**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**D E C I S I O N**

**OF THE PLENARY SESSION OF THE CONSTITUTIONAL
COURT OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Paragraph 1 and 3 of the Note section of
Article 177 of the Criminal Code of the Republic of Azerbaijan*

**23 April 2018 Baku city**

The composition of the Plenum of the Constitutional Court of the Republic of Azerbaijan, including Farhad Abdullayev (chair), Sona Salmanova, Sudaba Hasanova (reporter-Judge), Rovshan Ismayilov, Ceyhun Garajayev, Rafael Gvaladze, Mahir Muradov, Isa Najafov and Kamran Shafiyev,

with the participation of Court secretary - Faraid Aliyev,

representatives of interested subjects - Namiq Mammadov, Judge of the Baku Appellate Court and Kamala Pashayeva, Adviser of the Department on Administrative and Military Legislation of the Milli Mejlis of the Republic of Azerbaijan,

expert - Shahla Samedova, professor of the Criminal Law and Criminology Department of the Baku State University, Doctor of Law,

specialists - Shahin Yusifov, Chief of the Criminal Board of the Supreme Court of the Republic of Azerbaijan, Murvat Hasanov, Deputy Chief of the Department for the Defence of State Charges of the Chief Prosecutor's Office of the Republic of Azerbaijan, Head of the Department for the Protection of State Charges in Courts of Appeal and Cassation, and Nahid Mammadzadeh, Head of the Department of Chief Organizational-Inspection of the Ministry of Internal Affairs of the Republic of Azerbaijan,

heard in accordance with Paragraph 6 of Article 130 of the Constitution of the Republic of Azerbaijan, at open court hearing on special constitutional proceedings, the application of the Baku Appellate Court on the interpretation of paragraph 1 and 3 of the Note to Article 177 of the Criminal Code of the Republic of Azerbaijan in the light of Articles 16 and 177.2.2 of the Criminal Code of the Republic of Azerbaijan, Articles 60 and 71 of the Constitution, as well as Articles 6 and 7 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

Having heard the report of Judge S. Hasanova on the case, speeches of representatives of interested subjects and experts, opin­ion of the expert, examining and discussing the materials of the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Baku Appellate Court applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter - the Constitutional Court) for interpretation of paragraph 1 and 3 of the Note to Article 177 of the Criminal Code of the Republic of Azerbaijan in the light of Articles 16 and 177.2.2 of the Criminal Code of the Republic of Azerbaijan, Articles 60 and 71 of the Constitution, as well as Articles 6 and 7 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

The application indicated that the Baku Court of Appeal had been filed a criminal case based on an appeal protest related to the con­viction of A.Hamzayev under Article 177.2.2 of the Criminal Code. The Court decision on this criminal case has established that the accused has repeatedly committed theft.

So, in order to seize another's property secretly, on September 10, 2015, he plundered a brake winding of the machine in elevator sec­tion of the building and damaged the property owner in the amount of 106 manat.

Later, A.Hamzayev again with the purpose of seizing another's property, committed repeatedly theft crimes from September 11 to December 24, 2015, separating cables and stealing brake windings from the machine section of elevators located in different buildings with a damage of 106 manat per each episode, together 62 episodes.

A.Hamzayev was sentenced to 3 years and 3 months of imprison­ment on charges of committing a crime under Article 177.2.2 of the Criminal Code with the decision of the Surakhani District Court of Baku on October 23, 2017 and placed under the probation period of 1 year and 6 months in accordance with Article 70 of the Criminal Code.

The state prosecutor filed an appeal protest and requested elimi­nation of part on application of Article 70 of the Criminal Code and imprisonment of A. Hamzayev under Article 177.2.2 of the Criminal Code.

According to the Baku Court of Appeal, the lack of clarification at legislation regarding the fact that the requirement about the amount of damage caused with the firstly committed act should exceed five hundred manats, and if it was repeatedly should exceed one hundred manats for the purpose of interpreting the act as a repeated theft, creates hardships in the court's practice violating the principle of legal certainty. Thus, liability provided for in Articles 177.1, 178.1 and 179.1 of the Criminal Code arises when the prop­erty owner or other owner is damaged more than five hundred man­ats, but not more than five thousand manats. The liability provided for in Articles 177.2.1-177.2.3-2, 177.2.5 and 177.3.1 of this Code shall arise in the event of damage to property owner or other owner in the amount of more than one hundred manats. As it can be seen, the damage caused to the owner or other owner of the property for the simple theft act must exceed five hundred manats and in the event of repeated repetition more than one hundred manats.

According to the applicant, there is a need to interpret the men­tioned Articles to formulate a common judicial practice with respect to the acts, depending on the amount of damage incurred when the same acts were repeated.

The Plenum of the Constitutional Court considers it important to mention the following regarding the application.

According to the Paragraph I of Article 13 of the Constitution, the property in the Azerbaijan Republic is inviolable and is protected by state.

Property is an economic and legal category and constitutes a set of actual social relationships, such as possession, usage, and dispos­al of property obtained and owned by the proprietor. When regulat­ed by legal norms, these relations take legal form and are legally pre­scribed by the rights of the proprietor as possessing of movable and immovable property, and using and disposing it.

The property was also included in the list of objects protected by criminal law and its protection was defined as one of the main duties of the Criminal Code. According to Article 2.1 of the Criminal Code, duties of the Code are: providing of the peace and safety of mankind, protection of rights and freedom of the person and the cit­izen, of property, of economic activities, of social order and public safety, of environment, of constitutional grounds of the Azerbaijan Republic from criminal encroachments, and also the prevention of crimes.

It should be noted that the norms of the Criminal Code on offens­es against property are constantly improved by the legislator.

By the Order №2668 of the President of the Republic of Azerbaijan dated February 10, 2017 "On improvement of activity in the penitentiary sphere, humanization of the penal policy and the extension of the application of alternative punishment and procedur­al compulsory measures not related to isolation from society", an important boost was given to the implementation of further reforms for the liberalization of the criminal law policy, by restricting the application of arrests and deprivation of liberty for crimes which do not represent big public danger and less serious crimes, decriminal­ization of offenses and the application of broader alternative penal­ties. According to the Law of the Republic of Azerbaijan "On Amendments to the Criminal Code of the Republic of Azerbaijan" dated October 20, 2017, adopted in connection with the execution of the Order, many articles of the General and Special Part of the Criminal Code, including Article 177 of the Criminal Code and its Note section have been changed.

In Article 177.1 of the Criminal Code and changes to the "Note" section, it is shown that the criminal liability occurs in the event of a criminal offense against the property owner or other possessor in excess of five hundred manats, but not more than five thousand man­ats, and penalty that can be imposed vary from the public works from three hundred sixty to four hundred and eighty hours or cor­rective works for up to two years, or limitation of the liberty for the term up to two years, or imprisonment for the term up to two years. Before these changes, liability for theft of property was borne when the property owner or other possessor suffered for more than one hundred, but not more than three thousand manats (the text of the Criminal Code eliminated from December 1, 2017 on).

Thus, taking into consideration the socio-economic processes tak­ing place in the country, the amount for occurance of criminal lia­bility for the offenses against property committed for the first time has been increased from one hundred to five hundred manat.

Taking into account these changes, the Plenary of the Constitutional Court considers it necessary to review the relevant provisions of the Criminal Code.

Chapter 23 of the Criminal Code is devoted to crimes against property. Offenses of this category include theft, fraud, embezzle­ment or extortion, loot, robbery and so on. Among these crimes, plundering has special place.

Plundering is to take possession of another's property illegally and indispensably by damaging the property owner and other pos­sessor for the benefit of himself or other persons.

Article 177 of the Criminal Code has identified the theft as a covert plundering of another's property. The secretive way of seizure, which is an objective aspect of this offense, differentiates theft from other forms of plundering. During the theft, the criminal takes the property of the victim out of his will, and passes it to his own disposal. When it comes to coverty, it is understood as that the committal offense is unknown to both the proprietor and the other persons.

Defining criminal elements of the theft is of great importance for the criminal-legal assessment of the offense.

Necessary and facilitative elements have huge importance in the formation of the composition of criminal act. Necessary elements are such traits of each criminal act that without them the act does not constitute a criminal offense. Facilitative elements are those which are not necessary for all the criminal acts and play various roles in different compositions. Such elements include the time, place, and method of committal of the offense, characterizing the objective side of the offense, motive and purpose, characterizing the subjective side of the offense and so on.

Separation of the elements of the criminal composition into nec­essary and facilitative elements is of great importance for the identi­fication of separate criminal offenses and differentiating similar offenses. For example, while plundering one's property in a secretive way is a necessary element of theft (Article 177), it is an assessing element in an offense of deliberate killing with commonly danger­ous method (Article 120.2.4).

There is also significant legal importance of the concrete and evaluative elements of the criminal composition. The concrete ele­ments are clearly defined in the text of the norms of the Criminal Code. For example, the amount of damage inflicted with theft offenses (Note section of Article 177), the considerable and large extent of the damage suffered because of offenses committed in eco­nomic activity field (Note section of Article 190) and so on.

An analysis of Article 177 of the Criminal Code gives rise to con­clude that the secretive way of plundering another person's property is a necessary element of the objective aspect of the theft. Secret plundering also acts as a necessary element when those acts are repeated. The amount of damage inflicted on the proprietor or other owner of the property, as a specific sign, is indicated by the legisla­ture in the "Note" section, taking into account the essential elements of the offense.

Therefore, the Plenary of the Constitutional Court considers that "the same acts" of Article 177.2 of the Criminal Code implies only the necessary element of the theft under Article 177.1 of the Code,

e. the secret plundering of the other person's property. The amount exceeding five hundred manats mentioned in Paragraph 1 of Note section of Article 177 of the Criminal Code is concrete element of criminal composition being part of Article 177.1 of this Code, while the amount exceeding one hundred manats belong to Article 177.2 of the Code.

It should be noted that Paragraph 3 of "Note" section of Article 177 of the Criminal Code also establishes the repetition of the same crimes, as well as the repetition of various crimes. According to this paragraph, if the person who committed any or some of the offens­es set forth in Articles 177-183, as well as Articles 213-3, 217, 227, 232 and 235 of the Code, commits again any of the offenses stipu­lated by Articles 177-183 of this Code (except as provided for in Article 16.3 of this Code), it shall be deemed to be repetition of the crimes.

The Plenum of the Constitutional Court stated in its judgment "On Interpretation of Article 18.5, Article 61.1.1 and 65 of the Criminal Code of the Republic of Azerbaijan" of 18 March 2013 referring to the institute of repetition as that the set of crimes are characterized as aggravating criminal liability. The consecutive committal of offense by a person allows him to obtain practice in committing criminal offense, making his subsequent criminal activ­ity more dangerous.

In its judgment of 4 March 2013 on "Interpretation of Paragraph 3 of the Note section of the Article 177 of the Criminal Code of the Republic of Azerbaijan", the Plenum of the Constitutional Court stated that the repetitive committal of crime by the person proves, as a rule, his constant criminal inclination, which is, in the end, a sign of high public danger.

The Plenary of the Constitutional Court reiterates that the fact about that the person committed at least two publicly dangerous acts, must be established, in order to consider the case as repetitive com­mittal of crime. This fact always points to that the repetition charac­terizes the presence of adverse features in the perpetrator. Repetition involves the commitment of crimes at different times. Although the perpetrator has an opportunity to choose a legal behavioral in a vari­ety of living conditions, his choice of the conduct prohibited by criminal law proves his high public danger. Paragraph 17 of Part 1 of Article 94 of the Constitution relates the definition of crimes and other offenses, and the responsibility for their commitment to exclu­sive jurisdiction of the legislative authority.

The Plenum of the Constitutional Court considers that, the legis­lator, taking into account the degree of danger of theft in the aggra­vated circumstances, as well as repetitive theft referred to in Article 177.2 of the Criminal Code, and the degree of public danger of the perpetrators of this crime, established harsher criminal responsibili­ty for the purpose of ensuring the principle of fairness.

On the basis the above-mentioned, the Plenum of the Constitutional Court comes to the following conclusions:

- The expression "the same acts" in Article 177.2 of the Criminal Code envisions only necessary element of theft referred to in Article 177.1of this Code, i.e. the secret plundering of other person's prop­erty;

- Amount more than five hundred manats and amount more than one hundred manats mentioned in paragraph 1 of Note section of Article 177 of the Criminal Code constitute a concrete element of the offense being part of Article 177.1 and 177.2 of the Code, respectively;

- In case of repetitive committal of theft twice or more than twice, criminal liability under Article 177.2.2 of the Criminal Code emerges if the property owner or other owner is subject to damage more than one hundred manats for each act.

Being guided by the Parts V and IX of Article 130 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 expression "the same acts" in Article 177.2 of the Criminal Code envisions only necessary element of theft referred to in Article 177.1of this Code, ie the secret plundering of other person's property;

2. In case of repetitive committal of theft twice or more than twice, criminal liability under Article 177.2.2 of the Criminal Code emerges if the property owner or other owner is subject to damage more than one hundred manats for each act

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.