**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of conformity of Article 264 of the Criminal Code of the Republic of Azerbaijan to Article 66 of the Constitution of the Republic of Azerbaijan*

**29 January 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (President Judge), F.Babayev, B.Qaribov, R.Qvaladze, E.Mammadov (Reporting Judge), I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the representatives of the parties in the constitutional procedure Judge M.Mammadov of the Supreme Court of the Republic of Azerbaijan and S.Mammadov of the Administration of the National Assembly (Milli Majlis) of the Republic of Azerbaijan,

experts of the Law Department of the Baku State University: Professor Dr. F.Samandarov of the Chair of Criminal Law and Senior Reader R.Ismayilov of the Chair of Constitutional Law,

based on the inquiry of the Supreme Court of the Republic of Azerbaijan of 4 December 2003 (ref.# 8-7/03)

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section III of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of Article 264 of the Criminal Code of the Republic of Azerbaijan to Article 66 of the Constitution of the Republic of Azerbaijan.

Having heard a report of Judge Mammadov and statements from representatives of the parties Judge R.Mammadov and S.Mammadov and experts F.Samandarov and R.Ismayilov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

As stated in the inquiry of the Supreme Court of the Republic of Azerbaijan, the Absheron District Court had accepted to procedure a case of R.Baghirov accused under Articles of 263.2 and 264 of the Criminal Code of the Republic of Azerbaijan for causing a fatal auto accident and fleeing from the scene. Before a trial of the case the state prosecutor had motioned the court with a petition to request the Plenum of the Supreme Court to send an inquiry to the Constitutional Court of the Republic of Azerbaijan in order to examine conformity of Article 264 of the Criminal Code to Article 66 of the Constitution of the Republic of Azerbaijan.

The petition argues that Article 264 of the Criminal Code contravenes Article 66 of the Constitution inasmuch as it requires a person who committed a crime to wait on the scene for arrival of police and thus, in effect, expose himself in committing a crime under Article 263 of the Criminal Code whereas the Criminal Code defines no responsibility for leaving the scene of any other crime.

On 17 October 2003 the Absheron District Court ruled to:

forward the petition to the Plenum of the Supreme Court; and

suspend proceeding in the case pending resolution of the issue.

On 27 November 2003 the Plenum of the Supreme Court ruled to request the Constitutional Court of the Republic of Azerbaijan to examine conformity of Article 264 of the Criminal Code to Article 66 of the Constitution.

The official texts of Articles 143, 263 and 264 of the Criminal Code, Article 2 and Article 37 Section IV of the Law of the Republic of Azerbaijan on Road Traffic as well as Articles 20, 90, 91, 95.6.4 and 148 of the Code of Criminal Procedure (henceforth “CCrP”) as authenticated by the Administration of the National Assembly of the Republic of Azerbaijan were appended to the inquiry.

The Plenum of the Constitutional Court has noted the following in relation to the inquiry.

The Republic of Azerbaijan has chosen the path to state-building based on democratic values, the rule of law and pre-eminence of justice and proclaimed guaranteeing human and civil rights and freedoms as its most avowed goal. The Constitution also defines mechanisms of protection and guaranteeing human and civil rights and freedoms based on international legal standards. Individual-state relations are regulated by law. Judicial protection of rights and freedoms, the right to receive legal aid, inadmissibility of changing court jurisdiction, the rights of arrested, detained and criminally accused persons and other guarantees are enshrined in the Constitution and provided by constitutionally-based legislation.

Article 66 of the Constitution stipulates that nobody can be made to testify against oneself, one’s spouse, children, parents and siblings. The entire list of relations against whom no compulsory testimony is admitted is defined in the law.

The constitutional provision against compulsory self-incrimination is a key assurance underwriting principles of fair trial, individual freedom, presumption of innocence and inviolability of person. This constitutional norm is defined in line with norms stipulated by international legal instruments that the Republic of Azerbaijan has ratified. For example, Article 14 of the International Pact on Civil and political rights states that anyone during examination of any charge put forwards against him is entitled to the right to refuse to testify against himself and to accept his guilt as well as to other judicial guarantees and provisions.

Evidently, criminal proceedings are subject to both constitutional and international legal norms. Not accidentally, guarantees provided by Article 66 of the Constitution are also transferred to criminal procedure law. CCrP Article 20 states that no one can be forced to testify against oneself and close relatives and cannot be persecuted for refusing to do so. The right to refuse self-incrimination is an important protection of the right to refuse guilt by suspects and defendants. However, this right is not absolute, and its bounds are defined in every specific case based on finding the right balance between interests of an individual, society and the state.

This approach is found in the Constitution where Article 24 Section II states that rights and freedoms extend to include responsibilities before society and other individuals. Article 72 Section II of the Constitution requires from everyone to obey the Constitution and laws of the Republic of Azerbaijan, to respect rights and freedoms of other persons and to fulfil other legally mandated obligations. According to Article 80 of the Constitution, violation of the Constitution and laws of the Republic of Azerbaijan, including abuse of rights or non-performance of obligations stipulated by the Constitution and the laws begets liability before law. The state is entitled to establish criminal responsibility for socially threatening conduct with grave societal effects that cannot be prevented via other means and norms. It is important to understand this in the context of protection of human rights, especially rights and lawful interests of the injured party. Criminal prosecution and criminal penalties are considered lawful means of protecting human rights in any state under the rule of law.

A pertinent criminal law provision aimed at protecting the public from traffic-related threats to their rights and freedoms and preventing such crimes without compromising rights of suspects and accused persons is contained Article 264 of the Criminal Code. It states that in cases described under Article 263 of the same Code a person who has operated a transport vehicle in breach of the traffic rules or the rules for operation and maintenance of transport vehicles and has fled a scene of a traffic accident becomes criminally liable. According to Article 263, a person operating an automobile, a tramcar or any other mechanical transport vehicle in breach of the traffic rules or the rules for operation and maintenance of transport vehicles who has recklessly caused light or grave injury (Article 263.1) or by doing the same has recklessly caused death of the injured party (Article 263.2) or death to two or more persons (Article 263.3), is criminally liable to the extent of sanction allowed under each sub-article.

Article 264 of the Criminal Code covers circumstances of operating a transport vehicle in breach of the traffic rules or the rules for operation and maintenance of transport vehicles and fleeing a scene of a traffic accident in cases provided under Article 263 of the same Code. Inclusion of this Article into the Criminal Code is effected by the need to enforce compliance with the traffic rules and the rules for operation and maintenance of transport vehicles, to ensure speedy mitigation of traffic accidents caused by the breach of the said rules, to prevent damage to rights of other individuals and to swiftly reinstate any such rights as well as by relevant provisions of the Law on Road Traffic.

This Law defines the legal framework for taking comprehensive measures to attain safe and comfortable organisation of movement of transport vehicles and pedestrians on the roads, secure human life and health, protect the environment and private, municipal and public property, prevent traffic accidents and mitigate their effects as well as establishes rights and obligations of the state and road traffic participants in respect of the aforementioned (Article 2 of the said Law).

Article 37 Section IV of the Law defines obligations of a driver of a mechanical transport vehicle in respect of a traffic accident, including the following:

halt any movement of a transport vehicle;

not remove any objects related to the traffic accident;

provide possible first aid to victims of the accident;

call the ambulance service;

in case of a life-threatening injury, transport the victims to a nearest health facility by transport going in the same direction or, failing that, by own transport;

in case of blocking other traffic, free carriage-way;

report the accident to relevant executive authority;

await arrival of representatives of this authority on the scene; etc.

Evidently, the above provisions aim to provide urgent medical assistance to victims of the accident, help establish circumstances of the accident and swiftly restore road safety.

The Law on Road Traffic was drafted in consideration of rights and lawful interests of road traffic participants. When determining criminal responsibility for a driver of a transport vehicle fleeing a scene of a traffic accident if it has resulted in light or grave injury or death to a victim, the Criminal Code is guided by constitutional provisions compelling respect for the right to life (Article 27 of the Constitution), the right to safe life (Article 31 of the Constitution) and the right to demand compensation for damages (Article 68 of the Constitution).

It should be noted in this respect that the right of a driver of a transport vehicle to abstain from self-incrimination arises not immediately after a traffic accident, first of all because no traffic accident per se can be seen as a criminal offence. Upon arrival of a representative of a relevant executive authority (police) on a scene of a traffic accident, no party in the accident is yet present in a criminal process capacity. Persons involved must bear witness merely as parties in the accident. Therefore, initial testimony of all parties, including the driver, shall be understood not as self-incrimination but as fulfilling their legally mandated obligations.

Upon finding corpus delicti in action (or inaction) of a person who has caused the accident and instigating criminal prosecution, a person with a relevant status attains proper rights under criminal procedure which shall be guaranteed throughout the proceedings, including the right to refuse testimony against oneself. If any party in the accident is arrested under CCrP Article 148, that party attains a status of a suspect (CCrP Article 90.1.2); in other cases a relevant party may attain a status of a suspect, an accused person, an injured party or a witness. CCrP Article requires no suspect, accused person or a witness to testify against oneself and close relatives.

According to CCrP Articles 90.9 and 91.7, use or refusal to use appropriate rights by a suspect or an accused person may not be interpreted against him/her and shall not lead to any negative conclusions about him/her. No liability may arise out of testimony or explanation provided by a suspect (an accused person) except if he/she has knowingly incriminated an innocent person in committing a criminal offence. CCrP Article 95.6.4 states that a witness can refuse to testify or present any materials and information against oneself and close relatives.

As seen from the above discussion, a duty of a person who has violated the traffic rules or the rules for operation and maintenance of transport vehicles established in Article 264 of the Criminal Code to remain on a scene of an accident upon occurrence of circumstances foreseen under Article 263 of the same Code does not preclude or inhibit the constitutional right ((Article 66 of the Constitution) of the person operating a transport vehicle to refuse self-incrimination regardless of status he/she attains in any phase of a criminal process. If accomplished together with effective enforcement of the afore-stated procedural guarantees by agencies conducting pre-trial (preliminary) investigation, this is sufficient for assuring to every person the right to refuse self-incrimination.

A duty of a driver to remain on a scene of a traffic accident can not be interpreted as synonymous with compelling to self-incrimination. Of course, if a person who has caused a traffic accident is compelled at any phase of a criminal process to give testimony that can be used against him/her, such coercion may be qualified as violation of Article 66 of the Constitution.

It should be noted that when establishing the duty to remain on a scene the law-makers did not mean to suppose a fault on the part of a driver. In accordance with disposition of Article 264 of the Criminal Code, criminal liability of a person operating a transport vehicle arises upon deserting a scene of a traffic accident if consequences stipulated in Article 263 of the Criminal Code (i.e. light or grave injury, or death, or death to two or more persons) are present.

In contrast with Article 263, a person committing a criminal offence under Article 264 of the Criminal Code is subjectively guilty of malicious intent as he/she is acting upon realisation that he/she is leaving a scene of a traffic accident and wishes to do exactly so. This again underlines differences between these offences.

Pre-trial investigation clarifies the cause-and-effect relationship between breach of the traffic rules or the rules for operation and maintenance of transport vehicles by a person operating a transport vehicle and consequences of such breach (light or grave injury, death, or death to two or more persons). If such relationship exists, investigation shall further clarify whether psychic attitude (i.e. guilt) of the person towards the act and the effect was intentional or reckless.

This has crucial importance as Article 264 of the Criminal Code, in compliance with the Law on Road Traffic, requires a driver of a mechanical transport vehicle in a situation of a traffic accident to provide possible first aid to victims of the accident, call the ambulance service and, in case of a life-threatening injury, transport the victims to a nearest health facility by transport going in the same direction or, failing that, by own transport.

As seen from this context, the law-makers additionally define that a a driver of a mechanical transport vehicle who has violated the traffic rules and the rules for operation and maintenance of transport vehicles in a situation leading to a traffic accident bears additional criminal responsibility for abandonment in peril. Therefore, criminal liability in Article 264 of the Criminal Code serves as a special case in relation to the general norm of abandonment in peril established in Article 143 of the Criminal Code. This should lead to the situation of double penalty for the same action as Article 64 of the Constitution makes clear that no one can be convicted twice for the same wrongdoing.

Under the Criminal Code, breach of the traffic rules or the rules for operation and maintenance of transport vehicles by a person operating a transport vehicle that has recklessly caused light or grave injury, or death, or death to two or more persons (Article 263 of the Criminal Code) and, if these consequences has occurred, desertion of a scene of an accident by a person operating a transport vehicle who has violated the traffic rules or the rules for operation and maintenance of transport vehicles (Article 264 of the Criminal Code) are offences with different corpus delicti. Evidently, criminal responsibility defined for both of these crimes in the Criminal Code does in no way affect the constitutional right not to be convicted twice for the same offence.

The Constitutional Court also notes that the Law on Road Traffic corresponds to international legal instruments which the Republic of Azerbaijan has joined.

By the Law enacted on 29 April 1997 the Republic of Azerbaijan joined the International Convention on Road Traffic signed in Vienna on 8 November 1968. State parties to the Convention agreed to streamline international road traffic and increase road safety by applying similar traffic rules. Article 31 of this Convention defines proper conduct of a driver in case of a traffic accident. Along with duties of ensuring post-accident safety and providing first aid and urgent medical assistance to victims of a traffic accident, the Convention also requires of a driver or any other person who shared in causing the accident to wait on the scene fro arrival of road traffic patrol and to preserve traces that might be important for determining liability for the accident.

In addition to the Republic of Azerbaijan, criminal responsibility for fleeing a scene of a traffic accident is also stipulated in legislation of several other countries, such as Germany (Paragraph 142 of the Criminal Code), France (Articles 434-10, 221-6 and 222-19 of the Criminal Code), Russia (Article 265 of the Criminal Code), etc. the main purpose of such a provision is to compel a person who has caused a traffic accident to cooperation with relevant authorities for mitigation of effects of the accident and provision of swift medical assistance to victims to protect their right to life.

Legal provisions stipulating criminal responsibility for fleeing a scene of a traffic accident have been subject to constitutional scrutiny in Germany (in 1963) and Russia (in 2001). In both cases respective Constitutional Courts ruled that relevant provisions conform to national Constitutions, including constitutional provisions on human rights and freedoms.

In consideration of the foregoing, the Plenum of the Constitutional Court has come to the conclusion that provisions of Article 264 of the Criminal Code do not contravene Article 66 of the Constitution of the Republic of Azerbaijan.

Guided by Article 130 Sections III and IX of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. Article 264 of the Criminal Code shall be deemed conforming to Articles 66 of the Constitution of the Republic of Azerbaijan.
2. The Decision shall become effective from the day it is published.
3. The Decision shall be published in the newspaper Azerbaycan and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
4. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.