**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On the interpretation of Articles 37.4, 39.1.9, 40.2 and 41.7 of Criminal Procedure Code of Azerbaijan Republic*

15 July 2011 Baku city

The Plenum of the Constitutional Court of Azerbaijan Republic composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Rovshan Ismayilov, Jeyhun Garajayev, Rafael Gvaladze (Reporter Judge), Isa Najafov and Kamran Shafiyev,

attended by the Court Clerk I.Ismayilov,

legal representatives of interested subjects - judge of the Supreme Court of the Republic of Azerbaijan Farhad Kerimov, chief adviser of the Department of Administrative and Military Legislation of the Milli Majlis of the Republic of Azerbaijan Fuad Mammadov,

Specialist - Senior Advisor for the maintenance department of public prosecution in the Courts for Serious Crimes of the Office of Public Prosecutions for the maintenance of the Prosecutor General of Azerbaijan Republic Murvat Hasanov

in accordance with Part VI of Article 130 of the Constitution of Azerbaijan Republic has examined in open court in the order of a special constitutional court proceedings constitutional case at the request of the Supreme Court.

Having heard the report of Judge R.Gvaladze, reports of interested subjects and specialists, examining and discussing the materials of the case, Plenum of the Constitutional Court of Azerbaijan Republic

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan (hereinafter - the Supreme Court) in the appeal addressed to the Constitutional Court of Azerbaijan Republic (hereinafter - the Constitutional Court) asked to interpret Article 37.4, 39.1.9 and 40.2 of the Criminal Procedure Code of Azerbaijan Republic (hereinafter - the Code).

Out of circulation and materials intermingled to it shows that A.Jafarov, violating the statutory right to own land, illegally grabbed 200 square meters of land set aside allocated by N.Chernyakova and conducted illegal construction work. For this, A.Jafarov on the basis of Article 188 of the Criminal Code (hereinafter - the Code) has been prosecuted.

According to decision of Sabunchi District Court of July 1, 2010 A.Jafarov on the basis of Article 73 of the Criminal Code was exempted from criminal liability and criminal proceedings terminated.

Decision of the Criminal Bar of Baku Court of Appeal of August 26, 2010 The appeal was not satisfied, the sentence remains unchanged.

The public prosecutor in the appeal against the decision requested to cancel and return the criminal case for consideration of the appeal. Cassation protest was justified by the fact that due to the fact that a criminal prosecution under Article 188 of the Criminal Code according to the procedure of public prosecution in accordance with Article 73 of this Code, the termination of criminal prosecution contrary to the requirements of Articles 37.4, 37.6 and 39.1.9 of the CCP.
The appeal stated that according to Article 37.4 of the CPC except as provided for in Article 73 of the Criminal Code, criminal prosecution in the manner of public-private prosecution can not be terminated in connection with the reconciliation of the victim and the defendant. According to Article 39.1.9 of the CPC, if the reconciliation was the victim and the accused (only if the criminal prosecution of a private prosecution) A prosecution may be commenced and prosecuted subject to termination. According to the Supreme Court concluded, the conditions of both the law creates uncertainty in terms of Articles 40.2, 43.3 and 45.5 of the CPC, and the terms of Article 73 of the Criminal Code and limit the application of substantive rules.

Criminal Chamber of the Supreme Court found it necessary to interpret the procedural law that are referred to in the present case in the decisions taken by the courts and on appeal the protest.

In connection with the appeal Plenum of the Constitutional Court considers it necessary to disclose the essence of the Institute of reconciliation, as provided for in criminal and criminal procedural law and its legal consequences.

The new legislation changed the direction of law enforcement in terms of goals, pushed to the fore is not fighting crime, and protect every citizen from illegal encroachments.

Many countries are making an effort to use alternative measures of criminal responsibility. These measures serve to reduce the workload of the investigative and judicial system in place with a decrease in workload for prison, the rights of persons who have been harmed by crime and to ensure the public interest.

We can show two basic models of alternative measures in the criminal justice system in foreign countries. The first model - a model called the transaction "the Netherlands - Belgium." The essence of this model lays in the fact that the investigating authorities (prosecutors, police) in each case upon payment of the face amount of money into the state treasury, freeing him from criminal liability in respect thereof cease to criminal prosecution.

Emerged in 1935 in Belgium transaction should be the abolition of the trial against the accused in the case did not challenge his guilt for minor economic crimes.
In Belgium, the Institute of transaction found its full confirmation in 1984. Since then, the transaction is used for every criminal act providing for the punishment of imprisonment up to five years. Transaction can be used only in pre-trial stages of criminal proceedings. The prosecutor's office after the establishment of a sum of money to be paid and the term of payment, defendant submits proposal for payment of that amount. In case of refusal to pay this amount, the prosecution continues in a general way.

Unlike Belgium, the Netherlands can use this institution to the crimes, providing for the punishment of imprisonment up to 6 years.

The second model, which received wide circulation in the criminal law of foreign countries, is called mediation. This model exists in various models (simple and complex). According to the model itself, in the case of compensation for damages defendants, mediation procedures are used for its reconciliation with the victim.

An important feature of this system lies in the fact that mediation is not a passive provides a statement of the presence or not presence of Reconciliation and active measures brokered by authorized entities to resolve criminal and legal dispute. For example, in Belgium, mediation can be applied to all crimes, providing for the punishment of imprisonment up to 20 years. Criminal proceedings may be terminated when the defendant acts listed below: in damages, with the passage of the treatment course, if you receive training in the specialty, etc.

Currently, mediation in some form exists in Germany, Austria, Portugal, France and other countries.

The criminal legislation of Azerbaijan Republic is taken as simple acts of mediation Article 73 of the Criminal Code. Under this rule, a person who has committed a crime, does not pose great danger to society, may be exempted from criminal liability if they come to terms with the victims and compensate for the damage it or make amends for the harm.

Without disclosure of a criminal prosecution was possible to achieve a comprehensive analysis of the Institute of reconciliation.

The concept of the prosecution is given in Article 7.0.4 of the CCP. According to this article, the prosecution - criminal procedural activities undertaken in order to establish a crime, exposing the person who committed the offense under the criminal law, making an accusation, maintaining that the charges in court, the sentence, provision, where appropriate, measures of procedural coercion.
Depending on the nature and severity of the crimes prosecuted in accordance with the provisions of the Criminal Procedure Code is divided into three types: criminal prosecution, carried out in a private, public, private or public prosecution (Article 37.1 of the CPC).

Criminal prosecution of a private prosecution is carried out only at the request of the victim of crimes stipulated in Articles 147 (defamation), 148 (insult), 165.1 (violation of copyright and neighboring rights without the presence of classification criteria) and 166.1 (violation and patent rights without the presence of classification features) of the Criminal Code.

Criminal procedure law gives the victim an opportunity to be solved the question about going to court in case of injury to the rights and legitimate interests, the aforementioned criminal acts and to maintain a private prosecution (Articles 41.7 and 87 of the Criminal Procedure Code). That's why these things are called private indictments.

Prosecution of cases of private accusation begins only at the request of the victim and terminates in the event of reconciliation of the victim with the accused before the court in the deliberation room (Article 37.2 of the CPC).

This fact was confirmed in Article 41.7 of the CPC. According to this article, the implementation of criminal prosecution or waived in a private prosecution is dependent on the will of the victim. In this case, the proceedings on the complaint of a private prosecution should be terminated by the court.

According to article 39.1.9 of the CPC held if the reconciliation of the victim and the accused (only for prosecution of a private prosecution) A prosecution may be commenced and prosecuted subject to termination.

Thus, in accordance with Articles 37.2, 39.1.9 and 41.7 of the CPC, reconciling the victim with the accused - absolute grounds for termination of criminal proceedings in a private prosecution, if reconciliation of the victim with the accused before the court in the deliberation room to stop the prosecution.

Institute of exemption from criminal liability in connection with reconciliation with the victim as provided in Article 73 of the Criminal Procedure differs from the Institute of reconciliation, as provided in Article 37.2 of the CPC.

These differences consist of the following:

- The establishment of the grounds and conditions for the termination of criminal proceedings in connection with the release of the accused from criminal liability as a result of reconciliation of the victim and the accused, acts as a strengthening of the principle of discretionary (the ability to use their material and procedural rights of the subject of criminal proceedings) in criminal law and criminal procedure. However, Article 73 of the Criminal Code, this principle is expressed in a form different from that of Article 37.2 of the CPC. In contrast to the private convictions of cases, the principle of discretionary for offenses do not pose a great danger to society has no effect on the stage of a criminal case. In this case, the decision on whether or not a criminal case is used in the usual manner and on general grounds.

- Article 37.2 of the CPC gives the victim the right to request to punish the defendant or release him from criminal responsibility for crimes of a narrow circle (all four of the crime).

And Article 73 of the Criminal Code applies to all crimes; do not pose a great danger to society.

- Articles 37.2, 39.1.9 and 41.7 of the CPC are mandatory, and the reconciliation of the victim and the accused is an absolute prerequisite for the release of the latter from criminal liability.

And in Article 73 of the Criminal Code peremptory norm is not expressed. In accordance with this article discretionary action can not be placed in one plane with the publicity. Thus, the will of the victim and the accused, which have come together for reconciliation are not the reason for the decision to dismiss the case, just act as a condition of allowing such a decision by the authorities. Such a decision has determined the law not as a duty, but as the right authorities.

- Article 37.2 of the CPC for exemption from criminal liability on the basis of reconciliation does not require the defendant to the victim compensation for damage or remedying the damage caused by the offense.

According to article 73 of the Criminal Code such compensation is one of the important conditions for exemption from criminal liability;

- In cases where Article 37.2 of the CPC does not preclude the exemption from criminal liability as a result of reconciliation, even before the person has committed a crime, Article 73 of the Criminal Code as one of the main conditions of exemption from criminal responsibility includes committing a criminal act the accused for the first time.

As can be seen, Article 73 of the Criminal Code has set four conditions for the termination of criminal prosecution:

- Act against a person who is prosecuted shall not be of great public danger;
- The accused must commit the crime for the first time;
- The defendant must compensate the damage caused to the victim or make amends for the harm;

- The accused must be reconciled with the victim.

In the presence of all four of these conditions, the defendant may be released from criminal liability.

The comparative analysis of Article 73 of the Criminal Code and 37 of the CPC found that the article on the public-private and public indictment for talking about reconciling the accused with the victim, because in such a reconciliation of private indictment for criminal prosecution is completely eliminated.

On the basis of Article 37.3 of the CPC in the manner the prosecution of public-private prosecution by the crimes referred to in Articles 127, 128, 129.2, 130.2, 131.1, 132-134, 142.1, 149.1, 150.1, 151, 156-158, 163, 175 - 177.1, 178.1, 179.1, 184.1, 186.1, 187.1, 190.1, 197 and 201.1 of the Criminal Code of Azerbaijan Republic.

According to this article, criminal prosecution on these crimes begins at the request of the victim or in the cases provided for in Article 37.5 of this Code at the initiative of the prosecutor.

The legislator stated that the reconciliation of the victim with the accused in the manner of public-private prosecution, not in all cases is the reason for an end to criminal liability.

Thus, under Article 37.4 of the CPC except as provided for in Article 73 of the Criminal Code, criminal prosecution in the manner of public-private prosecution can not be terminated in connection with the reconciliation of the victim and the defendant.

Here, it is necessary to take into account that the offenses listed in Article 37.3 of the CPC referred to a public-private accusation cases specified in articles 127.1, 128, 129.2, 130.2, 131.1, 132-134, 142.1, 156-158, 163, 175-177.1, 178.1 , 179.1, 184.1, 186.1, 187.1, 190.1, 197.1 and 201.1 belong to the category of crimes do not pose a danger to society, and the crimes mentioned in other articles are less serious and violent crimes.

It is therefore the legislator in Article 37.4 of the CPC stipulates that the reconciliation of the victim with the accused during the criminal proceedings in the manner of public-private prosecution may result in termination of the prosecution only in cases specified in Article 73 of the Criminal Code.

As indicated, the terms of Article 73 of the Criminal Code, along with other terms, covers only offenses that do not pose great danger to society.

The Plenum of the Constitutional Court considers that, according to the requirements of Article 37.4 of the CPC in the case of reconciliation for the first time a person has committed a crime, does not pose a great danger to society, listed in Article 37.3 of this Code to the victims and compensation for any damage or remedying the damage caused, may be terminated by the prosecution carried out in order of public-private prosecution.

Criminal proceedings in the manner of public-private prosecution for other crimes listed in Article 37.3 of the CPC due to the fact that are less serious or violent crimes (Article 127.2 (intentional infliction of less serious harm to the qualifying features), 133 (torture)149.1 (rape), 150.1 (sexual assault), 151 (coercion to perform sexual acts), 157.3 (violation of the inviolability of the home by an official using his official position), 158.3 (violation of the integrity of buildings (premises) of legal persons by an official with the official position) of the Criminal Code) may not be terminated in connection with the reconciliation of the victim and the defendant.

Criminal proceedings in the manner of public prosecution are carried out as the crimes do not pose a great danger to society. In the criminal procedure law, the prosecution of public order charges, no limits on the cessation of production based on the reconciliation of the victim and the accused is not imposed. On the contrary, under the provisions of Articles 40 and 43 of the Criminal Procedure Code on this basis it is possible the exercise or termination of criminal proceedings in the manner of public prosecution. In response to these articles there is a need to clarify the concept of "exemption from criminal liability and punishment."
In theory, under the exemption from criminal responsibility implies the refusal of the state of a person is convicted for the crime committed and the application of penalties. Release from the penalty involves no use of punishment a convicted person or the exemption from the remainder of the sentence.

Of these, it is come to the conclusion that these institutions (exemption from criminal liability and penalties) are distinguished by the following:

- The stages of criminal proceedings;

- A circle of persons and bodies having authority to make such a decision.
Exemption from criminal liability may be in pre-trial stage and the stage of judicial review. A release from the punishment is only possible in the process of judicial review.

The investigator and the court with the consent of the prosecutor may excuse from criminal responsibility. Release from the punishment of the exclusive power of the court.

Exemption from criminal liability, respectively, cover and exemption from punishment. In this case, the first step in the release of criminal responsibility is a pre-trial stage, the final step - the stage of trial before the verdict. After these stages, it can only exemption from punishment.

Cases of exemption from criminal liability and penalties provided for in Section IV of the Criminal Code. This section is divided into two chapters: the eleventh chapter provides for exemptions from criminal liability, and the twelfth chapter - exemption from punishment. Grounds for excluding criminal responsibility set out in Articles 72-75 of the Criminal Code, and the grounds for exemption from punishment in Articles 76-80 of the Criminal Code.

As indicated, the exemption from punishment - it is the criminal justice institute, applied after the verdict against the person. And in this case is not logical termination of prosecution in cases of exemption from punishment as provided in Articles 76-80 of the Criminal Code.

Taking this into account, the Plenum of the Constitutional Court comes to the conclusion that Article 40.1 of the Code of Criminal Procedure exemptions from criminal liability and exemption from punishment under criminal law covers the release of the person who committed the offense of criminal responsibility, enshrined in Articles 72-75 of the Criminal Code.

Cases of exemption from criminal responsibility, along with articles 72-75 of the Criminal Code provided for in Articles 20 (exemption from criminal liability in connection with the achievement of the age limit does not allow criminal prosecution), 21 (exemption from criminal liability in connection with the commission of a socially dangerous acts in the a state of insanity), 2.30 (exemption from criminal liability in connection with a voluntary waiver of the offense) and 81.2 (exemption from criminal liability the act of amnesty) of this Code. As required by the presence of CPC cases listed in these articles may be grounds for not prosecuting.

Cases referred to in Articles 20, 21, 75 and 81.2 of the Criminal Code generally preclude criminal prosecution. Thus, according to the imperative nature of Article 39.1.3, 39.1.4, 39.1.10 and 39.1.12 for the identification, of any of the above cases, criminal proceedings against a person does not start, and the detection of already started production of the prosecution is terminated.

In contrast, not a criminal case or termination in cases stipulated in Articles 72-74 of the Criminal Code are not entitled to a duty of investigator and prosecutor, and the exercise of this right has its own characteristics.

Thus, under Article 40.2 of the CCP criminal proceedings may be initiated or terminated on the basis agreed with the prosecutor orders inquiry officer and investigator in the following cases, the exemption from criminal responsibility under Articles 72-74 of the Criminal Code:

40.2.1. Sincere repentance;

40.2.2. Reconciliation with the victim;

40.2.3. Change of circumstances.

As seen in this article, in the case of reconciliation with the victim accused the investigator or investigator decision to dismiss a prosecution, or its termination must be agreed with the prosecutor of the procedural aspects of the investigation.

And the rules of the termination of criminal prosecution in the case of reconciliation of the victim with the accused at trial enshrined in Article 43 of the Code of Criminal Procedure. According to Article 43.3 of the Code, with the consent of the defense, the court may also order in judicial proceedings in the cases specified in Articles 39.1.3, 39.1.5, 39.1.12 and 40.2 of this Code, the decision to discontinue the criminal proceedings against the accused.
In determining, during the trial the case referred to in Article 40.2.2 of the CPC, the court on this basis, with the consent of the defense can stop the prosecution.
Based on these, the Plenum of the Constitutional Court comes to the conclusion that the detection of cases provided for in Article 73 of the Criminal Code for criminal prosecution in the manner of public-private and private prosecution criminal prosecution pre-trial stage of production can not be initiated or may be terminated on the basis of an agreed investigator with the prosecutor and the investigator's decision. In the case of the establishment of this fact at trial, the prosecution may be terminated with the consent of the defense.
In a place so when considering the statement of reconciliation of the victim and the accused shall be inspected not only the existence of this statutory basis, and should be considered a public danger of the offense, the identity of the accused, particularly as all the circumstances, together with the circumstances aggravating and mitigating punishment.

In addition to these circumstances, it is important to take into account the nature of a criminal act. For example, in criminal cases against public security and public order or against the government, the termination of criminal prosecution as a result of reconciliation of the parties could not establish compliance with the requirements of Article 73 of the Criminal Code. Within the meaning of Article 73 of the Criminal Code exemption from criminal liability is valid only for crimes that infringe on the rights and lawful interests of individuals. And so, for example, in the cases against justice exemption from criminal liability in connection with the reconciliation of the victim and the accused must be perceived as not meeting the requirements of Article 73 of the Criminal Code.

Given the foregoing, the Plenum of the Constitutional Court comes to the conclusion that:

- According to Articles 37.2, 39.1.9 and 41.7 of the CPC reconciling the victim with the accused - absolute grounds for termination of criminal proceedings in a private prosecution, and criminal prosecution in achieving such a reconciliation before the court in the deliberation room;

- In accordance with the requirements of Article 37.4 of the CPC in the case of reconciliation for the first time a person has committed a crime, does not pose a great danger to society, listed in Article 37.3 of this Code to the victims and compensation for any damage or remedying the damage caused, may be terminated by the prosecution exercised in the manner of public-private prosecution. Criminal proceedings in the manner of public-private prosecution for less serious or violent crimes listed in Article 37.3 of the CPC can not be terminated in connection with the reconciliation of the victim and the accused;

- In identifying the cases provided for in Article 73 of the Criminal Code for criminal prosecution in the manner of public-private and private prosecution in compliance with the above conditions, the prosecution pre-trial stage of execution can not be initiated or may be terminated on the basis agreed with the prosecutor orders inquiry officer and investigator. In establishing this fact at trial, the prosecution may be terminated with the consent of the defense.
 Being guided by Article 130.6 of the Constitution of Azerbaijan Republic, Articles 60, 63, 65-67 and 69 of the Law "On Constitutional Court", the Plenum of the Constitutional Court of Azerbaijan Republic

**DECIDED:**

1. According to Articles 37.2, 39.1.9 and 41.7 of the Criminal Procedure Code of Azerbaijan Republic, reconciliation of the victim and the accused is an unconditional basis for the termination of criminal proceedings in a private prosecution, and criminal prosecution in achieving such a reconciliation before the court in the deliberation room;

2. In accordance with the requirements of Article 37.4 of the Criminal Procedure Code of Azerbaijan Republic in case of reconciliation for the first time a person has committed a crime, does not pose a great danger to society, listed in Article 37.3 of this Code to the victims and compensation for any damage or remedying the damage caused, may be terminated by the prosecution carried out in order public-private prosecution. Criminal proceedings in the manner of public-private prosecution for less serious or violent crimes listed in Article 37.3 of the Criminal Procedure Code of Azerbaijan Republic may be terminated in connection with the reconciliation of the victim and the defendant.

3. In identifying the cases provided for in Article 73 of the Criminal Code for criminal prosecution in the manner of public-private and private prosecution under the conditions specified in the reasoning of this decision, the prosecution pre-trial stage can not be initiated or may be terminated on the basis of an agreed investigator with the prosecutor and the investigator's decision. In establishing this fact at trial, the prosecution may be terminated with the consent of the defense.

4. The decision comes into force from the date of its publication.

5. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. Decision is final and can not be canceled, changed or officially interpreted by any body or official.