ON BEHALF OF THE REPUBLIC OF AZERBAIJAN

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

# *On Article 420.3 of the Criminal Procedure Code of the Republic of Azerbaijan*

## 19 April, 2002 Baku city

The Constitutional Court of the Republic of Azerbaijan composed of Kh.Hajiyev (Chairman), Judges: F.Babayev, B.Garibov, R.Gvaladze (Reporter Judge), S.Salmanova, A.Sultanov, I.Najafov, E.Mamedov.

joined in the proceedings by: the Court Clerk I.Ismayilov;

the legal representatives of the subjects interested in special constitutional proceedings: M. Agazade, judge of the Supreme Court of the Republic of Azerbaijan and. E.Askerov, employee of the board of administrative and military legislation of the Administration of Milli Majlis of the Republic of Azerbaijan;

the expert: R. Iskanderov, professor of the Criminal Procedure Board of the Law Faculty of Baku State University;

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined via special constitutional proceedings in open court session the constitutional case connected with the petition of the Supreme Court of the Republic of Azerbaijan of March 13, 2002, N 8-2/2002 on interpretation of Article 420.3 of the Criminal Procedure Code of the Republic of Azerbaijan.

Having heard the report of Judge R. Gvaladze, statements of the legal representatives of the subjects interested in special constitutional proceedings, M. Agazade and E. Askerov and the opinion of expert, R. Iskanderov, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS**:

In connection with difficulties emerging in court practice concerning application of Article 420.3 of the Criminal Procedure Code the Supreme Court of the Republic of Azerbaijan asks to give interpretation of this article.

The official texts of Articles 87, 409 and 420 of the Criminal Procedure Code of the Republic of Azerbaijan certified by Administration of Milli Majlis of the Republic of Azerbaijan are enclosed to materials of the case.

In connection with the petition, the Constitutional Court notes as follows:

According to Article 420.3 of the Criminal Procedure Code at referring of the criminal case, materials of simplified prejudicial proceedings or complaint in the form of private prosecution on new court hearing to the court of appeal instance a decision, aggravating the status of the convicted person can be adopted only in cases mentioned in Article 420.2 of present Code.

Article 420.2 of this Code stipulates that in the course of examination of the new case by the court of first instance attended by juries aggravation of punishment or application of law on more grave crime is admissible only in case of cancellation of the primary sentence on cassation protest of the public prosecutor.

From the content of the indicated articles it is seen that decision of the court aggravating the status of the convicted person can be cancelled only by cassation protest of the public prosecutor and only in that case court of appeal instance may aggravate status of the convicted person during the new examination of the case.

Thus, de-facto victim is deprived of the right to apply to the court of cassation instance with complaint on the grounds, aggravating the status of the convicted person.

It should be noted that according to Article 87.6.14 of the Criminal Procedure Code the victim has the right to lodge appeal or cassation complaint on sentence and another court decisions without any restrictions. According to Article 392.2 of the Criminal Procedure Code the victim has the right to put a question on aggravation of the status of the convicted or acquitted person. Meanwhile in spite of requirements of the indicated articles, Article 383.1.5 and 409.4 of this Code grant to the victim a right to lodge appeal and cassation complaint within the requirements, set up at the court of first instance.

The Constitutional Court considers that provisions of Article 420.3 of the Criminal Procedure Code contradict to whole number of the norms of the Constitution of the Republic of Azerbaijan, international law acts and Criminal Procedure Code.

The Constitution of the Republic of Azerbaijan (Article 12), based on the principles of the Rule of Law, proclaims that the highest priority objective of the state is to provide rights and freedoms of a person and citizen.

The state guarantees protection of rights and freedoms of all people (Article 26.2 of the Constitution), at that founding effective legal mechanisms of removal of any violations, including those which committed by state organs and authorities during the implementation of the criminal proceedings.

Restriction of the right of victim to appeal against court decision at the court of higher instance on motives of the aggravation of punishment or application of law on more grave crime by the Criminal Procedure Code essentially restricts the constitutional right of a person to protect his/her interests by all means and methods, which are not prohibited by law (Article 26.1 of the Constitution).

This provision of the Criminal Procedure Code does not conform to Article 60 of the Constitution, according to which legal protection of rights and freedoms of every citizen is ensured. At the same time the Constitutional Court considers necessary to note that according to given norm of the Constitution right to legal defence is not subject to any restriction and it is applicable in all court instances.

In international law legal defence is regarded as effective restoration of the violated rights by independent court by means of fair trial (Article 8 of the Universal Declaration on Human Rights, Article 14.1 of the International Covenant on Civil and Political Rights, Article 6.1 of the European Convention on Protection of Human Rights and Freedoms).

Thus, according to the requirements of the Constitution of the Republic of Azerbaijan and international law documents, the justice must correspond to the conceptions of fairness and must provide effective restoration of the rights. Delay as regards court decision cannot be considered as a fair act of justice and restriction of the right to lodge complaint on such decisions does not comply with the principle of fairness.

Provision of the actual prohibition by the Criminal Procedure Code to apply to the court of cassation instance on court decision on the grounds aggravating the status of the convicted person means responsibility of the victim to be subject to the unlawfulness, unfounded and unfair court decision.

According to Article 68.1 of the Constitution, rights of the person suffered from crime and also from usurpation of power are protected by law. Suffered person has the right to take part in administration of justice and demand for compensation of losses.

Particular interest of the victim concludes in restoration of all his rights, violated in result of the perpetration of crime, in compensation of the material and moral damages.

In criminal procedure the victim, who is the interested party in revelation of crime and truth, disclosure of the accused person, correct qualification of his/her acts and determination of a fair punishment for him/her, appears as an adversarial party to the accused person. This circumstance requires the guarantee for adversary system and equality of parties during the examination of case at the court, granting of necessary procedural powers to them for protection of own rights.

Administration of justice on the principles of adversary founds its strengthening in the Constitution (Article 127) and Criminal Procedure Code (Article 32).

Mentioned article of the Criminal Procedure Code emphasizes that the criminal proceedings in Azerbaijan Republic are carried out on the base of adversary between defence and prosecution.

Right to adversary implies using of the equal remedies and facilities by adversarial parties for the substantiation of own positions and claims, recognition of the right to contest positions and claims of another party by each party.

Procedural equality means that at the court proceedings the prosecution party - in the course of the proof of accusation, connected with the criminal prosecution, and defence party – in the course of denial of accusation, enjoy equal rights. Like an accused (convicted) person, the victim has the right to express his/her proposals on issues, arising at the court session, including the legal qualification of the act of accused person and final court session (Article 32.2.3).

Granting of the right to express own proposals on legal qualification of the crime and measure of the punishment by accused person without any restrictions and lack of granting of such rights to the victim unjustifiably restrict the constitutional right of the victim to legal defence, violate the principle of administration of justice on the grounds of adversary system and equality of parties before the court.

Provisions of Article 420.3 of the Criminal Procedure Code place ensuring of the rights of victim on actual dependence from the position of the public prosecutor. And this restricts the rights of independent party of the criminal proceedings – victim. From another hand, none of these norms of the Criminal Procedure Code grants to public prosecutor the right to represent interests of the victim.

Article 84.4 of the Criminal Procedure Code determines that the prosecutor held a preliminary investigation or realizing procedural guidance by the preliminary investigation on the criminal case, could not participate at the court hearings as a public prosecutor. But this circumstance, with consideration of the present actual procedural status of the public prosecutor, does not provide a comprehensive protection of the rights of victim.

Based on the above stated, the Constitutional Court came to conclusion that inasmuch as the right of victim to lodge a complaint to the court of higher instance on the motives of lightness of the punishment or application of law on more grave crime bases on the constitutional requirements, given right should find its stipulation in the Criminal Procedure Code.

According to paragraphs 1 and 6, part I of Article 94 of the Constitution of the Republic of Azerbaijan Milli Majlis of the Republic of Azerbaijan establishes general rules concerning the use of rights and freedoms of a person and citizen specified in the present Constitution, state guarantees of these rights and freedoms, and also legal proceedings, execution of court decisions.

Being guided by Article 130.4, 130.6 of the Constitution of the Republic of Azerbaijan, Articles 66, 75, 76, 78, 80, 81, 83 and 85 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Taking into account that the right of the victim to lodge a complaint to higher judicial instance concerning aggravation of the status of the convicted person, stipulated by Articles 12, 60, 68 of the Constitution of the Republic of Azerbaijan, restricted by the norms of the Criminal Procedure Code (Articles 383.1.5, 409.4, 420.3) to recommend to Milli Majlis of the Republic of Azerbaijan to introduce relevant modifications into the Criminal Procedure Code with regard to provisions of the present decision and decision of the Constitutional Court “On Articles 87.6.14, 89.4.12 and 422.3 of the Criminal Procedure Code of the Republic of Azerbaijan”.
2. The decision comes into force from the date of its publication.
3. The decision is subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

The decision is final and cannot be cancelled, changed or interpreted by any body or official.