**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 264 of the Criminal Code*

*of the Republic of Azerbaijan*

# 10 April, 2012 Baku city

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

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Ikram Shirinov, Judge of Nasimi District Court of Baku city, Eldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

specialists: Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan, Amir Bayramov, Judge of the Court of Appeal of Baku city, Murvat Hasanov, Deputy Head of Directorate for Maintenance of Public Prosecution, Head of Department of the Maintenance of Public Prosecution in the Courts of Appeal and Cassation instance of the Republic of Azerbaijan,

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

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of the Nasimi District Court of Baku city on interpretation of Article 264 of the Criminal Code of the Republic of Azerbaijan.

having heard the report of Judge Rovshan Ismaylov, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialist and expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Nasimi district court of Baku city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) indicated that according to the pending case a person accused by Articles 263.1 and 264 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) E.Gafarov having violated when driving a car the requirements of Article 50 of the Law of the Republic of Azerbaijan “On road traffic” (hereinafter referred to as the Law “On road traffic”), the rules of road traffic and vehicle operation, committed a run down on Sh. Dadashova and injured her health with less heavy harm. After that, E.Gafarov in spite of the fact that he took the victim to hospital where she was rendered a medical care and brought her to home, he did not return to the place of a road accident and did not report about this accident to relevant authorities of executive power.

In the submitted inquiry it is indicated that in connection with this case there is a diversity of approaches between prosecution and defense as to application of the provision provided by Article 264 of the CC: “Leaving of a place of road and transport incident by a person who operated a vehicle and broke the rules of traffic or operation of vehicles…”. Due to the failure to comply with requirements of Article 37.4 of the Law “On road traffic” that is “to return to the place of commission of accident and to report concerning the accident to the relevant authority of executive power” the investigative authorities brought a charge against accused person in accordance with Article 263 and Article 264 of this Code.

According to applicant, being a referential norm, Article 264 of the CC refers to Article 263 of the CC and provides for a criminal liability only in case of occurrence of consequences provided by this article.

The disposition of Article 264 of the CC does not contain any other actions or inactions, except specified in the disposition of Article 263 of the CC, including execution of the actions specified regarding the Article of 37.4 of the Law “On road traffic”, i.e. commission or non-commission of the actions specified in these norms is not covered by the disposition Article 264 of the CC.

Thus, the court, having come to a conclusion concerning the uncertainty of the contents of Article 264 of the CC, for the purpose of the correct, objective and comprehensive investigation of the arisen circumstance, asks to give interpretation regarding the situation containing in this article “leaving by the person of a place of a road accident” though the position of provisions of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) and the European Convention on the protection of human rights and fundamental freedoms (hereinafter referred to as Convention).

Plenum of the Constitutional Court in connection with the inquiry considers necessary to note as follows:

Resolution of the question which has been touched upon in the inquiry, depends on two aspects: from a position of Article 264 of the CC of existence or absence at the person of a duty to identify his identity and the occurred accident and in case of existence of such duty, whether it contradicts to provisions of Article 66 of the Constitution concerning inadmissibility of compulsion to testify against himself and Article 6.1 of the Convention. In that case, first of all, the attention has to be paid to the essence of the crime provided in the Article 264 of the CC.

In this regard it is necessary to consider that the Article 37.4 of the Law “On Road Traffic” assigns to the driver of the vehicle during a road accident a number of duties including not moving forward the vehicle, not moving the subjects concerning incident, taking possible measures of first aid to the victim, calling the cab of “Emergency medical service” if the victims got life-threatening injuries to deal with them in the nearest medical institution, showing there an identification paper and then returning to place of a road accident; at impossibility of the movement of other vehicles to release a carriageway if it is necessary to release a carriageway or to take victims to hospital on the transport, previously with participation of witnesses to record the condition of the vehicle, traces and subjects having relations to incident and to take all possible measures for their protection and for the organization of driving of vehicles by place of a road accident, to report concerning the accident to appropriate authority of executive power of the Republic of Azerbaijan (the Ministry of Internal Affairs of the Republic of Azerbaijan), to write down surnames and addresses of eyewitnesses of incident and to wait for arrival of staff of appropriate authority of executive power of the Republic of Azerbaijan, and also to be in appropriate authority of executive power of the Azerbaijan Republic for incident documenting in accordance with the established procedure.

The specified provisions of the Law “On Road Traffic” match with international legal acts of which the Republic of Azerbaijan is the party too. Thus, on April 29, 1997 the Republic of Azerbaijan without any reservations, joined the International Convention “On Road Traffic” signed in Vienna on November 8, 1968. The parties agreeing about adoption of this Convention wishing to facilitate the international traffic and to increase safety on roads by adoption of the uniform traffic regulation, assumed certain obligations.

Article 31 of this Convention establishes rules of behavior of the driver during a road accident. According to it, on the driver or any other involved in a road accident alongside with obligations for providing the subsequent traffic safety and rendering an emergency medical service to victims, also the duty to remain on a place before arrival of police, not to destroy traces which can be useful to establishment of responsibility for commission of a road accident is assigned.

However, it is necessary to consider that even if the duties specified in the Law “On Road Traffic” are directed on immediate prevention of burdening of consequences of the happened incident and identification of the objective truth connected with incident their non-compliance in itself cannot bring to emergence of responsibility. Proceeding from this position the legislator caused bringing to responsibility of persons guilty in violation of the traffic rules only as it provided by the legislation of the Republic of Azerbaijan (Article 81 of the Law “On Road Traffic”). In this sense because of emergence of responsibility brings to criminal legal consequences, it has to be exactly and clearly specified in the law, according to the principle of legal definiteness, the commission of what kind of action (inaction), including not execution exactly of what kind of duty, becomes the reason of it.

Importance of such approach can be seen and in jurisprudence of the European countries. Thus, the Constitutional Court of Belgium of July 13, 2005 specified in the Decision that the principle of *nullumcrimen, nullapoena sine lege* follows from that idea that the criminal law has to consist of expressions, whether which give everyone the chance to know the actions made by it are punishable. It, first of all, demands that in the legislation by rather detailed and clear expressions answering to the principle of legal definiteness it was specified what actions are punishable. In that case, the person who made any certain action can estimate in advance to which consequences can lead this action. Thereby transfer of excessive discretion to courts will be stopped.

The legal position of Plenum of the Constitutional Court in connection with the specified issue consists that is required in exact, unambiguous and in an open form to specify the act creating criminal liability in the law. According to the purpose of prevention of criminal prosecution of innocent persons and evasion of guilty persons from criminal liability, the provision of the criminal law establishing responsibility should not be uncertain and ambiguous (decision of June 21, 2010 “On interpretation of some provisions of Articles 228.1, 229.1, 230, 231 and 232.1 of the Criminal Code of the Republic of Azerbaijan”).

At the same time, the principle of legal definiteness in the field of the criminal legislation follows from Article 71.8 of the Constitution and Article 7 of the Convention. Provision in Article 71.8 of the Constitution expressing the principle of legality in the Basic law along with the requirement of lawful justification of a crime and punishment has to be based on the law (the principles of *nullumcrimen* and *nullapoena sine lege*), also demands a ban on broad interpretation of the criminal law (lexstricta) of clarity of definiteness of the criminal legislation (lexcerta).

In the decision of Grand Chamber of the European Court of September 19, 2008 on case of Korbely v. Hungary it was specified that Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullumcrimen, nullapoena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the national law (§70).

It should be noted that fulfillment of the above duties, first of all, is caused by stay at a place of a road accident of the driver of the vehicle. For this reason, the legislative acts establishing administrative and criminal liability are provide the various measures of responsibility concerning the driver of the vehicle which left a place of road accident.

Thus, chapter XIII of the Code on administrative offenses of the Republic of Azerbaijan is devoted to administrative offenses, violation of traffic regulations. Article 151.3 of this Code, along with other questions also establishes administrative responsibility for leaving of a place of a road accident. When causing slight injuries to health of the victim or causing material damage to the victim the administrative responsibility arises according to Article 151.5 of this Code.

If the road accident leads to heavy consequences, the public relations are already governed by provisions of the criminal law. Thus, according to Article 263.1 of the CC infringement by the person managing automobile, tram or other mechanical vehicle, rules of traffic or operation of vehicles, committed on imprudence entailed causing of less serious or minor serious harm to health of a victim lead to criminal liability. Along with it Article 264 of this Code in case of approach of the consequences provided by Article 263 of this Code defines leaving of a place of a road accident by the person who is operating the vehicle and broke the traffic regulation or operation of vehicles as the criminal act.

It is necessary to consider that it is no coincidence that this provision which is new in the national criminal legislation was included in the CC which came into force since September 1, 2000. Thus, in all member states a large number of road accidents became a serious problem, need of behavior of participants of these incidents according to interests of the victims and road and transport safety, and also a desirable combination of provisions of the law concerning the offenses of "hit and run" (leaving of a scene) the Committee of Ministers of the Council of Europe adopted on September 28, 1977 the Resolution (77) No. 29. According to point 4 of this document the rules of behavior laid down should be designed to prevent any deliberate obstruction of the taking of relevant particulars concerning the accident, such as leaving the scene of the accident for the purpose of withholding from the appropriate persons or authorities information, in particular as to one's identity and/or as to one's vehicle.

Similar norm has been reflected in criminal laws of other European states and there the relevant jurisprudence was already created. For example, in the decision of the Federal Constitutional Court of Germany as of May 29, 1963 it was specified that a duty of a law and order is to provide whenever possible payment of compensations to the victims of a road accident. Cancellation of provision concerning the leaving of a place of traffic accident, which is specified by criminal legislation as a criminal act, in most cases would considerably reduce requirements of incidents’ victims with respect to civil compensations, and even would make impossible investigation of these incidents. Value and purpose of Article 142 of the Criminal Code of Germany is to hold from such behavior and to prevent evasion of any person from execution of possible obligations which can arise before persons harmed as a result of a road accident. The principle of constitutional state is not broken by this provision.

According to jurisprudence of France created by Court of Cassation the leaving of a place of a road accident, being a deliberately committed crime, provides the will of the person who committed an incident to leave a scene, without having given the chance to identify his identity with purpose to avoid the civil and criminal responsibility. Respectively, the person who committed an incident with the purpose to identify his identity incurs the obligation to remain on an accident scene (decisions of March 17, 2010 and of February 14, 2012).

The legal position of the Supreme Court of the United States of America also consists that the criminal offense of “hit and run” (leaving of a scene) is directed not on mitigation of criminal prosecution, namely on ensuring execution of the civil liability which resulted from a road accident (decisions of June 21, 2004 and on May 17, 1971).

The foregoing gives the grounds to come to such conclusion that the purpose of Article 264 of the CC, sense of which bears universal character, consists in forcing of persons driving transport vehicle through remaining at accident scene right after the accident by any means to inform relevant authorities on their identity in order to have an opportunity later to restore civil rights of a road accident’s victim. Thereby to the victim to which health, as a result of a road accident, less serious injury was done is given the chance at once to receive reliable information about the person driving the transport vehicle. Respectively this provision of the criminal law commits a person driving the transport vehicle to remain at accident scene right after incident, to provide necessary information for his/her identification and simplification of subsequent ensuring the civil rights. Such information has to be transferred to the person to health of whom is done the harm and if it is impossible – to other person providing his interests. At the same time, it is necessary to consider that leaving of a place of a road accident for any reason by the person driving the vehicle, including the bringing of the victim to medical institution as it is specified in the inquiry does not exempt from the obligation by any means to inform the victim on his/her identity.

Such approach also serves for execution by driver of duties specified in the Article 37.4 of the Law “On Road Traffic” and by that whenever possible immediate elimination of consequences of a road accident. Proceeding from this position the Plenum of the Constitutional Court specified in the decision as of January 29, 2004 that the Article 264 of the Criminal Code, in compliance with the Law “On Road Traffic”, requires a driver of a mechanical transport vehicle in a situation of a traffic accident to provide possible first aid to victims of the accident, call the ambulance service and, in case of a life-threatening injury, transport the victims to a nearest health facility by transport going in the same direction or, failing that, by own transport.

As for compliance of a duty of vehicle’s driver to remain at road accident scene and to inform injured victim on his/her identity, with his/her right not to testify against himself/herself (following from the Article 66 of the Constitution and the Article 6.1 of the Convention) it is necessary to specify that Plenum of the Constitutional Court with the above-mentioned decision as of January 29, 2004 recognized the Article 264 of the CC confirming the Article 66 of the Constitution.

According to legal position of Plenum of the Constitutional Court expressed in this decision the right of the person driving the vehicle not to testify against himself does not arise right after a road accident, since it is a criminal procedure right. First, because any road accident in itself yet cannot be regarded as a crime. Even after arrival on a scene of staff of appropriate authority of executive power (police) any participant of a road accident does not immediately get the status of a person involved into criminal procedure. They have to give preliminary evidences about incident as participants of a road accident. In this case, evidence by these persons, including the person driving the vehicle, has to be regarded not as the testifying against oneself but as execution of the duties provided by the Law.

If actions (or inaction) of a person which led to incident form a corpus delicti, as a rule, after the beginning of criminal case, and depending on the status of the person, there are corresponding criminal procedure rights, including right not to testify against themselves which have to be provided at all stages of criminal trial.

If detention of one of participants of a road accident, according to the Article 148 of the Criminal Procedure Code of the Republic of Azerbaijan is recognized necessary (hereinafter referred to as the CPC), this person can have a status of the suspect (Article 90.1.2 of the CPC), and in other cases, further the status of the suspect or the accused person, victim or the witness. According to provisions of CPC, suspects or the accused persons and witnesses are exempted from testifying against themselves and close relatives.

Thus, according to the Articles 90.9 and 91.7 of the CPC whether the suspect exercises his rights or declines to do so, he should not thereby suffer prejudice or detriment. Except where he intentionally names a person in the knowledge that he was unconnected with the offence, no liability should accrue to the suspect on account of his statements and explanations. According to Article 95.6.4 of the CPC, the witness can use the right to   refuse to testify or present documents or information against himself or his close relatives.

As evident, provided by Article 264 of the CC, duty of persons who broken the traffic regulation or driving the vehicle to remain on scene of an accident in cases of emergence of the consequences provided in Article 263 of this Code does not create obstacles for use by the person driving vehicle of the right not to testify against himself, indicated in Article 66 of the Constitution, irrespective of future status and at any stage of criminal trial. This circumstance is enough for ensuring the right of any person not to testify against himself, at execution by the bodies conducting preliminary investigation of a duty effectively observe the above-mentioned criminal procedure guarantees.

According to a legal position of the European Court on similar cases, though coercion, and an offense is “criminal” by the nature, coercion results from that fact that, everything who drives the car, know that thereby they recognize a certain mode of regulation. This mode works not because driving is the privilege granted by the state but because knowledge of owing a cars and their use can lead to causing severe injuries. Those who make the decision to own or drive a car, assume the certain duties and obligations making part of the regulatory mode. The European Court noted that the requirement about the instruction of the simple fact - who was at a car wheel – is not in itself incriminating. Thus, the Court recognized that from the point of view of special character of the discussed regulatory mode and limited character of information requested according to the legislation the right of testifying against himself is not violated.

On the basis of the above stated the Plenum of the Constitutional Court comes to conclusion that:

According to sense of Article 264 of the CC, person who made a road accident incurs the obligation, remaining scene of an accident and by any means to inform the victim concerning his identity.

At observance of this obligation, the leaving of a place of a road accident, for any reason, by the person driving the vehicle including for delivery of the victim to medical institution cannot be regarded as leaving of scene of an accident.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60,63, 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. According to essence of the Article 264 of the CC, a person committing road accident is obliged to remain at accident scene and by any means to inform the victim on his/her identity.

At observance of this obligation, the leaving of a place of a road accident for any reason by a person driving the vehicle including for delivery of victim to medical institution cannot be regarded as leaving of scene of an accident.

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

3. 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”.

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