**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of point 3 of the note part of Article 177 of the Criminal Code of the Republic of Azerbaijan*

**4 March, 2013 Baku city**

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

attended by the Court Clerk F.Aliyev,

the legal representatives: Ikram Shirinov, Judge of Nasimi district court of Baku city and Eldar Askerov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

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

specialists: Farhad Kerimov, Judge of the Supreme Court of the Republic of Azerbaijan, Gail Mammadov, Judge of the Baku Court of Appeal, Gazanfar Bayramli, deputy head of Department of the Prosecutor’s General Office on Public Prosecution;

has examined in open session via special constitutional proceedings in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan the constitutional case initiated by Nasimi district court of Baku city concerning the interpretation of point 3 of the note part of Article 177 of the Criminal Code of the Republic of Azerbaijan.

having heard the report of Judge K.Shafiyev, the reports of legal representatives of the interested subjects, conclusion of experts and opinion of visiting specialist, 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 Constitutional Court) asked to interpret point 3 of the note part of Article 177 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code) from the point of view of Articles 63, 64 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) and also Article 6 of the Convention “On Protection of Human Rights and Freedoms” (hereinafter referred to as Convention) and Article 4 of the Protocol No. 7 of the Convention.

In the request it is specified that V. Atakishiyev on the 24th January and on the 6th March, 2011 made crimes of an illegal seizure of car without the theft purpose.

On the basis of a sentence of Surakhani district court of the 25th October, 2011 for this criminal action V. Atakishiyev was found guilty under Article 185.2.2 of the Criminal Code and sentenced on punishment in the form of imprisonment for a period of 3 years.

Further it became known that V. Atakishiyev made theft on the 14th February, 2011. This criminal case is now on proceeding of Nasimi district court.

As evident from the request, the public prosecutor being guided by a sentence of Surakhani district court of the 25th October, 2011 and point 3 of the note part of Article 177 of the Criminal Code asked to pronounce a sentence about V. Atakishiyev's recognition guilty under Article 177.2.2 of the Criminal Code (repeatedly committed act).

The counsel for the defence of accused having disagreed with a position of the public prosecutor specified that the considering of this act as multiplicity is inadmissible because criminal action made by V. Atakishiyev on the 24th January, 2011 is already provided as multiplicity in a sentence of Surakhani district court of the 25th October, 2011 and he was found guilty under Article 185.2.2 of the Criminal Code and condemned.

From this point of view the Nasimi district court asks to give interpretation of point 3 of the Note part of Article 177 of the Criminal Code.

In connection with the request, Plenum of the Constitutional Court considers necessary to note the following. According to point 17 of part I of Article 94 of the Constitution the Milli Majlis of the Republic of Azerbaijan establishes the general rules by defining crimes and other violations of law and establishing liability for the commission thereof. From this point of view the legislator carrying out the powers established in the field of the criminal legislation have a right in limits, provided by the Constitution to establish contents of provisions of the Criminal law, including punishment for commission of socially dangerous acts and other criminal and legal consequences of commission by the person of a crime.

At the same time a criminal-legal institutes directed on protection of persons, society and state and also on prevention of crimes, with unconditional observance of the constitutional guarantees of the person in the specified area of the general (public) legal relations, have to be based on the principles of harmony of justice and criminal liability to values protected by criminal legislation.

From this point of view at interpretation of point 3 of the Note part of Article 177 of the Criminal Code it is necessary to act from the general principles of legal responsibility following from the constitutional norms and components in this area a basis of relationship of the state and the person. These principles set the limits of powers of the legislator in the course of criminal and legal regulation and also constitutional and legal guarantees of the person who was brought to criminal proceedings.

Multiplicity of committing crimes is reflected in Article 16 of the Criminal Code. Multiplicities of committed crimes are two or more crimes provided by one Article of the present Code. Committing of two or more crimes provided by one Article of the present Code is admitted as multiplicity only in cases provided by appropriate Articles of the Special part of the present Code (Articles 16.1 and 16.2 of the Criminal Code).

The legislator in view of high public danger of a number of criminal acts from the criminological point of view directly specified emergence of multiplicity of such crimes in articles of Special part of the Criminal Code.

According to point 3 of the Note part of Article 177 of the Criminal Code the repeatedly commission of crime provided by Articles 177-185 of the present Code if it was preceded by commission of one or more crimes provided by these articles and also Articles 217, 227, 232 and 235 of the present Code recognize as multiplicity.

The institute of multiplicity of crimes in the criminal legislation is regarded as circumstance strengthening or aggravating responsibility. Commission by the person of a crime repeatedly, as a rule indicates his stable criminal tendency, not taking in attention the prevention made by court and it finally indicates his high public danger. From this point of view in the legislation for repeatedly committed crimes the more heavy punishment is provided.

At the same time in spite of the fact that in the criminal legislation though more heavy punishment which is imposed for repeatedly committed crimes according to the principle of justice of the criminal law, punishment and other measures of criminal and legal character applied to the person, committed a crime is provided, have to be fair, that is correspond to character and degree of public danger of a crime, circumstances of its commission and the identity of the guilty. At purpose of punishment the principles of legality, equality before the law, responsibility for fault, justice and humanity have to be surely considered.

According to Article 8 of the Criminal Code providing the principle of justice punishment and other measures of criminal - legal nature instituted to the person, who has committed a crime, have to be fair, and correspond to nature and a degree of public danger of a crime, circumstances of committing it and nature of a guilty person.

In Article 41.2 of the Criminal Code the purpose of punishment is revealed and specified that punishment is applied with a view of restoration of social justice, correction of condemned and prevention of committing new crimes by condemned and other persons.

According to Article 58.3 of the Criminal Code at imposing of punishment nature and degree of public danger of a crime, personality of guilty, including the circumstances softening and aggravating punishment, and also influence of the appointed punishment on correction of condemned and on conditions of his family life, should be taken into account.

Plenum of the Constitutional Court notes that inadmissibility of repeatedly criminal prosecution of everyone for the same crime which is a component of the principle of justice of the criminal legislation, follows from Article 64 of the Constitution.

According to sense of this constitutional norm expressing the generally accepted principle of nonbisinidem, condemnation of the person repeatedly for a crime which earlier committed and for which he was condemned is forbidden. It means that the person cannot be repeatedly brought to criminal proceedings and punished for the same crime. From the point of view of the constitutional and legal nature this right cannot be limited and in fact is directed to both to the legislator and to law-enforcement bodies who bring guilty to criminal liability and impose to him types and punishment limits.

The right not to be condemned or punished twice found the reflection as well in international legal acts which the Republic of Azerbaijan is a party too. According to Article 14 of the International Covenant “On Civil and Political Rights” – “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

According to Article 4 of the Protocol No. 7 of the Convention – “no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”.

Plenum of the Constitutional Court in the Decision of the 14th November, 2011 “On interpretation of Articles 46.2, 46.3 of the Criminal Code of the Republic of Azerbaijan and Article 346.1.14 of the Criminal Procedure Code of the Republic of Azerbaijan” noted that according to Article 8.2 of the Criminal Code providing the principle of justice, nobody can bear criminal liability twice for the same crime. This principle covers also inadmissibility of imposing of an identical type of punishment as the basic and additional.

The constitutional principle of inadmissibility of repeated condemnation for the same crime is enshrined also in the criminal procedure and criminal legislation of the Republic of Azerbaijan.

So, according to Article 8.2 of the Criminal Code nobody can bear criminal liability twice for the same crime.

According to Article 34.1 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Procedure Code) nobody may be convicted twice for the same offence.

A criminal prosecution may not start or should be discontinued and the criminal case may not be begun or proceedings in the criminal case should be discontinued if there is a final court judgment on the same charge or another court decision which has not been annulled and makes it impossible to implement the criminal prosecution, if there is an extant decision of the preliminary investigator, investigator or prosecutor not to initiate the criminal case on the same charge or to discontinue it (Articles 39.1.6 and 39.1.7 of the Criminal Procedure Code).

As evident from standards of the legislation the principle of nonbisinidem means that if court adopted on case a final guilty or not guilty verdict concerning this person and also if initiation of legal proceedings was refused or it is stopped at any stage of criminal prosecution, any further (repeated) prosecution and imposing of punishment on the same charge is impossible.

This principle also excludes any addition to the imposed punishment especially after served sentence even if the subsequent behavior of the person will find insufficiency of its influence and an inaccuracy of an initial judicial assessment. Prosecution from the state cannot proceed as much as long time it is repaid by release from punishment or its departure and cannot be renewed. For this reason the state cannot prolong on not certain time criminal prosecution in the relation of the guilty.

At the same time the principle of nonbisinidem reflecting prevention of numerous condemnations for the same crime fixed in the Constitution and the criminal law, not interpret at narrow sense, usually preventing repeated condemnation and punishment for the same criminal act.

This principle also excludes a providing of the same circumstance possessing criminal and legal value twice, both at crime classification and at purpose of punishment. So, this principle forbids at a legal assessment of criminal act, repeated application of any measure of criminal and legal character.

Some above signs of noted principle are reflected also in the criminal legislation of the Republic of Azerbaijan. So, according to Article 61.3 of the Criminal Code if the aggravating circumstance is provided by the relevant article of Special part of the present Code as a crime sign, it in itself cannot repeatedly be considered at purpose of punishment.

This approach is reflected also in a case law of the European Court of Human Rights (hereinafter referred to as European Court).

The European Court in the decision of the 7th June, 2007 on case of Sergey Zolotukhin v. Russia specified that Article 4 of Protocol No. 7 is not confined to the right not to be punished twice but extends to the right not to be prosecuted or tried twice. Where not the case, it would not have been necessary to add the word “punished” to the word “tried” since this would be mere duplication. Article 4 of Protocol No. 7 finds application even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction.

At the same time in the decision it was specified that Article 4 of the Protocol No. 7 provides that no one should be liable to be tried or punished for the same offence.

The Grand Chamber of the European Court also noted that Article 4 of the Protocol No. 7 to the Convention has to be understood as forbidding criminal prosecution or judicial proceedings on the case of the second offense in that measure in what it is based on the identical facts or the facts which the same in essence (decision of the 7th June, 2007 on case of Sergey Zolotukhin v. Russia).

Considering the above, Plenum of the Constitutional Court considers necessary to note that the constitutional principle of prevention to be tried repeatedly for the same crime, also excludes repeated application of any measure of criminal-legal character on the same case.

At the same time it should be noted that the called principle does not interfere both to the legislator – by fixing of a criminal record and the related institutes of multiplicity and repeated commission of crimes attracting legal consequences provided by the criminal law and to court – in the course of definition in accordance with the established procedure a kind and a measure of the punishment applied to the person, committed a crime, to consider character of a crime, its danger for values protected by the Constitution and the criminal law, intensity, the reasons and other circumstances of its commission and also data on the person who has committed a crime, provided that regulation of these institutes and their application to adequately constitutional principles of legal responsibility and guarantees of the personality in public relations with the state.

However if before passing a sentence to person the relation which is pronounced a sentence on the basis of multiplicity, established by the relevant article of Special part of the Criminal Code as a sign of criminal structure, the commission of crime provided by the same article is revealed, repeated classification of this act of the person by a sign of multiplicity is not in accordance with the constitutional principle of prevention of second conviction for the same crime and the principle of justice reflected in the Criminal Code.

Along with the specified it is necessary to consider that application of point 3 of the Note part of Article 177 of the Criminal Code in the order that inappropriate to constitutional legal sense defined in this decision can become the reason of excessively heavy punishment imposed to the person.

So, the person commits any crime or some crimes provided by Articles 177-185 and also 213-3, 217, 227, 232 and 235 of the Criminal Code and in his relation are pronounced a sentence for multiplicity of crimes specified in Articles 177-185 of this Code. Before passing a sentence it was established that the person committed one more crime provided by these Articles (177-185). If concerning his given act is known before passing a sentence, limits of the punishment imposed to him would be softer, than those which will be newly imposed on sign of multiplicity after passing a sentence.

According to Article 8 of the Criminal Procedure Code purposes of criminal proceedings are to detect offences as early as possible, to investigate all the circumstances thoroughly, completely and objectively, to prosecute and to incriminate those who have committed offences.

On the basis of the above Plenum of the Constitutional Court comes to such conclusion that commission by the person condemned for crimes provided by of point 3 of the note part of Article 177 of the Criminal Code of any of crimes specified in Articles 177-185 of this Code before passing a sentence creates multiplicity of these crimes.

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. Commission by the person condemned for crimes provided by of point 3 of the Note part of Article 177 of the Criminal Code of any of crimes specified in Articles 177-185 of this Code before passing a sentence creates multiplicity of these crimes.

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 cannot be cancelled, changed or officially interpreted by any body or official.