**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 56.1.1 and 56.1.2 of the Criminal Code of the Republic of Azerbaijan*

**18 June 2013                                                                            Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Amil Dosiyev, Judge of Criminal Board of Court of Appeal of Shirvan city; Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

expert – Jabir Guliyev, Associate Professor of Criminal Law and Criminalistics Chair of the Baku State University, Deputy Dean of Law Faculty, Doctor of Philosophy in Law,

specialists – Shahin Yusifov, Chair of Criminal Board of the Supreme Court of the Republic of Azerbaijan; Mahir Abbasov, Prosecutor of Department on Support of Public Prosecution in Courts of Appeal and Cassation Instances of Department of Support of Public Prosecution of Prosecutor Office of the Republic of Azerbaijan; Ziya Dadashev, Head of Legal Department of Penitentiary Services of the Ministry of Justice of the Republic of Azerbaijan, Lieutenant Colonel of justice;

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 inquiry of Court of Appeal of Shirvan city on interpretation of Articles 56.1.1 and 56.1.2 of the Criminal Code of the Republic of Azerbaijan.

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

**DETERMINED AS FOLLOWS:**

Court of Appeal of Shirvan city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to give an interpretation of Articles 56.1.1 and 56.1.2 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code) from the point of view of Articles 66.1 and 66.2 of the given Code.

In the inquiry it is specified that the accused Salimkhan Huseynov by a sentence of Saatly District Court dated February 7, 2013 was found guilty under Articles 263.2 and 264 of the Criminal Code and condemned under Article 263.2 of the Criminal Code to custodial sanction for a period of 3 years 6 months with deprivation of the right to motor vehicle driving for a period of 2 years, and under Article 264 of the Criminal Code to custodial sanction for a period of 1 year with deprivation of the right to motor vehicle driving for a period of 1 year 6 months. According to Articles 66.3 and 66.4 of the Criminal Code by partial addition of the imposed sentences, S. Huseynov is condemned to punishment in the form of imprisonment for a period of 4 years with deprivation of the right of driving of motor vehicle for a period of 3 years, with serving sentence in standard regime penal colony.

Having made the appeal complaint to a sentence the convict and his defender asked with application of Article 62 of the Criminal Code to define to him for serving sentence in penal colony settlement.

Due to the application of Articles 56.1.1 and 56.1.2 of the Criminal Code the Court of Appeal Shirvan city at considering the case has met the certain difficulties.

In the inquiry it is specified that in Article 56.1.1 of the Criminal Code provide the serving sentence, by persons condemned for the crimes committed on imprudence, to imprisonment for the term of not over of five years in penal colony settlement, and in Article 56.1.2 of the Criminal Code the serving of the imposed sentence to persons, for the first time condemned to imprisonment for commitment of deliberate crimes, not representing the big public threat or less serious and minor serious crimes, and also to the persons condemned for crimes, accomplished on imprudence, to imprisonment for the term from above five years – in institutions on serving of punishments of general mode is defined.

The Court of Appeal of Shirvan city considers that there was an uncertainty in law-enforcement practice because in Article 56 of the Criminal Code which determine a type of institution of serving sentence to persons condemned to punishment in the form of imprisonment definition of institution on serving sentence at imposing of final punishment to the persons condemned for the crimes committed on imprudence on set of crimes (sentences) to imprisonment for a period of up to five years, and also to persons who was for the first time convicted to imprisonment for commission of the crimes which are not represent significant public threat or less serious and serious crimes is not indicated.

From this point of view, the Court of Appeal of Shirvan city notes that application of the specified articles in various order creates difficulties for formation of uniform jurisprudence, and there is a need of official interpretation of these norms by the Constitutional Court.

In connection with the inquiry the Plenum of the Constitutional Court considers necessary to disclose some provisions, establishing the legal nature of punishment, an essence of assignment of punishment as addition of crimes, types of institutions on serving sentence of the Criminal Code and regulating an order of execution of the punishment of the Code on Execution of Punishments of the Republic of Azerbaijan (hereinafter referred to as the CEP).

Punishment is the measure of criminal - legal nature appointed on a decision of court. Punishment is applied to the person recognized as guilty in commitment of a crime and consists of the deprivations established by the present Code or restrictions of rights and freedom of this person. 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. (Articles 41.1 and 41.2 of the Criminal Code).

In the decision of the Plenum of the Constitutional Court of March 17, 2011 “On interpretation of Article 53.4 of the Criminal Code of the Republic of Azerbaijan and Article 112.1 of the Code on Execution of Punishments of the Republic of Azerbaijan” it is specified that on the one hand the punishment is the reaction of the state to the committed crime, and on the other hand to a person who committed a criminal act is the criminal legal result of the committed crime. Punishment is a special measure of state coercion, and it can be appointed only by the criminal law for an act or omission referred to as a crime.

In the penal legislation along with a concept of punishment, also the types of penalties, imposed to persons who committed a crime are determined.

Among penalties imposed according to court verdict with respect to persons guilty in commitment of crime, only two are connected with isolation of the convict from society: imprisonment for a certain term and life imprisonment (Articles 42.0.12 and 42.0.13 of the Criminal Code).

Imprisonment on a certain term consists in isolation of condemned from a society by his premise in establishments of a settlement type, in establishments on serving punishments of the general, strict or special mode or in prison. The persons, condemned to imprisonment, but did not reach eighteen to the moment of removal by court of a decision, shall be located in educational establishments of general or strengthened regime (Article 55.1 of the Criminal Code).

Determination of a type of institution on serving of sentence and extent of isolation of the convict from society is solved taking into account nature and public danger of the committed crime, his personality whether he was earlier condemned or not, a sex, age of the guilty person and other circumstances.

Determination of a type of institution on serving of sentence to the persons condemned to custodial sanction for a certain term is regulated by directly penal legislation. Determination by the penal statute of different types of institutions on serving of sentence serves for the purpose of correction of convicts.

Article 56 provides for the type of punishment execution institution for the persons sentenced to deprivation of liberty. The classification of punishment execution institutions create favorable conditions for individual educational work directed at understanding of the fallacy of the views formed by prisoners at the norms set by the society, and the human behavior. The perception by the convicted person of fairness of the sentence applied and the imposed coercive measures is one of the main conditions for the achievement of the purposes of punishment (decision of the Plenum of the Constitutional Court of January 12, 2012 “On interpretation of Article 56.1.3 of the Criminal Code of the Republic of Azerbaijan”).

In Article 56.1.1 of the Criminal Code it is established that the persons condemned for the crimes committed on imprudence to imprisonment for the term not exceeding five years have to serve sentence in penal colony settlement, and in Article 56.1.2 of the Criminal Code it is established that persons, for the first time convicted to imprisonment for commission of deliberate crimes not representing significant public threat or which are considered less serious crimes, and also persons condemned for crimes committed on imprudence to imprisonment for the term exceeding five years have to serve sentence in institutions on serving of sentence of a general regime.

Due to the matter in the decision of the Supreme Court of the Republic of Azerbaijan dated June 28, 2002 “On practice of definition by courts of a type of institution on serving of sentence for persons convicted to punishment in the form of imprisonment” it has been specified that at imposing of punishment in the form of imprisonment as set of crimes or sentences a type of institution on serving of sentence or serving of a part of punishment in prison has to be specified not separately concerning each crime but only after imposing of final punishment.

According to part 2 of this decision if the person has committed several criminal actions both deliberately and on imprudence and this person on set of crimes is condemned to punishment in the form of imprisonment for the term of not over five years, then the court can appoint serving sentence in penal colony settlement in case the sentence which is not connected with imprisonment is imposed to the defendant for deliberately committed crime.

The type of institution for serving of punishment by the person condemned to punishment in the form of imprisonment is determined by the court verdict and is specified in a resolute part of a conviction according to the above-stated articles of the Criminal Code (Article 56.3 of the Criminal Code and Article 353.4.4 of the Criminal Procedure Code of the Republic of Azerbaijan).

Establishment in Article 56.1 of the Criminal Code of different types of institutions on serving of sentence depending on severity of the crimes committed by convicts, and also their personality also follows because of need of contents of them separately from each other, protection of the persons who have committed less serious crime and for the first time the persons condemned to imprisonment from negative influence who have committed serious or especially serious crimes and are created by a possibility of ensuring of different approach to convicts of different categories.

At the same time, the persons sentenced to imprisonment shall be differentiated by sex, age, severity of the crimes committed by convicts, the behavior of the convicted person within the period of serving of sentence and his state of health. Differentiation of the convicted persons is essential for the individualization of execution of punishment in the form of deprivation of liberty in the form of a group, the protection of persons sentenced to deprivation of liberty for the first time in the short term from the harmful impact of more dangerous criminals. The basis of differentiation of punishment execution institutions comprises such principles of criminal law and law enforcement, as justice, humanism purposeful application of coercive measures and means of correction of prisoners, encouragement and reinforcement of the law in correctional treatment (decision of the Plenum of the Constitutional Court of January 12, 2012 “On interpretation of Article 56.1.3 of the Criminal Code  of the Republic of Azerbaijan”).

In the Article 112 of the CPC, the conditions of execution of punishment in penitentiary institutions of general regime and in the Article 119 in penal colony settlement are established.

The Plenum of the Constitutional Court notes what for achievement of goals of the punishment prescribed in Article 41.2 of the Criminal Code a type of serving of sentence where has to serve sentence the person condemned to punishment in the form of imprisonment in the criminal legislation has to be reflected in an accurate, unambiguous and clear form and is specified in the court verdict.

Concept set of crimes and an order of impose of punishment on set of crimes are provided in Articles 17 and 66 of the Criminal Code.

In Articles 17.1 and 17.2 of the specified Code it is specified that set of crime forms include two or more crimes, provided by various articles of the present Code, and if a person was not condemned or released from the criminal liability on the lawful grounds for committed crimes, and also if time for attraction to criminal liability on one of these crimes have not expired. Committing by one action (inaction) of two or more crimes, provided by two or more articles of the present Code, forms ideal set of crimes.

The two types of set of crimes that is considered an independent kind of plurality of crimes – ideal and real set of crimes are differentiate. Both types of set of crimes arise only in that case, when the person was not condemned for any of committed crimes and period of limitation of criminal prosecution on the bases provided by the law did not expire. The article of the Criminal Code providing responsibility for this act should classify each committed criminal act (in both types of set).

According to a concept of set of crimes, the legislator has also adjusted special norm an order of assignment of punishment for commissions of crime on set.

Thus, court in case of imposing of punishment on set of crimes having imposed for each crime separate punishment and by absorption of less strict punishment to more strict or by full or partial addition of the imposed punishments imposes final penalty (Article 66.1 of the Criminal Code). Apparently, the court in case of assignment of punishment on set of crimes, in independence of what order provided in Article 66.1 of the Criminal Code will be applied, for each crime imposes penalty separately and establishes final punishment on set. The type of institution on serving of sentence shall be determined not separately for each crime but after imposing of final punishment by set.

Article 24 of the Criminal Code specify that the person, who has committed a crime (action or inaction) is admitted as guilty only on deliberate or on imprudence grounds.

Two forms of intention and imprudence are provided in the criminal legislation:

- crime accomplished deliberately, shall be acts (action or inaction), accomplished with direct or indirect intention admits (Article 25.1 of the Criminal Code);

- crime accomplished on imprudence, shall be admitted acts (action or inaction), committed on criminal self-confidence or criminal negligence (Article 26.1 of the Criminal Code).

The concept “guilt” of the criminal law is understood as the mental relation of the person to the made socially dangerous act (action or inaction) and its consequences that is expressed in the form of intention or imprudence.

The guilt as psychological category possesses the certain content consisting of set of various psychological elements. To the psychological elements forming content of guilt belong the reason and will, and they as draw up the psychological statement respectively the conscious and reasonable part of socially dangerous behavior. These psychological elements in turn create degree of public danger of act (action or inaction).

The type of institution on serving of sentence in the form of the imprisonment imposed according to degree of public threat of act is enshrined in the criminal legislation as one of types of institutions on serving of sentence of more high security for deliberately committed acts established by legislature according to this psychology.

Considering the above mentioned, the Plenum of the Constitutional Court comes to conclusion that according to essence of the Articles 56.1.1 and 56.1.2 of the Criminal Code:

- with respect to persons condemned for a crime committed imprudently for a period of up to 5 years of imprisonment and for crimes not representing significant public threat, less serious and serious crimes to the punishment which is not connected with imprisonment by set of crimes the penal colony settlement for serving of sentence shall be applied;

- if set of crimes (sentences) covers crimes committed both deliberately and imprudently and a person is convicted to be imprisoned for crimes committed both imprudently and for crimes not representing significant public threat, less serious and serious crimes, with respect to such person shall be applied imprisonment in a penitentiary institution with standard regime (penal colony settlement).

Along with specified, the Plenum of the Constitutional Court considers necessary to note that in case of implementation of the powers established by the Constitution in the field of protection of human and citizens rights and also the criminal legislation, the legislator has the right to determine content of provisions of the penal statute, including punishments for commitment of socially dangerous acts and other criminal and legal results of the crime committed by the person.

From this point of view to the persons condemned for a crime on imprudence for a period of up to 5 years of imprisonment and for the crimes which are not represent significant public threat, less serious and serious crimes to the punishment which is not connected with imprisonment on set of crimes it is impossible to exclude regulations in a legislative order a possibility of definition of serving sentence in penal colony settlement.

Being guided by the 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. According to essence of the Articles 56.1.1 and 56.1.2 of Criminal Code of the Republic of Azerbaijan:

- with respect to persons condemned for a crime committed imprudently for a period of up to 5 years of imprisonment and for crimes not representing significant public threat, less serious and serious crimes to the punishment which is not connected with imprisonment by set of crimes the penal colony settlement for serving of sentence shall be applied;

- if set of crimes (sentences) covers crimes committed both deliberately and imprudently and a person is convicted to be imprisoned for crimes committed both imprudently and for crimes not representing significant public threat, less serious and serious crimes, with respect to such person shall be applied imprisonment in a penitentiary institution with standard regime (penal colony settlement).

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 institution or official.