CASE TRANSLATION: **ESTONIA**

Case citation:
1-11-12390/28

Name and level of the court:
Tallinna Ringkonnakohus (Tallinn Circuit Court)

Date of decision:
2 October 2012

Members of the court:
Meelika Aava, Ivi Kesküla, Urmas Reinola

Appellant: **R Õ**

Respondent: **L J**

Representative of the appeal: **Northern District Prosecutor's Office and the lawyer of the victim**

Prosecutor: **Rainer Amur**

Lawyer of the victim: **Rainer Kuulme**

Lawyer of the respondent: **Indrek Sirk**

Estonia; admissibility of digital evidence; trustworthiness of digital evidence

IN THE NAME OF THE REPUBLIC OF ESTONIA

Tallinn Circuit Court

Decision

RESOLUTION

To annul the judgment of the Harju County Court of 25 May 2012 in criminal case No. 1-11-12390 regarding L J's acquittal under Section 423(1) of the Penal Code.

With the new decision:

1. Declare L J guilty pursuant to Section 423(1) of the Penal Code and punish her with 1 (one) year of imprisonment. Dismiss the violation of traffic regulation under Section 123 of the Penal Code (Section 50(3)1) and 2) of the Traffic Act since 1 July 2011) pursuant to Section 423(1) of the Penal Code.
2. On the basis of Section 73(1) and (3) of the Penal Code, the punishment shall not be enforced if L J will not commit a new intentional crime during a probation period of 3 (three) years. The start of the probationary period is considered to be the day the judgment is announced.
3. On the basis of Section 50(1)1) of the Penal Code, L J shall receive an extra penalty of suspension of her driving license for 3 (three) months. Pursuant to Section 127 of the Traffic Act, L J is obliged to hand over her driving license to the Road Administration within five working days of the decision entering into force.
4. On the basis of Section 310(1) of the Code of Criminal Procedure, to satisfy the victim's claim for the material loss in full, for the non-pecuniary damage in part and order for the benefit of the victim from the accused payment of EUR 20 966,10 (twenty thousand nine hundred and sixty-six euros and 10 cents).
5. To order on the basis of Sections 175, 179, and 180(1) from L J EUR 435 (four hundred and thirty-five) a penalty payment to the state revenue. The fine is payable to the account of the Ministry of Finance in SEB Pank 10220034796011 or Swedbank No 221023778606, reference number 2800049748, (explanation: the number of the decision and the person for whom the claim is paid and the type of claim).
6. On the basis of Section 180(3) of the Code of Criminal Procedure, leave the expenses related to the expert assessments in the amount of EUR 970,18 the expenses of moving the vehicle in the amount of EUR 22,50, the cost of making copies of the criminal file in the amount of EUR 14,58 and compensation for the victims contractual representative in the amount of EUR 2499,38, and the costs of the proceeding in the amount on EUR 3506,64, to be paid by the state.
7. To order the Republic of Estonia to compensate the costs of legal aid provided to the victim in the amount of EUR 2499,38 (two thousand four hundred nine euros and 38 cents).

8. Leave the 7 CDs of the materials on the criminal file.

9. To satisfy the appeal represented by the prosecutor in full. To satisfy the appeal represented by the victim in part.

10. To order the Republic of Estonia to pay the costs of legal aid in the appeal proceeding: EUR 400,71 for the victim, EUR 384 for the accused.

The procedure for appeal

The decision of the Circuit Court can be appealed to the Supreme Court by way of cassation within 30 days through the Tallinn Circuit Court. The accused has the right to file a cassation through her lawyer. The party shall inform the Circuit Court of the desire to use the cassation right in writing within 7 days.

ACCUSATION

1. L J is accused of violating traffic regulations pursuant to Sections 33(2)8), 50(3)1) and 2), 17(2)3) of the Traffic Act. She was driving on 5 September 2008 at 11:50 AM a motor vehicle Honda Civic, registration number 344 AKD on Suur-Sõjamäe street towards Tartu highway in Tallinn, reaching a regulated crossroad near Suur-Sõjamäe 4 (Ülemiste shopping centre). Then she stopped prior commencing left turn, she gave way to a vehicle driving on the main road and started performing a left turn manoeuvre towards the Ülemiste shopping centre, but she did not ascertain before making the manoeuvre that it was safe and did not endanger other road users, she did not adjust the speed of her vehicle in a way that would take into account all other traffic conditions and which would have allowed her to stop her car in case of any unforeseeable obstacles, such as other cars driving on the main road. She did not stop the vehicle even though there was another motor vehicle driving on the main road, that must have been seen at least for 114 meters, meaning she did not give way to a motorcyclist driving in the opposite direction on the main road of Suur-Sõjamäe driving from Tartu highway towards Lasnamäe whilst green (allowing) traffic light with Yamaha YZF-R1, registration number xxxxxxx, thus the victim rode into the right side of the accused car, rushed over it, landed on asphalt, and sustained life-threatening injuries.

L J violated the following traffic requirements with negligence: Section 91 of the Traffic Code (since 2011 Section 33(2)8) of the Traffic Act) the driver must ascertain before making a manoeuvre that it is safe and does not obstruct or endanger other road users; Section 123 (since 2011 Section 50(3)1) and 2) of the Traffic Act) the driver must adapt the speed of their vehicle to the situation but must not exceed the speed limit. The driver must take into account when choosing the speed, his or her driving experience, road conditions, state of the road and the vehicle, peculiarities of any goods carried, weather conditions, density of the traffic and other traffic conditions so that he or she is able to stop the vehicle within the range of visibility in front of the vehicle and without hitting any obstacle that can reasonably be expected to be on the road; reduce the speed and, if necessary, to stop if the conditions so require, especially if visibility is poor; Section 156 (since 2011 Section 17(5)3) of the Traffic Act) drivers of trackless vehicles must give way upon turning left to the road users driving into oncoming traffic or to drivers overtaking such road users.

L J committed a qualified criminal offence under Section 423(1) of the Penal Code, i.e. violation through negligence of traffic requirements or vehicle operating rules by a driver of a motor vehicle and thereby causing major damage to the health of a person.

THE DECISION OF HARJU COUNTY COURT:

2. Harju County Court ruled L J not guilty under Section 423(1) of the Penal Code.

In accordance with Section 310(2) of the Code of Criminal Procedure, the victim's civil action totalling EUR 23 335,18 (twenty-three thousand three hundred thirty five euros and 18 cents) was dismissed by the court. On the basis of Section 181 of the Code of Criminal Procedure, all procedural expenses were withheld from the state.

The County Court found that the victim had exceeded the speed limit prior to the accident. In this criminal case it has not been unequivocally identified in which lane the collision between the motorcycle and the car took place.

According to the court's assessment, given the location of the injuries of the car, the accident might have happened on the first lane. Pursuant to the technical traffic expert report No. 11ELL0039 carried out on 20 July 2011, if the accident took place on the first lane, the accident would not have happened if the motorcycle was driving at the permitted speed limit.

The court found that in the present case it is not possible to slander the accused of not fulfilling his duty of care. The court found that the accusation is not substantiated enough and it is incomprehensible what the infringement was in the sense of Section 123 of the Traffic Code, thus there is no legal basis to accuse L J of violating Section 123 of the Traffic Code.

The court applied *in dubio pro reo* principle and pursuant to Section 7(3) of the Code of Criminal Procedure, a suspicion of guilt regarding the accused which has not been eliminated in the criminal proceeding shall be interpreted to the benefit of the accused.

APPEALS:

3. In the prosecutor's submission, the motives of the judgment mainly consist of the analysis of evidence, which are centred around proving the speeding of the victim, but the court used the evidence selectively and failed to take into account that some of the evidence was not trustworthy.

The victim testified at the court that he did not exceed the speed limit, because his speed was ranging between 50-60 km/h. He said that he approached the crossroad on the motorcycle with straight back on the second lane when suddenly the manoeuvre of the accused cut his lane off. The victim braked in a way that the rear wheel went up in the air, but nevertheless the collision happened between the right side of the car and the motorcycle. There is no reason to believe that the victim who has been warned of knowingly giving false testimony would deliberately lie in the court, having testified convincingly in both pre-trial and in the court proceedings that he did not exceed the speed limit.

The prosecutor agrees with the court that had it been revealed during the court proceeding that the victim significantly exceeded the speed limit, then the principle of trust in traffic would apply. However, the court did not find evidence that would prove that the victim was significantly exceeding the speed limit. Unlike the court, the prosecutor is convinced that a reverse situation became apparent during the court proceedings – when assessing the trustworthy evidence in aggregate, it is apparent that the accused was negligent, commencing the manoeuvre at the time the motorcyclist was already very close to the crossroad.

In addition to the victim, there was only one witness at the scene of the event who could have testified about the speed of the motorcyclist and surrounding circumstances. The witness, T M, who saw the motorcyclist approaching the crossroad and the collision with the vehicle driven by the accused. Other witnesses who testified in the court were not able to give testimony about the speed of the motorcyclist and surrounding circumstances. Witness M stood with his vehicle on the second lane of the drive-out of Ülemiste shopping centre parking lot as the first car and saw the motorcyclist approaching the crossroads. Nothing interrupted his view. The witness specifically said in the court that he was watching the motorcyclist and even wondered why he was driving so slow. Witness M was completely convinced in the court that the motorcyclist was driving at the permitted speed limit and did not exceed it. He assessed the speed of the motorcyclist according to his own driving experience and the view he saw. Witness M described in detail how the motorcyclist approached the crossroad – the motorcyclist was in the second lane, his back was straight and he drove to the crossroad where his rear wheel was raised into the air and immediately after it collided with a red car that was perpendicular to the motorcycle.

There is no reason to think that the witness, knowingly warned against giving false testimony, would lie for the benefit of a stranger, i.e. the victim, risking being punished himself. It became apparent in the judicial investigation that witnesses V V and V M did not see the collision and arrived at the scene later.

The witness M K, who was in the accused's car at the moment of the collision was not able to give testimony about the accident, because he did not observe the traffic, but was busy with work. Witness K was not able to give testimony about the speed and distance of the approaching motorcyclist.

The court held the testimony of witness L M to be trustworthy, using the testimony for providing reasons the judgment. The court has overlooked the fact that witness M confirmed in the court that his memory is deceptive. The deception of his memory became apparent at the hearing, where he testified that during the accident, his car was on the left lane on Ülemiste road as a third car, but it turned out to be false. After giving the testimony, during the cross-examination, the witness recognized from the video recording that his car was in the first lane and was the first car. On this, the witness said that consequently his memory is deceived. Therefore, the testimony of such a witness cannot be considered trustworthy as a

whole, because if one important fact is deceived by his memory, there is no certainty that it would not deceive other important facts as well. The court did not refer to that in the judgment. Therefore, the testimony of witness M cannot be trusted regarding the fact that he did not see the approaching motorcyclist, yet heard it and it sounded like the motorcyclist was exceeding the speed limit. At the same time the witness was not able to say numerically how quickly the sound approached. The prosecutor submitted that the testimony of a witness whose defective memory had been detected in the court, is not trustworthy and should be excluded from the evidence.

In conclusion, the prosecutor submits that the court has assessed the evidence one-sidedly and selectively. Victim R Õ's and witness T M's coinciding testimonies directly prove that the motorcyclist did not significantly exceed the speed limit when approaching the cross-road, the motorcyclist was in the second lane and the victim's vehicle suddenly maneuvered across the motorcyclist. Witnesses V V, V M and M K did not see the accident, thus it is not possible to assess the speed of motorcyclist with their testimonies.

In additional to personal evidence (testimonies), the court also examined written evidence and video recordings. The main evidence on which the court relied on was the video recording of a security camera, located on the side of Ülemiste shopping centre, which depicts the motorcycle approaching the crossroad.

The prosecutor argued that it is impossible to reliably determine the victim's speed from the original video recording, because the timestamp on the footage is unreliable and the footage is incomplete. The prosecutor found that the footage was missing several frames, was frozen at some points while the time indicator kept going, and was pixelated, thus could not be used to calculate the victim's speed. The court has not referred to this fact in the judgment. The prosecutor stated that the video recording could have been taken into account only to assess the reliability of given oral testimonies.

The court compared the video recording of the security camera dated 5 September 2008 and the staged footage recorded during a research experiment on 11 July 2010.

The prosecutor cannot agree with the way the court provided reasons in the judgment with the evidence. There is no evidence regarding the fact that the cameras of 5 September 2008 and 11 July 2010 footage were the same. It is apparent from the comparison of the two, that the cameras used were different. The quality of the recording of 11 July 2010 is significantly better than the quality of 5 September 2008 footage. Furthermore, the camera angle is completely different, thus it is impossible to place the police motorcycle in the exact same place as the victim's motorcycle was on 5 September 2008. Therefore, the conditions on 5 September 2008 were completely different from the ones on 11 July 2010 (about 2 years had passed). Consequently, it is false to claim by the court that the comparison of the two video recordings proves the fact that the victim was exceeding the speed limit. The prosecutor submits that it is impossible to make trustworthy conclusions about the speed of the motorcyclist by comparing the video recordings.

The court also considered the other experimental research project carried out by the case handler for the purposes of identifying the speed of the motorcyclist as evidence. The experiment was carried out on 11 May 2011, however it did not reveal the exact location of the motorcyclist on Suur-Sõjamäe street, but merely gave an overview of the probable locations. Probable locations were marked as A and B. During the traffic expert examination, the expert calculated the probable speed of the motorcyclist deriving from the distance between A and B. The outcome was 62 km/h or 118 km/h. The purpose of this research experiment was to prove the average speed of the motorcyclist, but taking into account the quality of the video recording of the security camera (it was used as an example for determining the possible locations of the motorcycle on Suur-Sõjamäe street), camera angle, and the results of the experiment, the calculations are not trustworthy, because if there occurs a mistake of even a meter, then the speed calculations are immediately different. Evidence cannot be hypothetical, but the results of the research experiment are, thus the experiment did not reach its purpose. Therefore, the research experiment and the results of it cannot be deemed as trustworthy since the possibility of error in the assessment of the speed of the motorcyclist is too high.

Thus, the prosecutor finds that experiments made, and the video recording of the security camera do not

prove that the motorcyclist exceeded the speed limit, but merely show how misleading a recording can be. Similarly, carrying out research experiments in pre-trial proceedings with unreliable results does not mean that the doubt should be ruled in the benefit of the accused. Not trustworthy evidence should be excluded from the evidence in aggregate. In the present case, the actions of the accused must be judged on the basis of trustworthy evidence.

During the course of the criminal proceeding, several expert traffic examinations were carried out for the purposes of determining the speed of the motorcyclist. The court has found in its judgment when analyzing the expert report No. 11ELL0039 that the expert has given an opinion stating that the speed of the motorcyclist was 50 km/h at the time of the accident. In fact, the expert report states that the speed of the motorcycle at the moment of the accident cannot be calculated computationally, since it is impossible to determine the location of the vehicles at the moment of the collision. Deriving from the damage to the vehicles, it is possible to roughly estimate the speed of the motorcycle, which at the time of the collision must have been in the range of the permitted speed. Therefore, it is an estimate of an expert rather than a fact. The court has not taken the aforementioned into consideration when providing reasons in the judgment.

The prosecutor believes that the evidence presented in the court (the video recordings and the reports of the research experiments) cannot be deemed as trustworthy and cannot be taken into account when determining the speed of the motorcyclist. Excluding the aforementioned evidence that cannot be considered to be trustworthy, it is possible to fully demonstrate the fault of L J under Section 423(1) of the Penal Code.

L J's guilt can be proved with the victim R Õ's, witness T M's, expert T E's and accused L J's testimonies, which must be assessed in accordance with the video recordings of the security camera of Ülemiste shopping centre and expert examinations.

The court has essentially found that L J cannot be accused of violating the Traffic Code because she was convinced about the safety prior to the manoeuvre. The prosecutor does not agree with such conclusion. L J testified in court that she stood before the left turn to pass through two vehicles on the main road. It can be seen from the video recording of the security camera, that the traffic on the crossroad disappears at 11.47.58.343, she started her manoeuvre from Suur-Sõjamäe street to the road leading to Ülemiste shopping centre at 11.48.5.890. Therefore, at that time, she could have not stood on the crossroad. At 11.48.23.703 a white vehicle approaches the crossroad from the Tartu highway. After that, there are no vehicles prior the motorcycle. Therefore, L J was wrong in the number of vehicles driving in opposite direction.

The court assessed the manoeuvre and the speed of the accused only through subjective evidence, i.e. the 22 April 2009 oral statement of the victim and protocol of the surroundings, and 16 February 2010 technical traffic report no LL-5-10/130. The court found that that the victim must have been driving faster than the permitted 50 km/h, because the estimated time to clear the crossroad and complete the manoeuvre was between 4.9 to 7.0 seconds. At 50 km/h, vehicle passes 114 meters in 8.2 seconds, which is estimated to be the longest possible time at the permitted speed limit to pass the distance of the manoeuvre. From this, the court concluded that regardless of the speed of the accused, she would have cleared the road at least 1.2 seconds before the victim reaching the crossroad, thus the victim had to drive faster than permitted 50 km/h.

Firstly, the court misinterpreted L J's testimony about the moment when she started the manoeuvre and how far was the motorcyclist at that moment. L J testified that whilst standing on the crossroad, she looked twice to the direction the motorcyclist came from prior to the manoeuvre. At the first time, the motorcyclist was on the peak after the curve, which was 114 m away deriving from the testimony and its association with the surroundings. L J said that after seeing the motorcyclist in the curve, she did not start the manoeuvre, but she also looked at the motorcyclist a second time and at that moment the motorcyclist was in a place where there was a traffic sign on the safety island and white lines. Deriving from the testimony and its association with the surroundings, the distance was 98.4 m. According to her own statement, L J started the manoeuvre after the second look.

Secondly, the distances calculated upon the testimony of the accused and its association with the surroundings is hypothetical and approximate, and the possibility of error is very high.

Thirdly, the expert's calculation about the speed and manoeuvre passing time is purely theoretical and

computational, and based on the prerequisite of the accused performing the manoeuvre at an ideal angle and with a particular acceleration. However, the video recording shows that L J had plenty of time to perform the manoeuvre, but for some reason she did it at the time the motorcyclist was very close to the crossroads. Therefore, it is impossible to trust the assessment the speed of the motorcyclist, which is based upon the testimonies, its association with surroundings, and the expert report no LL-5-10/130, yet the court has accepted it.

According to the court, it has not been proven in which lane the collision between the car and motorcycle happened. The prosecutor does not agree with this position. R Õ as the victim gave specific testimony that he was in the second lane. The witness T M also unambiguously confirmed that the motorcyclist was moving into the second lane. Also, from the video recordings of security cameras it can be seen that just before the accident, the motorcycle was in the second lane, near by the left side road line, which marks the separation of road directions.

The court has referred to the expert opinion that the occurrence of the accident in the second lane should be excluded if the motorcyclist reacted to the threat situation at the moment it emerged, i.e. at the moment the accused commenced the left turn and the motorcyclist linked it to R Õ not being in the second lane. The court has used the expert opinion only to the extent it allows to offer a reason for the fact that the victim was not in the second lane, but the court has not taken into account the expert's actual answer to the question asked as a whole. The expert gave testimony regarding the victim driving in the second lane, but in reality he cannot answer the question, because it is purely hypothetical, because it is not known when the threat was actually responded to. Therefore, the expert has not given an opinion on the circumstances of the specific accident, which would reflect that it is excluded that R Õ could have been in the second lane, thus the court reached a false conclusion.

Another factor in which the court finds that the collision between the motorcycle and the car took place in the first lane, are the conclusions about the damage to the car. However, the court has not justified what specific damage resulted in such conclusion. Even if a traffic expert was not able to form an opinion about where exactly the collision happened, then the court cannot act as an expert and give an opinion that requires special knowledge.

The prosecutor finds that the conclusions of the court about the location of the collision between the car and the motorcycle do not correspond to the proven facts and evidence. Evidence has shown that the collision occurred in the second lane.

The court has found that although the actual speed of the motorcycle has not been determined as a result of inadequate initial data, witnesses' testimonies and the testimony of the accused, the injuries of the motorcyclist, which are unlikely to occur at a speed of 50 km/h, refer to the motorcyclist exceeding the speed limit. According to the prosecutor, the court has also taken an expert role here, providing expert knowledge of the seriousness of the damage to health. The court cannot make such assessments. Nor has the court specified which witness statements indicate that the motorcyclist exceeded the speed limit.

In the opinion of the prosecutor, it has been proven that L J was obliged to give way to the vehicles on the main road, including the victim R Õ. As there was a collision between the victim's vehicle and the accused's vehicle, the accused did not give way to the victim, resulting in life threatening injuries to the victim.

All trustworthy evidence – the testimony of the victim, the testimony of the witness M, the expert opinion about the speed range and the video recording of the security camera, all confirm that the motorcyclist did not significantly exceed the speed limit. The prosecutor also finds based on the same evidence that the motorcyclist was in the second lane. The prosecutor points out that L J has given statements about the situation where the motorcyclist approached the crossroad. L J said that she saw the approaching motorcyclist in the second lane. It is not logical that the motorcyclist, driving in the second lane would move to the first lane just before the accident, into the direction the car was manoeuvring. No expert opinion excluded the fact that the motorcyclist was in the second lane. Thus, in can be concluded unanimously that R Õ was in the second lane at the moment of the accident.

The prosecutor points out that points 8 and 9 of the expert report No. 11ELL0039, which refers that even if the speed of the motorcyclist was 62 km/h and the accident happened on the second lane, the car of the

accused caused a risky situation to the motorcyclist. The motorcyclist had no opportunity to avoid the collision, even if he was driving 50 km/h, because the manoeuvre time of the accused's car still remains within the time cap where the motorcyclist cannot effectively brake, meaning that he felt the danger earlier and started braking earlier, which also reflects L J's testimony. Namely, L J has said in the court that prior to the manoeuvre she first stopped at the stop line, then she moved a little further to make sure no one was coming and then started the manoeuvre. The victim has also said that the car started moving, then stopped, which resulted in that the victim started slowing down the speed. Therefore, the even if the victim exceeded the speed limit by 12 km/h, it would not be a cause of the accident.

Leaving aside the evidence, that is not trustworthy in its content, there is another item of evidence, the trustworthiness of which can be assessed by monitoring the video recording of the security camera. The testimony of witness T M is fully compliant with the video recording of the security camera and other witnesses' testimonies who arrived at the scene after the accident. The testimony of the victim is in line with the testimony of witness M and expert's statements regarding the speed and location of the collision. The video recording of security camera raises questions about the testimonies given by the accused. In addition, the testimonies of the accused were repeatedly contradictory to the ones given in pre-trial proceedings, which is why the court should be sceptical towards the testimonies of the accused.

Thus, the prosecutor finds that the court has misapplied substantive law, having assessed the evidence one-sidedly and inadequately, and began to unduly accuse the victim and having analysed the evidence selectively, which led to wrong conclusions.

Deriving from the aforementioned and from Sections 318, 319, 338(2), 340(4)2) and 3) of the Code of Criminal Procedure, the prosecutor asks to overturn the 25 May 2012 decision no 1-11-12390 of Harju County Court about acquitting L J under Section 423(1) of the Penal Code. To make a new decision to deem L J guilty and punish her pursuant to Section 423(1) of the Penal Code with 1 (one) year of imprisonment, which shall be conditionally suspended under Section 73(1) and (3) of the Penal Code, if the convicted will not deliberately commit a new criminal offence during 3 (three) years of probationary period. To deprive the convicted of the right to drive a motor vehicle for 3 (three) months under Section 50(1)1) of the Penal Code.

4. The representative of the victim contests the 25 May 2012 decision of Harju County Court in its entirety and asks for the judgment to be set aside. He asks for a new decision to declare the accused guilty in accordance with Section 423(1) of the Penal Code and to satisfy the civil action of the victim against the accused to order EUR 23 335,18 for the benefit of the victim and to leave the costs of the proceeding, including the expenses of the contractual representative to be compensated by the state.

The testimony given by the accused at the County Court hearing are contrary to the testimony given in pre-trial proceeding, thus her testimonies cannot be deemed as trustworthy and these should not be taken into account in resolving this case. The representative of the victim refers to the testimonies of the accused and notes that despite the above-mentioned contradiction, the court has not paid any attention to those contradictions and has wrongly acquitted her on the basis of the controversial testimonies. The incorrect conclusion of the County Court that the victim exceeded the speed limit prior to the accident, is contrary to the evidence gathered in the proceeding, and the County Court has assessed the evidence erroneously, selectively, provided reasons for the decision with hypothetical opinions, that are not based on any evidence gathered in the proceeding.

The court's conclusion that, given the location of the injuries on the car, the collision might have occurred in the first lane is incorrect and is not based on any evidence presented in the file and is hypothetical.

The following evidence confirms unequivocally that the accident happened in the second lane: the victim's testimonies, the accident report with the scheme, the accident scenery report photos no 1 and no 3, testimony of the witness M K, testimony of the witness V M, testimony of the witness T M. Stating incorrect and contrary to the above evidence, that the victim exceeded the permitted speed limit, the court has not taken into consideration the above-mentioned evidence (which clearly states that the victim did not exceed the speed limit) is in violation of the laws of criminal procedure.

Selective assessment of evidence is on the one hand, a violation of the obligation to provide reasons for the

judgments under Section 339(1)7) of the Code of Criminal Procedure, and on the other hand one-sidedness of judicial investigation under Section 338 (1) of the Code of Criminal Procedure (see the 19 December 2011 judgment of the Supreme Court no 3-2-1-92-11 p 13).

The victim emphasizes that the video recording of the security camera of Ülemiste shopping centre is clearly not valid as an evidence, taking into account the fact that some of the frames are missing. The position of the County Court is incorrect, that the evidence gathered in the case do not fully demonstrate the guilt of L J in committing the traffic accident.

The representative of the victim brought out the content of Section 423(1) of the Penal Code, Sections 91, 123, 156, and 226 of the Traffic Code and finds that the evidence confirms the violation of traffic requirements the L J is being accused of and which caused life threatening health damage to the victim. He presents the testimonies of the victim, witness T M, T E, V M, expert opinion of Lt T and statements given at the hearing and the decision of the Supreme Court No. 3-1-1-8-10. He finds that the court has fundamentally breached the law of criminal procedure by making a decision where the conclusion of the court's decision does not correspond to the facts established by the evidence – pursuant to the evidence, the accused violated her duty of care and the victim did not exceed the speed limit, and the victim had no opportunity to prevent the accident, in spite of driving at the permitted speed, thus according to the evidence, the accused must be deemed guilty.

The representative of the victim considers that it has been proven and there is no dispute about the fact that the victim sustained life threatening injuries as a result of L J's violation of the traffic requirements (see expert report No. 276 and No. 26 by the expert A V, which depict that the injuries were life threatening).

Deriving from the foregoing, L J must be deemed guilty under Section 423(1) of the Penal Code. Taking into account the unbearable physical and mental pain and suffering, a significant and sustained decline in the quality of life of the victim and considering the relevant case law, a reasonable and fair amount of money for the non-material damages would be at minimum EUR 22 369,08, which the victim requests with the material damages of EUR 966,10 (medical expenses EUR 115,08 and broken safety equipment/helmet EUR 850,02), in total EUR 23 335,18. The victim applies for oral proceeding and wishes to participate in the oral hearing.

THE OPINIONS OF PARTIES TO THE PROCEEDINGS DURING APPEAL PROCEDURE

The accused and her representative find that an acquittal decision is in accordance with the law and there are no grounds to overturn it.

Prosecutor presents an appeal and asks for the County Court to overturn the acquittal judgment and declare the accused guilty in accordance with the appeal.

The representative of the victim supports the appeal and applies for the County Court decision to be overturned and to satisfy of the appeal.

THE REASONING OF THE CIRCUIT COURT

6. The panel of the court, having examined the materials of the file, the allegations of appeals, hearing both parties of proceeding, finds the decision of County Court based on appellations to be overturned.

The criminal offence stipulated in Section 423(1) of the Penal Code amongst other things contains violation through negligence of traffic requirements or vehicle operating rules by a driver of a motor vehicle and thereby causing major damage to the health of a person.

In this case, it is not disputed that L J, after arriving to the Suur-Sõjamäe 4 crossroad, which is controlled by traffic lights, and stopping to make a left turn was obliged to give way to the driver approaching the crossroad in opposite way /Section 156 of the Traffic Code; currently in force Section 16 of the Traffic Act/ and before carrying out the manoeuvre had to ensure that it was safe and did not interfere with other road users.

There is no dispute that the victim R Õ, driving a motorcycle, moved along Suur-Sõjamäe street towards Lasnamägi and the traffic light at the crossroad was green. According to the Traffic Code, he had a privilege over the accused to go over the crossroad first.

There is also no dispute that L J made a left turn, but without reaching the crossroad, the motorcycle driven by R.Õ hit the right side of vehicle.

There is also no dispute that as a result of this traffic accident, R.Õ received a life-threatening health damages.

Two vehicles participated in this accident. In County Court decision and also in the appeal, there are references to Supreme Court decisions, according which only a person can be held liable and responsible for this accident. When investigating a traffic accident that involves multiple parties, the investigation must be impartial, comprehensive and objective in order to determine whether and who has violated traffic law and whose (traffic offending) act caused this consequence.

The County Court has assessed the actions of both the victim and the accused in the determination of the circumstances of the traffic accident, and thus has complied with the instructions of the Supreme Court, but has come to the conclusion, which is wrong in the mind of appellants and the panel of the court, as they find it is wrong to conclude that the result of the verdict was caused by the victim's violation of the traffic requirements.

The County Court has in its decision assessed the testimonies of the accused, the victim and the witnesses as personal evidence. The victim's representative has referred in the appeal to the mistakes that have been made in the assessment of the personal evidence, in particular in regard to the testimony of the accused. The representative has again brought out the contradictions between the testimony given by the accused at the court hearing and given by her as a witness.

The panel of the court notes that, as regards the claims made by the victim's representative in the appeal, in 1997 case No. 3-1-1-36-97 the Supreme Court stated that the testimony given by the accused in pre-trial investigation can be used as evidence only if these coincide with other statements from the same person and the same person has confirmed the pre-trial statements during the proceeding, in which the rights of defence are guaranteed to her. Consequently, the testimonies of the accused will not be deemed as untrustworthy because of the differences in them, thus to that extent the request of the victim's representative will not be satisfied.

It is relevant what the prosecutor stated in the appeal that witnesses V V, V M and M K, were not able to give testimony about the circumstances of the accident, because they did not see the accident and it is impossible to determine the speed of the motorcyclist based on their testimonies.

L M admitted at the court hearing that his memory is deceptive, that he did not see the collision, nor the approaching motorcycle, he just heard the sound of the approaching motorcycle. He cannot determine the speed of the motorcycle, but by the sound of it, it could have been faster than 50 km/h. The panel of the court finds that it is impossible to determine upon L M's testimony whether the motorcyclist exceeded the speed limit significantly.

The appellants have rightly stated that testimonies of the accused R Õ and the witness T M are coincidental, and it is factually apparent from the testimonies referred to in the judgment.

The victim R Õ has testified that he crossed the Tarty highway and drove on the Suur-Sõjamäe street to the direction of Lasnamäe in the first lane at 50-60 km/h. It was the first vehicle and it changed the lane to the second one in the smooth curve on Suur-Sõjamäe street. Whilst exiting the curve, the motorcyclist saw the Honda Civic on the crossroad and the car's direction indicator was blinking. The motorcyclist understood that the accused wished to make a manoeuvre. He continued driving, the traffic light was green. When he first saw the car, it seemed that she began commencing the manoeuvre, he took the gas off the motorcycle, but then the car stopped again. He continued to drive normally. Right before the crossroad, he saw people sitting in the car and was very close to the car, the car suddenly commenced the manoeuvre and drove in front of him. He braked sharply, the rear wheel raised up and the collision was immediate.

Also witness T M who was waiting on the crossroad to exit the parking lot of the Ülemiste shopping centre, testified that he was watching the approaching motorcyclist. The motorcyclist drove at an ordinary speed, around 50-60 km/h. He precisely noticed the motorcyclist because of he was not speeding. The witness evaluated the speed according to visual sight. The County Court found that the motorcyclist had to significantly exceed the speed limit, and has not provided reasons to exclude the testimony of the victim and the testimony of T M, which matches the statements of the victim.

According to the testimony given by T E at the court hearing, to which the court has referred to in the judgment, in his expert opinion, the victim has a powerful braking system that should be able to stop at 100 km/h after 35-40 meters. Raising the rear wheel in the air is already possible at 30 km/h. Thus,

pursuant to T E testimony, the fact that the rear wheel was in the air does not prove that the victim exceeded the speed limit.

The accused has testified that while standing on Suur-Sõjamäe street and waiting for the possibility to make the left turn, she let the cars driving in the opposite direction pass by, and the first time she saw the motorcyclist after the curve of Suur-Sõjamäe street. During the experiment, it was detected to be 114 meters from the crossroad. Prior to commencing the manoeuvre, she looked again to the direction of the motorcyclist, and the motorcycle was considerably ahead of the approaching column of cars. It seemed that the motorcycle was driving in the middle of the road and was closer than the cars. The second time she saw the motorcycle, it was by the dividing strip road sign. She was not able to assess the distance, but during the experiment it was assessed. After the accident, her car was towed out of the way of the ambulance car. Pursuant to the testimony of the accused, the distance of the motorcyclist from the crossroad at the moment of the accused commenced the manoeuvre was detected to be not 114 meters, but 98 meters. she was not able to assess the speed of the motorcycle. Even though she saw the motorcycle, she thought it was possible to finish the manoeuvre safely.

The County Court concluded from the 22 April 2009 testimony given by the accused and the association protocol of the surroundings, that the accused commenced the manoeuvre when the motorcyclist was 135.3 meters away from the crossroad. Such a conclusion is false and contradicts the testimony of the accused, in which she said that she noticed the motorcyclist at the curve, which is around 114 meters away from the crossroad, and she did not immediately commence the manoeuvre, but she started after looking the second time in the direction of the motorcyclist.

The panel of the court considers that it is not possible to determine the speed of the motorcyclist by assessing the testimonies. According to the victim, his speed was up to 60 km/h, which was reduced after the curve and then again recovered after the curve, but he did not look at the speedometer. According to the testimony of L M, the speed of the motorcyclist might have been over 50-60 km/h. Pursuant to the testimony of T E, the rear wheel of a motorcycle raises into the air already at the speed of 30 km/h.

However, the panel of the court considers that on the basis of above mentioned evidence and in particular on the basis of the testimony of the victim, it can be concluded that the victim exceeded the speed limit of 50 km/h. In fact, the victim's representative has referred to that in the appeal, but mistakenly came to the conclusion that the victim had not exceeded the speed limit. It is not arguable that the maximum permitted speed is 50 km/h on that road.

In the written evidence, the County Court has indicated that in the criminal case the recording of a safety camera, which was attached to the shopping centre, has been certified as evidence. Based on the recordings of 11 May 2011 there was an experiment, which is also documented. Based on the results of the experiment an expert report was prepared on 20 July 2011. Also, there was a experiment conducted on 11 July 2010. The court then notes that according to the court, a comparison of recordings that were recorded in the same location and by same cameras, indicate that R.Õ speed was not 50 km/h, but by the time of the accident it was significantly higher.

The panel of the court considers that on the basis of the materials of the criminal case, it can be ascertained, and it is also referred in the appeals, that the cameras on the Ülemiste Center on 5 September 2008 and 11 July 2010 were not the same. The quality of the recording in 11 July 2010 is considerably better than it was on 5 September 2008, in addition the camera angle was different, which is why the location of the police motorcycle could be different of the victim's motorcycle on 05 September 2008. Therefore, the conditions of 5 September 2008 were significantly different.

Therefore, the conditions of 05 September 2008 were significantly different from the conditions of 11 July 2010, which is why there is an incorrect statement by the court that a comparison of these recordings proves that the victim has exceeded speed limit.

The purpose of the experiment conducted on 11 May 2011 was to determine the speed of the motorcyclist. However, during the experiment the exact location of the motorcyclist in the Suur-Sõjamäe street could not be determined, so they were based on possible locations. The panel of the court notes that, although after two years from the events it cannot be ensured that the investigative experiment is fully compatible with the circumstances of the event under investigation, however it should be ensured that the

essential conditions directly dependent on the results of the research experiment are correct.

In this case, during the experiment, the motorcyclist's possible locations on Suur-Sõjamäe street were marked with points A and B. During the traffic expert examination, the expert calculated the possible speeds of the motorcycle between points A and B, could be 62 or 118 km/h. However, the expert repeatedly confirmed that the speed of 118 km/h is technically impossible and unrealistic.

The panel of the court considers that, in important circumstances, the basis underlying the experiment was hypothetical, which led to very different expert opinions about the speed of the motorcycles, which makes it impossible to determine the speed of a motorcycle based on the results of the research experiment because of the very high error rate. Therefore, the conclusion of the County Court is incorrect that the results of this experiment confirm that the speed of the motorcycle had to be significantly higher before the collision.

As regards to the place where the traffic accident occurred, the County Court first noted (p. 7 of the judgment) that the criminal case did not identify which lane the collision occurred, but the court then found that, given the location of damages on the car, the accident could have occurred in the first lane.

However, the court did not justify by reference to particular damage to the vehicle the court made this kind of conclusion, even an expert, based on the damages on the car, could not determine the exact location of the vehicle.

The panel of the court finds that the appellants have rightly referred to a body of evidence that gives a base to reach a different conclusion than that reached by the County Court that when approaching the crossroad, the victim was moving with his motorcycle in the second lane.

This testimony given by the victim R.Õ specifically confirmed that he was moving towards the crossroad in the second lane. The witness T M also unambiguously confirmed that the motorcyclist was moving into the second lane. The data from the recording of the security cameras and the observation protocol also suggests that the victim was moving into the second lane.

Also, the accused L J has said that when she saw a motorcyclist approaching, he was moving into the second lane.

The court has referred to the explanations of the expert given at the court hearing, but in fact throughout the three research experiments, the expert has not excluded the possibility of the motorcyclist driving into the second lane. The expert gave testimony regarding the motorcyclist driving in the second lane stating that, in reality, he could not answer the question, because it would be hypothetical, and it is not known when the victim reacted to the threat. There is no argument about the fact cited by the court that the victim remained lying down in the first lane after the accident, but this does not give rise to the conclusion that the accident happened in the same lane. The expert has confirmed the possibility that the victim might have been dashed to the sides after the accident and the court has referred to this testimony. The panel of the court finds that based on the abovementioned evidence, it can be concluded that the victim approached the crossroads in the second lane. Therefore, he was in the second lane at the time the accused decided to start the manoeuvre, and also at the time she actually was performing the manoeuvre. The conclusion of the County Court that the victim drove in the first lane is not consistent with any of the above-mentioned evidence. The panel of the court considers this conclusion to be incorrect.

Based on the finding that the victim exceeded the speed limit, in assessing whether the accused is guilty, it is important consider whether if the incriminating conduct of the accused is a direct causation with the consequence, in other words, if the victim would have driven 50 km/h, had it prevented the accident. In this case, the panel of the court depends on the technical traffic reports. In the expert report no LL-510/130, the expert has stated that when a motorcycle Yamaha drives at a steady speed at 50 km/h, it passes 114 m in 8.2 seconds, in case the speed is 60 km/h, then in 6.8 seconds. The estimated manoeuvre time of the car Honda Civic from commencing the left turn until crossing the crossroad is about 4.9-7.0 seconds, taking into account the traffic situation and the starting point of the car. Hereby the panel of the court points out that the accused commenced the manoeuvre at the moment the victim was 98 meters away, thus deriving from the calculation the distance should be passed in 7.0 seconds at the speed of 50 km/h. Based on the position of the panel of the court, that the motorcycle

drove in the second lane, in expert report no 11E-LL0039, the expert has given an opinion that if the accident happened in the second lane, the motorcyclist had no chance to avoid the accident even if the motorcyclist drove at the speed of 50 km/h or at 62 km/h. Therefore, the panel of the court finds that it can be clearly established that even if the victim was acting in accordance with laws and driving at 50 km/h, there still was no chance of preventing the accident.

In conclusion, the panel of the court finds that the accident was caused by the fact that the accused, while obliged to give way to the drivers on the main road driving in the opposite direction, should have ascertained that commencing the manoeuvre is safe and does not hinder others in any way, but she violated these obligations by exceeding the permissible risk rate as she did not give way to the victim and commenced the manoeuvre when it was not safe. The accused saw the approaching motorcyclist and knew that she has to give way to him, but she did not and performed the manoeuvre. If she had not performed the manoeuvre, there would have been no consequences. The accused drove in front of the motorcycle, creating a hazardous situation to traffic in which the victim lacked the ability to avoid driving into the car. Therefore, causal link between the beach of duty of care by the accused and causing life-threatening injuries to the victim, and the consequences are attributable to the accused.

The accused was negligent at the time of the conduct. She was obliged not to interfere the car on the main road. The one performing left-turn must show a heightened duty of care in order to ensure safety and must take into account that the left-turn would not become dangerous to the others. The panel of the court finds that the conduct of the accused substantially matches the Section 432(1) of the Penal Code and must be deemed guilty. The panel of the court is of opinion that the County Court has rightly caste a doubt on the fact that the accused violated Section 123 of the Traffic Code (currently valid Section 50(1) and (2) of the Traffic Act). The main purpose of the Section 123 of the Traffic Code is to ensure that vehicles are driving at a speed that allows them to stop in the case of an obstacle. Therefore, Section 123 of the Traffic Code is applicable in cases where the driver is not able to stop the vehicle where an obstacle occurs, that was reasonably foreseeable. The main characteristics of such violation would be the incorrect speed. Since it is determined that the accused did not give way to the motorcyclist and the motorcyclist drove into the car, it is clear that it is not the case in which the accused was not able to stop at the chosen speed. In the present case, there is no causation between commencing the manoeuvre at chosen speed and the consequences. Therefore, the panel of the court finds that Section 123 of the Traffic Code must be excluded from the accusation.

5.2. In terms of determining the punishment, the Circuit Court is bound by the appeal. In the appeal the prosecutor requested the accused to be punished under Section 423(1) of the Penal Code with one year of imprisonment. Section 423(1) of the Penal Code foresees both pecuniary punishment and imprisonment. Taking into account the testimony of the accused that her monthly salary is EUR 378,46 and she experiences material difficulties and still has to pay a monthly loan, the panel of the court finds that a pecuniary penalty would be too burdensome. On the basis of the financial situation of the accused, there is a fair reason to believe that the accused will not be able to pay the pecuniary penalty. It must also be taken into account that the defendant must pay the damages and costs of the court proceedings. The panel of the court finds that the prosecutor's request in the appeal is in accordance with the law. The panel of the court has not detected any mitigating or aggravating circumstances. The conduct of the accused is a second-degree negligence offence. The accused has not been punished previously. The panel of the court finds that punishment below the punishment foreseen in the law is in accordance with the law and the appeal of the appellant is justified.

The prosecutor has requested applying Section 73 of the Penal Code, in particular Section 73(3) of the Penal Code which stipulates the minimum probationary period. The panel of the court satisfies this request in full. The prosecutor has also requested depriving the accused of the right to drive for 3 months under Section 50(1)1) of the Penal Code. Section 50(1)1) of the Penal Code stipulates a deprivation of driving privileges for up to three years in case of criminal offence. Driving a vehicle is not necessary for the profession of the accused nor necessary for mobility due to a physical disability. There are no exceptional circumstances that would result in failure to apply the additional punishment. Depriving the right to drive from the accused brings her attention to the meaning and effect of the offence and on her future life decisions. The panel of the court considers that the request of appeal is to be upheld

and the accused will be deprived of the right to drive vehicles for 3 months.

6. The victim's representative has requested in the appeal to upheld in favour of the victim by a civil action EUR 23 335,18, of which material damage is EUR 966,10 and non-material damage is EUR 22 369,08. According to Section 1043 of the Law of Obligations Act, a person (tortfeasor) who unlawfully causes damage to another person (victim) shall compensate for the damage if the tortfeasor is liable for causing the damage or is liable for causing the damage pursuant to law. The panel of the court find that the accused committed a criminal offence under Section 423(1) and is guilty. Pursuant to Section 130 of the Law of Obligations Act, in the case of an obligation to compensate for damage arising from health damage or bodily injury caused to a person, the obligated person shall compensate the aggrieved person for expenses arising from such damage or injury, including expenses arising from the increased needs of the aggrieved person, and damage arising from total or partial incapacity to work, including damage arising from a decrease in income or deterioration of the future economic potential of the aggrieved person. In the present case, the victim has requested EUR 115,08 in damages for medical expenses. The victim has provided written evidence proving the expenses. The panel of the court considers the request for medical expenses justified, thus it will be satisfied. The victim has requested material damage for the damaged safety equipment and helmet. Section 132(1) of the Law of Obligations Act amongst other things stipulates the obligation to compensate the price equal to the newly purchased thing. The panel of the court finds that the total amount of EUR 850,02 for the equipment destroyed is reasonable, in accordance with the market price and the request will be satisfied.

The victim also filed for non-material damage in the amount of EUR 22 369,08. The victim has said that he suffered from severe physical pain, which in fact has not gone away, in addition his quality of life has decreased significantly. Pursuant to Section 130(2) of the Law of Obligations Act, in the event of injury or damage to health, a reasonable amount of money shall be paid as compensation for the non-material damage caused thereby. A claim for non-material damage in the context of criminal proceedings allows the victim to overcome the negative consequences of a criminal offence. It also helps to offset the sense of justice in the society, which is harmed by criminal offences. Ordering of non-material damages is in the sole discretion of the court. It is not possible to determine exact tariffs for a specific injury. It is the duty of the court to assess the circumstances of each case (for example, victim's injuries, period of being incapable to work, complexity of surgeries, permanent damage to health, etc) and accordingly, to determine the corresponding amount for compensation. Therefore, non-material damage must be proportionate to the seriousness of the offence. It is difficult, if not impossible, to bring out a principle that would indicate in which case the offence is easy or difficult. This is a case-by-case assessment. However, in determining the compensation for non-material damage, the court must be convinced that the sum will not result in a significant decrease in the welfare of the accused. The Supreme Court has given the following guidelines for determining the amount of non-material damage in decision No. 3-2-1-1-01: "The amount of non-material damage is expressed in the court's assessment, which is based on the general principles of law, the level of general welfare in the society and case-law. /.../. Both, the circumstances of the damage, in particular the nature of the damage as stipulated in the Section 172(4) of the General Part of the Civil Code Act and the nature of the damage and the level of culpability and the financial situation of the victim. Similarly, the reduction of compensation may be based on the amount of material damage sustained or compensated to the victim. In determining the compensation for non-material damage, the court must be convinced that the sum will not result in a significant decrease in the welfare of the accused and her family." In decision no 3-2-1-34-05 the Supreme Court stated that the amount of compensation awarded for moral damage must correspond to the current case law and the general welfare of the society. The panel of the court finds that in order to determine reasonable compensation, it must be taken into account that the victim sustained life threatening injuries, which needed surgery on a number of occasions. The life quality of the victim has decreased. His incapacity for work is 60%. He is still not able to take actions that are straining to his injured leg. His physical appearance is permanently damaged. The panel of the court finds that the suffering and permanently decreased quality of life give rise to a reasonable compensation of EUR 20 000, which must be paid by the accused.

7. Regarding the procedural expenses incurred in the decision of the County Court, the panel of the court

first considers that it is necessary to point out that on the basis of acquittal decision made by the County Court, it has righty referred to Section 181 (1) of the Code of Criminal Procedure, which stipulates that in the event of acquittal, the state will compensate the procedural costs. The County Court has indicated in the resolution that all expenses, including the amount paid to the representative of the victim in the amount of EUR 3994,92 and costs of legal aid of the accused lawyer EUR 4896 must be left to the state to compensate. Consequently, the County Court should have ordered the sums in benefit of the victim from the state. But the County Court did not do that.

The Circuit Court overturns the acquittal division of the County Court and makes a new decision of conviction. Section 180(1) of the Code of Criminal Procedure stipulates that in case of conviction, procedural expenses shall be reimbursed by the convicted offender. In the present case, the costs of pre-trial proceedings are related to expert assessments in the amount or EUR 970,18, the expenses of moving the vehicle in the amount of EUR 22,50, the cost of making copies of the criminal file in the amount of EUR 14,58. At the County Court hearing and in the Court of Appeal, the contractual representative of the victim has requested compensation of EUR 3994,91. The panel of the court finds that this amount cannot be compensated in full. An invoice provided by the victim in the amount of EUR 1495,53 is by Finantsarvestuse OÜ and the service provider AB Veso ja Partnerid. The representative of the victim has waived the application for the civil action. Therefore, in this case, the invoice does not show the amount invoiced by the representative of the victim, who is from AB Lillo & Partnerid, thus these expenses cannot be deemed as procedural expenses. The victim's representation fee of EUR 2499,38 can be deemed as relevant and justified. In case of a second-degree criminal offence, a convicting judgment is accompanied by penalty payment of EUR 435 pursuant to Section 179(1)2) of the Code of Criminal Procedure.

Section 180(3) of the Code of Criminal Procedure stipulates amongst other things, that when determining the costs of the proceeding, the court shall take into account the financial status of the convicted offender. If it is not realistic for the accused to pay the procedural expenses, the court leaves a part of the expenses to the state.

The panel of the court finds that in view of the amount of the costs of the proceedings and the amount of damages, and the fact that the monthly income of the accused is not high, there are grounds for concluding that the payment of the procedural costs to the full extent by the accused is probably not possible, and therefore it is reasonable to leave some of the costs to be borne by the state. In this case, the accused has already paid to the contractual representative fairly large amounts of money for legal assistance, which in the event of a conviction would not be reimbursed to her. The panel of the court considers that a sum of EUR 435.00 must be paid by the accused as penalty payment. The procedural expenses, including the costs of the accused representative, must be paid by the state, and the victim must receive EUR 2499,38 for the compensation of legal fees.

8. Based on the aforementioned and deriving from Sections 337(1)4), 338(1) and (2) and 340(4)2) of the Code of Criminal Procedure, the court overturns the judgment of the county court in its entirety and makes a new conviction.

9. In the appeal proceedings, the victim's representative applied for compensation in favour of the victim in the amount of EUR 400.71. The description of the service was to review the decision and drafting the appeal, totalling 3.25 hours. Preparation for the court hearing and sitting in the hearing totalled 1.5 hours in the amount of EUR 126,54. The panel of the court finds that these actions were necessary, and the time spend on performing these can be considered reasonable. Accordingly, the panel of the court considers that in the appeal proceedings, the victim must be reimbursed EUR 400,71. The contractual representative in the appeal proceedings requested EUR 384 for 4 hours of work. The actions include analysing the appeal, preparations for the court hearing and sitting in the hearing. The panel of the courts considers these actions necessary and time spent on them reasonable and justified, therefore the request is satisfied. Section 185(2) of the Code of Criminal Procedure stipulates that if the appeal is presented by the prosecutor, the costs of the proceeding will be paid by the state, Section 185(1) of the Code of Criminal Procedure stipulates the same in case of annulling the judgment. Therefore, the costs in connection with the appeal proceedings occurred to the victim and the accused, will be reimbursed by the state.

Case analysis: trustworthiness of a video recording

By

Stella Raudsepp

Brief overview of the case

J L (accused) was prosecuted for violating traffic regulations pursuant to Sections 33(2) 8), 50(3) 1) and 2), 17(2)3) of the Estonian Traffic Act (ETA), as she did not ascertain before making a manoeuvre that it was safe and did not endanger other road users, exceeded the speed limit, and did not give way to a motorcyclist (victim) on the main road. The victim rode into the right side of the accused's car, rushed over it, landed on asphalt, and sustained life-threatening injuries. The Harju County Court found the accused not guilty.

One disputed fact was whether the victim himself exceeded the speed limit and therefore contributed to the accident. The main evidence relied on by the Harju County Court comprised a video recording of a security camera by the company Ülemiste Keskus that recorded the event. The prosecutor appealed to the Tallinn Circuit Court. One of the arguments on appeal was based on the failure to verify the reliability of the evidence from the security camera.

Submissions on behalf of the accused

The Harju County Court compared the footage of the incident from 05.09.2008 (the original video recording) against the research experiment footage from 11.07.2010, and found that the comparison between the two recordings proved the victim exceeded the speed limit. The Harju County Court found that the victim must have been driving faster than the permitted 50 km/h, because the estimated time to clear the crossroad and complete the manoeuvre was between 4.9 and 7.0 seconds. At 50 km/h, a vehicle passes 114 metres in 8.2 seconds, which is estimated to be the longest possible time at the permitted speed limit to pass the distance of the manoeuvre. From this, the Harju County Court concluded that regardless of the speed of the accused, she would have cleared the road at least 1.2 seconds before the victim reaching the crossroad, thus it followed that the victim had to drive faster than permitted 50 km/h.

It is important to note that in reaching this decision, the court did not take into account the human factor and difference in reaction time. It seems from the court's arguments that everybody drives in an optimised and calculated way, which is unrealistic, and thus a naïve way of reaching a reasoned decision.

Submissions by the prosecutor

The prosecutor argued that it is impossible to reliably determine the victim's speed from the original video recording, because the timestamp on the footage was unreliable and the footage was incomplete. The footage was missing several frames, was frozen at some points while the time indicator kept going, and was pixelated in places, thus it could not be used to calculate the victim's speed. The prosecutor submitted that the video recording could have been taken into account only to assess the reliability of the oral testimonies.

Furthermore, the prosecutor noted that the video footage used as a comparison was recorded with different cameras, which was demonstrated by the quality of the research experiment footage, which was considerably better. In addition, the angle of the camera differed between the recordings, and it must have been impossible to place the motorcycle used in the research experiment to the same place as the victim's motorcycle actually was at the time of the accident. The prosecutor argued that it was impossible to make reliable conclusions about the speed the victim was driving by comparing the two video recordings, because the original video recording was not trustworthy.

The prosecutor based their submissions on the trustworthiness of the digital evidence, which was not even considered by the Harju County Court.

The decision by the Circuit Court

The Circuit Court stated that the two video recordings were not the same, which meant the conclusions reached on this point by the Harju County Court were not correct. A comparison of the video recordings could not prove that the victim exceeded the speed limit. The Circuit Court also did not take a stand on the trustworthiness of the evidence. The Circuit Court found that even if the victim had not exceeded the speed limit, the accident would have happened anyway, as the accused was negligent when starting the manoeuvre. The Circuit Court found the accused to be guilty.

Trustworthiness of the evidence

In Estonia's court system, the trustworthiness of an item of evidence is analysed after the admission of the evidence.[1] Pursuant to sections 61(2) and 60(2) of the Estonian Penal Code (EPC), the trustworthiness of evidence means that the judge is convinced based on his inner beliefs and evaluation, that firstly, the evidence adequately reflects the situation subject to the proceedings, and secondly, this reflection can be addressed and reproduced in the proceedings.[2] The decision of the appellate court must be right, but the reasoning was insufficient and not in accordance with the provisions of section 312 2) of the EPC, which obliges the court to expressly set out in its judgement the evidence which the court deems to be untrustworthy and the reasons thereof.[3] The Circuit Court should have analysed the trustworthiness of the video recording and not assume it by default.

Although there is no criteria set in Estonian laws nor court practise for assessing the trustworthiness of digital evidence, analysing trustworthiness of digital evidence should, amongst other things, comprise of (i) establishing the authenticity of the evidence; (ii) determining whether the recording device was capable of making the recording and was operational, (iii) analysing if changes, additions or deletions had been made or not, and (iv) analysing the preservation of the video recording.[4] The court did not expressly set out its position regarding these aspects.

Firstly, an original digital recording may be authenticated by a witness with personal knowledge of the scene.[5] In the present case, the video recording was presented in a copy form on a CD, and a witness testified that the recording was an accurate representation of the situation. The parties did not dispute the authenticity of the evidence. It can therefore be concluded that there was no doubt in the minds of the prosecution and the defence of the authenticity of the original video recording and the evidence recorded.

Secondly, the court should have analysed whether the direct source of the evidence,[6] the recording device, was capable of making the recording. Video recording might seem like a perfect item of evidence, but even if the footage is informative, it might convey an inaccurate description of the situation because of the faulty recording device. As it became apparent from the proceeding materials, the time indicator kept going, even when frames were frozen and pixelated. The court did not take into account the fact that surveillance cameras are automated, i.e. no person constantly checks the video recording. It does not follow that automated systems always operate perfectly.[7] It is clear that there were some problems either with the recording system, software or hardware that hampered the quality of the video recording. Furthermore, the evidence might have been altered in the process of making a copy of it, as the defence referred to missing frames. Yet the court did not have any doubts about the capabilities of the recording device or about the copying process. Arguably, the court should have analysed whether an error occurred that affected the original video recording and the evidence. The court should have established why the problems occurred, and in case of minor technical issues that did not alter the visuals of the video recording, the second prerequisite of trustworthiness would have been fulfilled.

Thirdly, the court did not analyse the prosecutor's claim regarding the integrity of the video recording. Taking into account that the quality of the recording was so poor that it was not possible to establish on which lane the motorcyclist was driving prior to the incident, frames were missing, and time stamp was off, the court should have not assumed that the digital evidence was by default trustworthy, thus it would have been essential to establish whether these issues were related to the integrity of the recording.

[1] RKKKo 3-1-1-89-12 p 14; E. Kergandberg. Komm vlj. KrMS § 61 (2).
[2] E. Kergandberg. KrMS. Komm vlj. § 61 (2).
[3] E. Kergandberg. M. Sillaots. Kriminaalmenetlus. Tallinn: Juura, 2006, p 229 p 7.2.2.
[4] E. S. Eissenstat. Making sure you can use the ESI you get: pretrial considerations regarding authenticity and foundation of ESI. 2008, p 7, available at https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/123.authcheckdam.pdf ; F.I. Lessamblo. Auditing, Assurance Services, and Forensics: A Comprehensive Approach, (Springer, 2018), p 461.
[5] *Making sure you can use the ESI you get: pretrial considerations regarding authenticity and foundation of ESI, p 7;* P. R. Rice. Electronic Evidence. Law and Practice. 2nd edition, American Bar Association, 2009, p 336.; J. J. DeGaine. Digital Evidence. Army Lawyer 2013/4, p 15, available at https://www.loc.gov/rr/frd/Military_Law/pdf/05-2013.pdf .
[6] A. Kangur. Kohus ja kohtulahend: mõtteid ja soovitusi kohtulahendi kirjutajale. Tartu: Riigikohus 2012, p 37.
[7] Stephen Mason and Daniel Seng, editors, *Electronic Evidence* (4th edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2017), p 304, para 9.48, available online at http://ials.sas.ac.uk/digital/humanities-digital-library/observing-law-ials-open-book-service-law/electronic-evidence .

Assessing the integrity of the video recording requires methods of determining whether the recording has been altered, maliciously or otherwise. For this, the court cannot solely rely on file size, dates or other file properties, but needs audit logs to check for possible errors.[8] In order to establish hardware or software integrity one needs to verify that: (i) sufficient security measures are in place to prevent unauthorized or untracked access to the computers, networks, devices, or storage, and (ii) stable physical devices will maintain the value they were given until authorized to change, to include such information as users/permissions, passwords, firewalls, and system logs.[9] From the perspective of digital forensics, reliability is the trustworthiness of a record as to its source, defined in a way that points to either a reliable person (physical or judicial) or a reliable software, or a piece of hardware.[10] The method of preservation of a video recording may affect the trustworthiness of the footage,[11] thus the integrity of the recording is connected with the preservation of the evidence, because in the process of creating a duplicate of a data, it might be either accidentally or intentionally modified.[12] In the present case, presumably the prerequisites were fulfilled, although there is no indication in the judgment that they were. It is not apparent from the case whether the video recording was kept in digital form and then transferred into CD-format. Before the court took possession of the copy in CD-format, it presumably had been in the possession of Ülemiste Keskus, thus the security and restricted access to the recording was probably provided. Ülemiste Keskus did not have any interest in altering the video recording. Deriving from this discussion, the source, Ülemiste Keskus, was reliable, but the camera or the software running on it were possibly at fault. Therefore, deriving from the facts of the case, it would seem that the integrity of the video recording was demonstrated, but the court should have provided a more thorough analysis of this evidence.

In conclusion, it is arguable whether the prerequisites regarding the trustworthiness of the recording could be deemed to be fulfilled. It is clear that despite the fact that the video recording seemed to be faulty and the trustworthiness of it was not demonstrated, it had probative value. The case gave the courts an opportunity in the Estonian legal system to discuss in depth the assessment of the trustworthiness of a video recording (digital evidence), but the courts failed to do so. The County Court did not analyse the trustworthiness at all, and the Circuit Court agreed with the prosecutor's arguments, but did not elaborate on why it found the original video recording unreliable.

It seems that the essence of analysing digital evidence lies in knowledge about handling it, which in the present case, all of the parties were missing. Although the difficulties in understanding the core of digital evidence makes it tempting to presume that digital evidence is trustworthy at all times, it is quintessential for practitioners and courts to educate themselves regarding digital evidence to fortify their stance. It is obvious that current laws do not reflect the ability to thoroughly analyse and work with 'emerging technology', thus collecting and assessing evidence remains problematic. Improved understanding of digital evidence would help to realise that digital evidence is not trustworthy by default, but rather the trustworthiness should be determined through analysis as a part of forming the court's inner belief.

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[8] Luciana Duranti and Corinne Rogers, 'Trust in digital records: An increasingly cloudy legal area', *Computer Law & Security Review*, 2012, Volume 28 Issue 5, 526.
[9] 'Trust in digital records: An increasingly cloudy legal area', 526.
[10] 'Trust in digital records: An increasingly cloudy legal area', 525.
[11] *Electronic Evidence* 304, para 9.48.
[12] *Electronic Evidence 304,* para 9.49.