**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Articles 18.5, 61.1.1 and 65 of Criminal Code of the Republic of Azerbaijan*

# 18 March, 2013 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Mahir Muradov(Reporter-Judge)and Kamran Shafiyev;

attended by the Court Clerk Faraid Aliyev,

the legal representatives of the subjects interested in special constitutional proceedings: Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan, Fuad Mammadov, senior advisor of Department of Military and Administrative Legislation of Administration of the Milli Mejlis of the Republic of Azerbaijan;

experts: Rafik Guliyev, associate professor of Department of Criminal Law and Criminalistics of the Baku State University;

specialists: Mirzaali Abbasov, Judge of Court of Appeal of Baku city, Muzaffar Aghazade, Chief of Staff of the Court of Appeal of Sumgayit city, Gazanfar Bayramli, Deputy head of Department on Public Prosecution of the Prosecutor’s General Office;

in accordance with the Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Supreme Court of the Republic of Azerbaijan concerning interpretation of Articles 18.5, 61.1.1 and 65 of Criminal Code of the Republic of Azerbaijan.

having heard the report of Judge Mahir Muradov, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialists and experts, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan(hereinafter referred to as the Supreme Court) having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for interpretation of Articles 18.5, 61.1.1 and 65 of Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC).

In the request, the Supreme Court specified that by a sentence of Kapaz district court of Ganja city of April 2, 2012 Y.Babayev was found guilty under Article 221.2.1 of the CC and sentenced to corrective works for a period of 2 years.

The sentence of criminal board of the Court of Appeal of Ganja city of May 17, 2012 which considered case on the basis of an appeal protest of the state accuser, the sentence of court of the first instance was changed and the sentence in the form of imprisonment for a period of 1 year is imposed to Y.Babayev.

In the cassation protest given on a sentence of Court of Appeal of Ganja city it was specified that because Y.Babayev without having served the sentence imposed by a sentence of Samukh district court not removed conviction from official records committed a deliberate crime and it formed recidivism. In spite of the fact that recurrence is provided in a disposition of Article 221.2.1 of the CC as the characterizing sign but because in this article recurrence of a crime is not established as the characterizing sign at imposing by courts to the person of punishment the recurrence was not taken into consideration and requirements of Articles 18.5, 61.1.1 and 65.2 of the CC were violated.

The Supreme Court in the request was asked to interpret whether Articles 18.5, 61.1.1 and 65.2 of the CC are applied in case if a condemned again committed a crime with a sign of recurrence.

Due to the question which is brought up in the request, Plenum of the Constitutional Court considers necessary to note importance of observance of the principle of legality of criminal law from the point of view of protection of essence of this principle and the constitutional bases and also protection of the rights and legitimate interests of accused person of criminal legal proceedings.

The principles of criminal law relying on the general principles of legality it is the main directions of criminal and legal creativity and the activity connected with application of this right defining the nature of criminal law and its institutions and fixed in the legal norms.

The principles reflected in the CC follow from a number of the constitutional principles providing guarantees of the rights and freedoms of the person and the citizen.

According to the principle of legality, one of the basic principles of criminal law, criminal action (actions or inaction), and also punishments for this actions and other measures of criminal - legal nature is determined only by the CC (Article 5.1 of the CC).

In the Decision of Plenum of the Constitutional Court as of October 21, 2011 “On interpretation of Article 182.2.4 of the Criminal Code of the Republic of Azerbaijan” it was noted that the essence of the principle of legality is that activity of the law-enforcement body connected with application of the criminal law, is guided only by the law and is carried out on the basis of the law and also that recognition of act by a crime and recognition of the person guilty of commission of this act and application of punishment concerning him is allowed only on the basis of the criminal law.

At the same time, public and dangerous act of the person forming the corpus delicti, creates the bases for its criminal liability, act recognition by the crime deserving punishment is defined only by the criminal law that is one of the main methods of ensuring the principle of legality.

According to the legal position of Plenum of the Constitutional Court created in the noted decision when adopting by legislature of the criminal legal norm it is necessary to pay special attention to observance of such principles of legality as the principle of supremacy, unity, expediency of the law and reality of legality. Execution of the listed principles follows from the principles of equality fixed in the Constitution, harmony, legal certainty, balance.

Based on above-stated, Plenum of the Constitutional Court considers that for the correct resolution of the questions raised in the request and ensuring of the principle of legality it is necessary to clear up the concepts of multiple crimes, recurrence of crimes, set of crimes and repeated commission of crimes.

In the legal theory, the term “recurrence” is used both in narrow and broad meanings. Recurrence in a broad sense is a commission of crime by the person who earlier committed a crime. Recurrence is also called as the general recurrence. Such broad concept of recurrence is expressed in the term “multiple crimes” which reflects in itself commission of several similar and personal types of crimes.

According to requirements of the legislation all crimes components of multiplicity are committed by one person and thus it makes absolutely no difference, what kind of role (the executor, the organizer, the accomplice or the instigator) the accused plays in crimes.

If the person is exempted from criminal liability for committed act or a criminal record for committed actions is removed from official records, and also expired the term of criminal prosecution, these acts at establishment of multiplicity are not considered.

Multiplicity of crimes is regarded, as the circumstance aggravating criminal liability. Consecutive commission by the person of crimes allows him to save up experience of commission of crimes, gives more danger to his further criminal activity.

Similar provisions are also in criminal legislations of other countries, including Germany, Spain, France.

Thus, under multiple crimes it is necessary to mean the cases of commission by the perpetrator of the consecutive acts that became the reason of criminal liability or cases of commission of new crimes in the period of the term of the restriction connected with criminal prosecution for earlier made actions.

Though the term “multiple crimes” is not mentioned in criminal legislation, nevertheless, the Articles 16, 17 and 18 of the CC regulate issues connected with repeated commission of crimes, set of crimes, with recurrence of crimes and its types which belong to multiple crimes.

The institute of recurrence is the most difficult form of multiplicity of crimes and used in the CC in narrow sense.

Study of specific signs of recurrence of crimes is important.

Unlike the previous criminal legislation, repeated commission of crimes provided in independent norm in the Special Part of CC. In the previous CC, the recurrence of commission of crimes was defined in norms of Special Part, as a sign of corpus delicti and as the sign of necessary structure providing the aggravating circumstances. In the Article 16 of the acting CC the legislator established two independent types of special recurrence:

- commission of two or more crimes provided by the same Article of the Code (Article 16.1 of the CC);

- commission of two or more crimes provided by various Articles of the Code in the cases which are directly specified in Special Part of the Code (Article 16.2 of the CC).

As evident from essence of article the repeated crimes share on identical and uniform crimes.

Repeated commission of the crimes with identical signs of structure by the CC are considered as identical crimes (for example the person commits two crimes of theft or twice in a row crime of illegal capture of the car or other vehicle without the robbery purpose).

Uniform crimes is the repeated commission deliberately or by inadvertence of the crimes possessing similar signs of structure (Articles 177-185 of the CC).

The recurrence provided in Article 16 of the CC arises:

- at commission of crimes both by inadvertence and deliberately;

- in a case when the person who repeatedly committed crimes was not condemned for one of them;

- at commission by person of two or more crimes;

- at commission of identical and uniform crimes.

Other form of multiplicity is a set of crimes.

According to Article 17.1 of the CC a set of crimes forms commission of two or more crimes provided by various articles of the present Code, of which person made act of a crime was not condemned for one or not exempted from criminal liability on legal grounds, and also if on one of these crimes did not expire limitation periods of criminal prosecution.

Proceeding from essence of the specified article it is possible to come to such conclusion that set of crimes is characterized by the following signs:

- commission by the person of two or more crimes;

- existence of signs of independent structure of crimes in each of the crimes covering by it;

- commission of crimes by the person who does not have a criminal record;

- its emergence irrespective of commission of crimes in various or at the same time.

Set of crimes differs from repeated crimes in that whereas repeated commission of crimes arises at two or more multiple commission of crime, provided same or similar articles of the Code, and set of crimes arises at commission of the crimes provided by various articles of the Code.

Unlike previous criminal legislation, the acting CC for the first time regulates concept and types of recurrence, crimes as multiplicity of crimes.

According to Article 18 of the CC, existence of recurrence in act of the person requires two conditions:

- existence at the person of a criminal record for earlier committed deliberate crime;

- commission by the person of a deliberate crime.

At the same time, recurrence of crimes possesses specific features:

- consecutive commission of the crimes forming recurrence;

- existence of not removed and unspent conviction in the order established by law for earlier committed crime (decision of Plenum of the Constitutional Court of the Republic of Azerbaijan of September 6, 2010);

- full or partial serving of the sentence imposed by court for earlier committed crime.

Proceeding from above-noted it is possible to come to such conclusion that there are features distinguishing recurrence of crimes from other forms of multiplicity of crimes, especially from recurrence.

It is the following:

- existence of not removed or unspent conviction in the order established by the law for the crime which is earlier committed by the person;

- deliberate commission by the person of a new crime.

This difference plays the main role in resolution of the question specified in the request.

In Article 18 of the CC the 3 types of recurrence are established: simple, dangerous and especially dangerous. According to sense and essence of this article recurrence is classified by the following bases:

- character of crimes committed by the person;

- criminal records of the person;

- severity of deliberately committed crimes.

According to a criminal record and severity of the committed crime the recurrence shares on simple and difficult. It is in detail explained in Article 18 of the CC.

From the point of view of character of crimes, recurrence shares on the general and special recurrence. The crimes which are not directed on the same objects and possessing various forms of fault are considered as recurrence of a general view of crimes.

Crimes the part of which are identical or uniform crimes are considered as recurrence of a special type of crimes. As it was already noted, identical crimes are the crimes possessing signs of identical structure, and uniform crimes are the deliberately committed crimes possessing signs of similar structure.

Plenum of the Constitutional Court pays attention that the legislator unambiguously notes as recurrence of a crime deliberate commission of crime by the person previously convicted for deliberately committed crime. Repeated deliberate commission of the same or uniform crime by the person previously convicted for deliberately committed crime, also admits, recurrence of a crime thus its act cannot be classified by a sign of multiplicity of commission of crimes. As it was noted, according to sense and essence of Article 16 of the CC a crime, provided by this article are considered repeated in that case when the person was not condemned for one of these crimes.

Such conclusion, follows from requirements of the criminal law, and also the legal positions created by the Constitutional Court. Plenum of the Constitutional Court in the decision “On interpretation of notion of “person who have committed a crime for the first time that does not represent a significant public danger” fixed in Articles 72, 73 and 74of the Criminal Code of the Republic of Azerbaijan” of December 25, 2009 explaining an essence of Article 16 of the CC, noted that in case of presence of firm well-founded suspicions of previously commitment of one or several crimes and in case of bringing an action against the given person as a result of these suspicions subjection of the person to criminal prosecution as the person before committed a crime without the sentence of court which has come to effect is possible. It does not contradict to presumption of innocence. The issue of guilt or innocence of the person decides by a sentence of court make on the merits of the case.

Also in this decision it was specified that despite an establishment during preliminary investigation of firm well-founded suspicions on commitment of several criminal acts, the recognition on the basis of a presumption of innocence of act as for the first time made referring to no make decision which has come to effect, at least on one of these crimes can lead to refusal as to the objective validity of multiplicity of committing of crimes or occurrence of set of crimes.

Apparently, in this decision of Plenum of the Constitutional Court the multiplicity provided in Article 16 of the CC does not coordinate with existence of the sentence of court that entered into force.

Unlike Article 16 of the CC, in Article 18 of this Code it is provided that recurrence of crimes is the repeated deliberate commission of crime by the person having not removed or unspent conviction.

It is also necessary to note that at establishment of recurrence of crimes in case recurrence is not provided in the relevant article of Special Part of CC as sign of corpus delicti, according to Article 61.1.1 of the CC it has to be recognized as the case aggravating punishment.

Thus, at establishment of recurrence of crimes in case if recurrence is not provided in the relevant article of Special Part of CC as a corpus delicti sign, according to Article 61.1.1 of the CC it has to be to be considered as the circumstance aggravating punishment and guilty should be imposed sentence, with application of Article 65 of the CC.

Repeated commission of crime by the person who served sentence for earlier committed crime, however with not removed or unspent conviction testifies that the measure of criminal and legal influence applied concerning the person did not give the expected results, the person did not get rid of influence of dangerous bents and habits. Therefore, in comparison with for the first time condemned, persons the committed crimes recognized as recurrence are considered as more dangerous.

Plenum of the Constitutional Court in a number of decision specified that the criminal record is caused not only by the criminal record is reasoned not only by the fact of condemnation of the person and imposing of punishment. The criminal record expresses a legal status of condemned leading to the legal consequences established by the criminal legislation at repeated commitment of crime; the pending not removed previous conviction possessed by a person constitutes special social-legal relations which are formed between him and the state on the basis of the criminal-legal regulation serving for appraisal of person to in case if he commits new crimes and the crimes committed by him which represent big public danger and consequently imposing regarding concerning him of more austerity measures of legal character(decision of Plenum of the Constitutional Court “On interpretation of Article 83 of the Criminal Code of the Republic of Azerbaijan in connection with inquiry of the Court on Grave Crimes” dated May 25, 2009).

In view of above-noted, Plenum of the Constitutional Court comes to conclusion that:

- The repeated deliberate commission of the same or uniform crime by the person previously convicted for deliberate commission of crime should be recognized as recurrence of a crime. At the same time the act of this person cannot be qualified by a sign of repeated commission of crimes.

- At establishment of recurrence of crimes in case if in the relevant article of Special Part of the CC the recurrence is not provided as sign of corpus delicti, according to the Article 61.1.1 of this Code it is necessary to consider recurrence of crimes as circumstance aggravating punishment and guilty has to be imposed sentence, with application of Article 65 of this Code.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The repeated deliberate commission of the same or uniform crime by the person previously convicted for deliberate commission of crime should be recognized as recurrence of a crime. At the same time the act of this person cannot be qualified by a sign of repeated commission of crimes.

2. At establishment of recurrence of crimes in case if in the relevant article of Special Part of the CC the recurrence is not provided as sign of corpus delicti, according to the Article 61.1.1 of this Code it is necessary to consider recurrence of crimes as circumstance aggravating punishment and guilt with application of the Article 65 of this Code.

3. The decision shall come into force from the date of its publication.

4. 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”.

5. The decision is final, and may not be cancelled, changed or officially interpreted by any institution or official.