

THE EVIDENCE OF COMMUNICATION THROUGH A TELEPHONE OPERATOR AND THE APPROPRIATE TIME TO FILE A CRIMINAL COMPLAINT

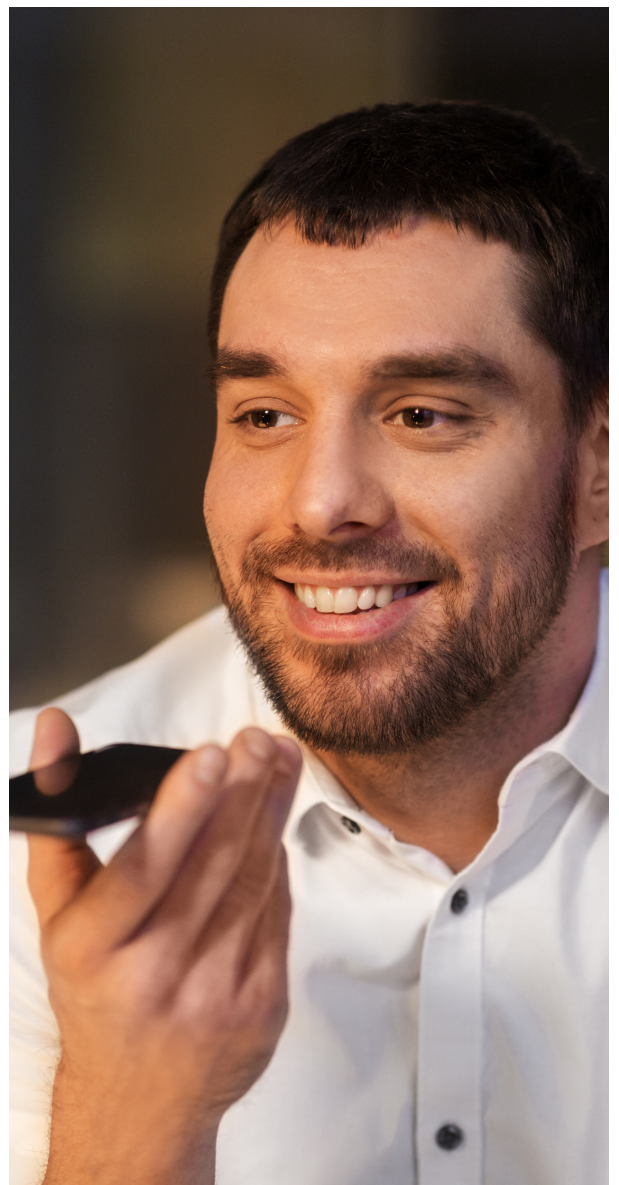
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Hypothetical case

Suppose this is an honorable man, a member of the community outreach committee of his religious organization, with a steady partner and a teenage daughter who is an athlete and excellent student.

In January of year 1, he attends a bachelor party organized by former college classmates for a fellow member of the group. The social gathering is called for the beach pool house of one of the classmates. Our honorable man attends. Naturally, he has a few beers with his friends.

As it almost never happens in Panama, a fellow member of the Class organizes everything so that at 11 p.m. the surprise of an outstanding group of not so decent, lightly dressed, pretty girls arrive and become the sensation of the pool party. The revelry goes on until 4 am.



Those attending the celebration are so entertained that they do not notice that one of the neighbors on the beach was also having fun with his drone, filming the best scenes of the event.

A week after the party, calls start coming in to our honorable man's cell phone. They all come from the same phone number. He is told that they have photos and videos of him partying in potentially compromising circumstances with the women who were at the party.

A threat is posed: if US\$5,000.00 in cash is not delivered each month, the photos and videos will be published on social networks. The money is to be sent inside a package by "delivery" in a motorcycle, to a different address each month that will be informed to him by phone call. During February of year 1, the honorable man receives dozens of calls reiterating the threats and instructions, which creates a state of stress, indecision and worry. Because of the pressure, he accepts.

For 11 months of year 1, the honorable man followed the instructions and paid. From the second month on, the contacts decreased: he only received the delivery address of the package by phone call. He was only able to keep up the payment rhythm for 11 months: his income and savings were not enough to keep up with the payments.

He stopped paying and was no longer contacted. From then on, he could not sleep peacefully for fear that the

compromising images would be disseminated.

A year and a half later nothing had happened, except that the honorable man was psychologically affected. To get over it, he tells everything to his partner and daughter, who support him.

The three of them decide that a lawyer should be hired to file a criminal complaint for extortion against the neighbor of the beach house where the party was held. They have received very credible reports that said Mister has a drone with which he entertains himself on weekends and has had problems with neighbors because he makes "jokes" with videos that he films, but those issues have not escalated. He is also very active in social networks.

The Complaint is filed 2 years and 10 months after the party and 2 years after the last payment. It is admitted, the investigation begins.



At the initiative of the Complainant and with the support of the Public Prosecutors, three years and one month after the party, a note with the following basic content was sent to the telephone operating companies:

"Mr. Manager:

By means of today's Communication, this office has ordered this telephone company to provide us with the history of incoming and outgoing calls of the sim card numbers XXXX-XXXX and YYYY-YYYY, from "year 1" to the present, the exact locations of the activation of the antennas in coordinates and cells, as well as the general information of the owners of the same; this with the purpose of obtaining the identity of the author or participant of the events under investigation".

Two weeks later the telephone company responds as follows:

"Dear Sirs Public Prosecutors

Dear Sirs:

In response to your letter *** dated ###, we inform you that, according to what we have investigated in our database, the lines XXXX-XXXX and YYYY-YYYY are registered in our system. Please find enclosed general data.

Please note that our information system keeps call records for the

last twelve (12) months of the year, so we cannot provide you with the call records of the XXXX-XXXX and YYYY-YYYY lines, since year 1 as requested by you, nor can we establish which IMEI was active for the above-mentioned period. However, please find enclosed the call activity of these lines for the last 12 months.

Sincerely, "

Because of this response, the investigating officer in the Public Prosecutor office informs the Complainant Attorney that they have been gathering evidence but that the evidence is not very convincing and recommends him to withdraw the Complaint.

He explains that the crime of extortion in a circumstance such as the present case, requires evidence of intimidation or serious threat, which is difficult to prove, because everything happened via cell phone more than 12 months ago and it is not even possible to get evidence that there were calls between the phones of those involved, in the relevant months, because it is the policy of the telephone company to keep only the information of the last 12 months and in that time there was no contact.

Legal Thoughts

The previous case is totally fictitious. We have made the case extremely subject to the need for evidence of certain telephone communications, in order to



highlight the point of the potential impact of the influence of the private policies of telephone companies in criminal cases. Not all cases rely so heavily on this type of evidence.

Based on the above, it is necessary to mention that the crime of extortion in the Panamanian Criminal Code is one of the crimes against freedom, given that someone is forced, against his/her free will, to dispose of a patrimony, tolerate something, do or omit something, producing prejudice and mediating violence, intimidation or serious threat on account of the actor.

The penalty is affixed between 5 to 10 years of imprisonment, and therefore the statute of limitations of the action is 10 years, within which the indictment must be made. In our hypothetical case, where we are dealing with a continuous crime, such term starts to be counted from the moment the victim made the last payment and ceased to have contact with the person who extorted.

In this hypothetical case, the element of evidence of the telephone communications and the policies of the

companies to keep the necessary information puts an element of pressure on the opportunity to exercise the criminal prosecution. The question arises as to whether such a policy of private companies should be above the interests of justice in a state governed by the rule of law.

It is an issue that is at least worth considering, especially when communications are less and less face-to-face. Should the State ensure, by law, that these companies keep this information for a longer period, in the event that it is needed for criminal investigations?

At the other end it is also true that the percentage of cases that will depend definitively on this type of evidence may not be so high, and to what extent is it justified for these companies to assume the expenses involved in maintaining all the information for the maximum reasonable time possible? What if the State dedicates some subsidy or pays the companies part of the expenses to guarantee that this evidence will be at the service of justice when it is needed?

The discussion has many edges. To add a further complication, it would be good to ask how to deal with the cases of terrorism, crimes against humanity and forced disappearance of persons where there is not any statute of limitation at all, as ordered by the Code of Criminal Procedure. In the name of these crimes, should the data of telephone calls be kept for life?

FINAL COMMENT

In situations such as the hypothetical case analyzed in this document, the existence of a 10-year statute of limitations would seem to justify crime victims allowing themselves several years of reflection before deciding to bring a criminal action through a complaint. However, the matter is not so simple, for two reasons.

In the first place, because, as a general rule, the exercise of the burden of proof by the Public Prosecutors and the victims always increases the prospect of success if it is carried out closer to the date of the facts that constitute the punishable conduct, because in this way the options of quantity and quality of the evidence are increased.

Common sense imposes the idea that

the passage of time erases and vitiates the evidentiary means.

Secondly, in cases such as the hypothetical case of our honorable man, where the evidence of telephone communications is so relevant, timely action is much more conditioned, because the private policy of telephone companies imposes a peremptory term to obtain the evidence.

In summary: Given that the fatal term that in fact hangs over the evidence of telephone communications poses a dilemma of difficult solution, if you consider yourself a victim of crime, want to pursue criminal action through a Complaint and your case depends heavily on that type of evidence, it is better to do it on time.

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