was not used in vain, it means precisely what it literally says, only, “An attempt to commit a criminal offense punishable by imprisonment of at least three years shall be punishable. For instance, in the way the expression “at least” was used in Article 20, par. 2, it was not used in Article 90, par. 5, in which the word “punishable” is used but not the expression “at least”. This must have a meaning, the Jurisprudence cannot be developed based on the assumption that the legislator did not know how to express or that was not consistent in using the words.

The interpreter of the Law must assume that the legislator has known how to express its ideas, but also that that the legislator is consistent in the wordings used.

The jurisprudence evoked by the other members of the panel means in practice that the legislator wanted to punish all attempts of criminal offences in which it is possible to convict to three years of imprisonment, although this is not written in the law.

And it is not what the legislator wanted, because for the other cases, the legislator states that “an attempt shall be punishable only if expressly provided for by law, Article 20, par 2,. This is why the legislator, for instance in the example of the criminal offense of theft (in Article 252, par. 1, P.C.C.K., it is established that it is punished by a fine or imprisonment of up to three years”) has provided for in par. 2 of the criminal offense that “An attempt of the offense provided for in paragraph 1 of the present article shall be punished”.

If the evoked interpretation, the Jurisprudence, is right then it means that the legislator is inconsistent…or does not know the general rule: if in a case of theft 3 years of imprisonment may be imposed, why had the legislator to say in Article 252, par. 2, that the attempt shall be punished? – In short, the evoked jurisprudence or the understanding underlying it cannot be accepted by the subscriber. It is against the text of the law, against the consistency of the legislator just exemplified, not only with Article 90, par. 5, but also with Article 252, par. 2, P.C.C.K.

Another argument that must be rejected is the conclusion that the Jurisprudence produced under the new code applies, sort of *ipso facto*, to the cases that are subject to other code, the provisional. An interpretation is always an

interpretation of a given provision, in which each word counts, and as explained before the wording from Article 20, par. 2, of the provisional Code to Article 28, par. 2, of the current Code has changed substantially. This must have a meaning…

Also the principle of legality must be considered. 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 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.

As just said, the subscriber does not agree, as explained, not only because there is a retroactive application of jurisprudence but also because the undersigned believes that such understanding goes against the principle of legality, as it must be applied not only to the elements constituent of the criminal offense but also to other legal requirements related to its punishment, namely to their interpretation. In case of doubt or ambiguity an interpretation against the defendant cannot be accepted, this is line with the mentioned principle of legality, as set in Article 1, par. 3, P.C.C.K., "The definition of a criminal offense shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offence shall be interpreted in favor of the person being investigated, charged or convicted".

Finally, and considering the differences in the wording from one version of the code to the other, then the principle of the most favorable law applies (although this should not be needed, because the law that is to be applied is the one in effect at the time the criminal offense was committed, this is the general rule, the exemption is in the case the subsequent law is more favorable – Article 2, pars. 1 and 2, respectively).

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For the above mentioned reasons:

In the subscriber's view, the accused Sh.B. and A.M. should have been acquitted because pursuant to Article 364, par. 1.1, C.P.C.K., "the act with which the accused is charged does not constitute a criminal offence", as this attempt of blackmail is not punishable, in accordance with Articles 20, par. 1 and 2, and 268, par. 1, P.C.C.K. There is a legal requirement to punish the attempt that in this case is not present, the element "punishable with imprisonment of at least three years", as the *minimum* set for the criminal offense is three months.

The lawmaker of the Provisional Criminal Code considered at the time that the threshold for the intervention of the criminal system of justice was the attempt of a criminal offense punishable with a *minimum* of 3 years, regardless the cases in which the punishment of the attempt is provided by the criminal offense itself, "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 by law" (Article 20, par. 2, P.C.C.K. – as the example given above with Article 252, par. 2, the criminal offense of theft).

In the meantime, the lawmaker has changed the requirement to punish the attempt as now the Article 28, par. 2, C.C.K., states that "An attempt to commit a criminal offense for which a punishment of three or more years may be imposed shall be punishable. An attempt to commit any other criminal offense shall be punishable only if expressly provided for by law". In the new wording it is clear that the lawmaker changed the criterion, now it is the punishment that can be imposed within the *minimum* and *maximum* set in the criminal offense ("for which a punishment of three or more years may be imposed"), whereas before it was the *minimum* punishment provided for the criminal offense ("punishable by imprisonment of at least three years").

Therefore at the time of the facts the attempt of blackmail was not a punishable criminal offense, as an objective requirement for its criminal punishment was missing.

The facts may be subject to social disapproval but not to the criminal one, as the response by the criminal justice system is the *ultima ratio* of any society to

regulating relations between persons and it is up to the legislator to make the decisions of criminal policy and decide what falls beyond the limits deemed acceptable.

Nowadays, as said, the very same action would be a criminal offense, as the requirement of "for which a punishment of three or more years may be imposed" is met.

For all afore mentioned reasons the defendants Sh.B. and A.M. should be acquitted, pursuant to Article 364, par. 1.1, C.P.C.K., "the act with which the accused is charged does not constitute a criminal offence" – or, better said, does not constitute a punishable criminal offense.

Done in Pristina on the 8 December 2014,

The Presiding Judge

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(Eulex Judge Jorge Martins Ribeiro)