**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 407.2 of the Criminal Procedure Code of the Republic of Azerbaijan*

**17 December 2014                                                                           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, Mahir Muradov, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev (Reporter-Judge);

attended by the Court Clerk Teymur Ojagverdov,

representatives of interested parties – Zamin Tahirov, Judge of Guba District Court; Fuad Mamedov, Head of Sector of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – prof. Firuddin Samandarov, Head of the Department of Criminal Law and Criminology of Baku State University, Doctor of Legal Sciences;

specialists – Shahin Yusifov, Chair of the Criminal Board of Supreme Court of the Republic of Azerbaijan; Mirzali Abbasov, Judge of the Court of Appeal of Baku city;

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 Guba District Court on interpretation of Articles 398.1.4, 407.2 and 412.7 of the Criminal Procedure Code of the Republic of Azerbaijan.

having heard the report of Judge Kamran Shafiyev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialists, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Guba District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked for interpretation of Articles 398.1.4, 407.2 and 412.7 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Procedure Code) with regard to Articles 66.5, 67.1 и 18.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code), decisions of the Plenum of Constitutional Court of September 6, 2010 “On interpretation of Articles 18 и 83.1 of the Criminal Code of the Republic of Azerbaijan” and of February 22, 2012 “On interpretation of Article 66.5 of the Criminal Code of the Republic of Azerbaijan.

In the inquiry it is specified that by a sentence of Gusar District Court dated July 24, 2013 O. Hasiyev was found guilty under Articles 177.2.2, 177.2.3 and 177.2.4 of the Criminal Code and condemned to penalty in the amount of 4.000 AZN.

This sentence was changed by the decision of the Court of Appeal of Sumgait city of October 4, 2013, and the sentence in a form of imprisonment for a period of 3 years was imposed with respect to O. Hasiyev according to Article 69.3 of the Criminal Code, punishment in a form of imprisonment for a period of 2 years 7 months 1 days according to Article 70 of the Criminal Code was kept, and punishment was recognized as conditional with a trial period of 2 years.

By the decision of Criminal Board of the Supreme Court of the Republic of Azerbaijan of April 1, 2014, the decision of the Court of Appeal of Sumgait city was cancelled and criminal case was returned for reconsideration to court of appeal instance. By the decision of Gusar District Court of July 24, 2013 the decision of appeal instance of June 10, 2014 was changed, the penalty with respect to O. Hasiyev in the amount of 4.000 AZN was replaced by custodial sanction for a period of 3 years, based on Article 69.3 the custodial sanction for a period of 2 years 8 months 1 days are kept and this decision took legal effect.

In the inquiry it is also specified that the crime of which O. Hasiyev is accused under Article 234.1 of the Criminal Code on the case which is in proceeding of Guba District Court was committed on March 18, 2014, that is, then when the decision of the Court of Appeal of Sumgait city of October 4, 2013 concerning him was in force.

Inquirer considers that committing by the person of a new crime during action of the decision of court of appeal instance, owing to absence in the law of direct specification of a punishment for cumulative crime or cumulative sentences concerning this person after cancellation of this decision and adoption of the new decision by court of appeal instance, becomes the reason of various approaches in court practice.

Inquirer points out that the following remains unclear: does an action of a person who committed criminal act after entering into force of judgment of court of appeal instance of October 4, 2013, cancellation of this decision and announcement of new decision by court of appeal, conviction specified in Article 18.1 of the Criminal Code (including at the same time the decision of court of appeal) create a recurrence?

In connection with the inquiry, the Plenum of the Constitutional Court considers necessary to note the following.

The issues raised in the inquiry actually connected with imposing of punishment on cumulative crimes or cumulative sentences concerning the person who committed a new crime after the judgment of the court of appeal instance in case of the subsequent cancellation of this decision and with whether or not his act creates the recurrence.

Cumulative crimes and their recurrence, being the difficult social and legal phenomenon, confirm increase of danger for public from an accused person, and his/her criminal professionalism and organizational abilities. For this reason, the criminal legislation, while legally treating difficult crimes and defining purpose of more rigid punishments is guided by restoration of social justice and achievement of goals of punishment.

The concept of cumulative crimes and order of imposing of punishment for it provided by Articles 17.1 and 66 of the Criminal Code.

Cumulative crimes 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 (Article 17.1 of the Criminal Code).

According to Article 66.1 of the mentioned Code in case of cumulative crimes for each committed crime shall be appointed separate punishment and by absorption of less strict punishment to more strict or by full or partial addition of the appointed punishments shall be appointed final punishment.

Two principles of imposition of punishment on cumulative crimes found their reflection in the Criminal Code: principles of absorption (replacement) and addition (complete or partial). The legislator determined imposition for each separate crime the one final punishment by cumulative crimes.

Along with it, the legislator provided an order of imposition of punishment if after imposition of punishment on criminal case, it is established that the convicted person is guilty also in committing other crime before imposition of punishment. Based on Article 66.5 of the Criminal Code the punishment shall be imposed by the same rules, if after imposition by court of a decision on case will be established, that condemned is guilty also in other crime, committed by him before judgment was adopted.

In the decision of the Plenum of Constitutional Court dated February 22, 2012 “On interpretation of Article 66.5 of the Criminal Code of the Republic of Azerbaijan” it is indicated that because of the fact that the concept “condemned” of criminal law covers the person returned guilty on the basis of the sentence which entered into force the Article 66.5 of the Criminal Code provide the sentence which entered into force on the first case.

On the other hand, in view of special danger of the convicted person who without having served completely sentences has made a recurrence from the point of view of Article 18.1 of the Criminal Code, and also insufficiency of the sentence for the prevention of commission of a new crime imposed on the previous case, the legislator has established imposition to the person of punishment on cumulative sentences. Thus, according to Article 67.1 of the Criminal Code at imposition of punishment on cumulative sentences, court, to the punishment imposed on a new decision, in part or completely attaches deserved part of punishment on the previous decision.

Taking into consideration the above-mentioned norms of criminal legislation it is obvious that punishment on cumulative crimes shall be applied with respect to crimes committed until the first criminal record, and punishment on cumulative crimes - to cases of commitment of a new crime by a person condemned by a sentence, which took legal effect. Apparently, the legislator connects distinction in imposition of punishment on set with time of commitment of crimes.

For the purpose of adoption of the correct decision, the issue raised in the inquiry, the Plenum of the Constitutional Court considers necessary to reveal an order of entry into force of a sentence and decision of court.

According to Article 358.2 of the Criminal Procedure Code if a sentence or the decision of the court of first instance is not protested or not appealed in an appeal order, then it takes legal effect after 20 (twenty) days. At the same time, according to Article 389.1 of the Criminal Procedure Code a complaint or appeal against a sentence or decision of a court of first instance stays before the execution thereof. The final decision of court of appeal instance comes into force immediately after its delivery (Article 407.2 of the Criminal Procedure Code). According to Article 412.7 the lodging of a complaint or appeal against a final court sentence or decision does not stay before the execution of the latter.

Thus, based on Article 407.2 of the Criminal Procedure Code, the final decision of court of appeal instance comes into force immediately after its delivery and therefore the final punishment with respect to a person who committed a crime after this decision shall be imposed on cumulative sentences.

Along with it, it should be noted that a person who committed crime while the relevant decision of the court of appeal instance was in effect, in case of cancellation of this decision by court of cassation instance in accordance with material or procedural bases, and if this person is not considered as justified, or a fact of commitment of a crime by him/her is not confute, shall have a penalty on cumulative sentences. Apparently, the main condition of imposition of punishment on cumulative sentences is commitment of a new crime by a person condemned by the sentence, which took legal effect.

The Plenum of the Constitutional Court also notes that based on Article 18.1 of the Criminal Code, commitment of an intentional crime by the person who was previously convicted for commitment of intentional crime creates a recurrence of crimes. According to Article 83.1 of the same Code, the person condemned for commitment of crime is considered as the offender from the date of the introduction of a conviction of court in a legal force until cancellation or expungement of a criminal record.

According to the decision of the Plenum of Constitutional Court as of September 6, 2010 “On interpretation of Articles 18 and 83.1 of the Criminal Code of the Republic of Azerbaijan” the provision “condemned person” of Article 18.1 of the Criminal Code covers, according to Article 83.1 of the same Code, a person concerning whom there is a conviction of court which entered into force and existence of outstanding or not cleared criminal record. The existence for a person of outstanding or not cleared criminal record at time of commission of new deliberate crime in the subsequent stage of criminal trial, independently of cancellation of a criminal record does not prevent imposing upon this person - in cases established by law - of punishment for recidivism.

Apparently, one of basic elements of a recurrence is again committed intentional crime by a person earlier condemned. Person concerning whom there is a conviction of court that took legal effect is considered as “convicted”.

Proceeding from the aforementioned, the Plenum of the Constitutional Court comes to the following conclusion:

According to Article 407.2 of the Criminal Procedure Code, commitment by a person once again of the intended crime, after the final judgment of the court of appeal instance, which took legal effect from the moment of its announcement, creates a recurrence of crimes and concerning this person it is necessary to impose punishment on cumulative sentences.

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 the Article 407.2 of the Criminal Procedure Code of the Republic of Azerbaijan, commitment by a person once again of the intended crime, after the final judgment of the court of appeal instance, which took legal effect from the moment of its announcement, creates a recurrence of crimes and concerning this person it is necessary to impose punishment on cumulative sentences.

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.