**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of the complaint by Bayramov et al concerning conformity of the decision*

*of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 23 March 2004 to the Constitution and laws*

*of the Republic of Azerbaijan*

**9 September 2005 Baku city**

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

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

in presence of the complainants’s representatives F.Aliyev and N.Abdullayev

and Cand. of Law M.Qafarov, Associate Professor at the Chair of Criminal Process, Department of Law, Baku State University in the nexpert capacity

based on a complaint lodged by Vaqif Bayramov, Vaqif Valiyev and Ali Gunashli;

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 23 March 2004 in the criminal case against Vaqif Bayramov, Vaqif Valiyev and Ali Gunashli concerning charges under Article 178.3.2 of the Criminal Code of the Republic of Azerbaijan to the Constitution and laws of the Republic of Azerbaijan. The respondent party was informed about the time of the proceedings but because a representative of the Supreme Court failed to attend the session of the Plenum of the Constitutional Court, the constitutional proceedings were held in absence of a representative of the respondent party.

Having heard a report of Judge Babayev and statements from the complainants’s representatives F.Aliyev and N.Abdullayev and expert M.Qafarov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

On 6 August 2003 the Court of Grave Crimes of the Republic of Azerbaijan pronounced a verdict of guilty for Vaqif Bayramov, Vaqif Valiyev and Ali Gunashli under Article 178.3.2 of the Criminal Code of the Republic of Azerbaijan and sentenced the defendants to ten, nine and ten years of imprisonment, respectively.

The verdict stated that Bayramov, Valiyev and Gunashli were guilty in complicity to defraud L.Eyvazov to lay hold on latter’s assets. With this intent they persuaded Eyvazov to lease his shop located at 2/15 Shixali Qurbanov Street, Baku to Bayramov, for which purpose on 26 July 2002 they took him to the notary public office No. 28 under the pretext of certifying a lease agreement. Exploiting Eyvazov’s poor knowledge of Azerbaijani language and Roman script, they had him sign a purchase agreement which allowed them to assume ownership of the shop. Subsequently, they sold the shop to Husnu Farzaliyev for USD 210,0o0 on 5 September 2002. Thus, Bayramov et al inflicted extensive damage to Eyvazov through committing a crime of fraud.

The court came to a conclusion that the fact of criminal offence of Bayramov et al was proven through testimony of Eyvazov and others. The testimony of Eyvazov as quoted in the verdict read that Bayramov and others had exploited his poor knowledge of Azerbaijani language and had him sign certain papers at the notary office which he had thought were a lease agreement but later found out to be a purchase agreement.

As seen from the materials of this criminal case, Bayramov and others pleaded not guilty during the pre-trial investigation and at the trial. They indicated that Eyvazov had given contradictory testimony on several occasions but the investigation had failed to follow through to establish facts of the case which are the following. In 2001 Eyvazov lawfully leased a part of the shop he owned to Gunashli through mediation of Valiyev. In June 2002 Eyvazov, again through offices of Valiyev, agreed to lease the remaining part of the shop to Bayramov but later changed his mind and decided to sell the entire shop to Bayramov for USD 150,000. Based precisely on this understanding, on 26 July 2002 Eyvazov and Bayramov signed a purchase agreement at the notary office No. 28 and transferred the payment on the amount of AZM 727,500,000 (the equivalent of USD 150,000) to Eyvazov. Eyvazov confirmed the receipt of the payment by his signature. According to testimony of Bayramov and others, the fact that the notary public certified the purchase agreement on legal grounds was extensively investigated. No violation of law on the part of the staff of the notary public was found. Based on the agreement, Bayramov obtained a registration certificate to the property from the Department of Privatisation of Public Property on 1 August 2002. In about a month, he legally sold the shop to Farzaliyev, and the latter likewise obtained a certificate of ownership.

Bayramov and others, considering themselves not guilty of the crime they were convicted of, appealed the verdict to higher court instances.

On 19 November 2003 the Collegium of Criminal and Administrative Offences of the Court of Appeals of the Republic of Azerbaijan ruled to uphold the verdict of the Court of Grave Crimes of 6 August 2003.

On 23 March 2004 the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan ruled to uphold the decision of the Court of Appeals of 19 November 2003.

An additional cassation claim by Bayramov et al about bringing the case before the Plenum of the Supreme Court was dismissed for the lack of merits by the letter of the Chairperson of the Supreme Court of 22 February 2005.

Subsequently, Bayramov et al complained to the Constitutional Court. They substantiated their complaint by arguing that because of non-compliance with Articles 124.1,.1.1 and .1.2 and 144 and 145.3 of the Code of Criminal Procedure during the pre-trial investigation and at the trial, their rights under Articles 12, 26, 28 and 63 of the Constitution of the Republic of Azerbaijan had been violated.

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

The legal dispute between Bayramov and Eyvazov should be resolved under criminal law in case the body of crime (corpus delicti) is found in actions of Bayramov and others. Otherwise, the dispute should be settled under civil law. In line with requirements of Article 34.3 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court is competent to review the matters related to application by common courts in the criminal case against Bayramov et al concerning the charge under Article 178.3.2 of the Criminal Code without examining the factual circumstances of the case.

Article 60 of the Constitution of the Republic of Azerbaijan guarantees everyone judicial protection of his/her rights and freedoms. The essence of this provision consists in affirmation of the protection by the courts of rights and freedoms of every individual guaranteed to him/her by the Constitution and other normative legal acts of the Republic of Azerbaijan. Hence, prosecution, conviction and determination of types and terms of penalties under current legislation shall be performed in accordance with the system of guarantees afforded the Constitution.

According to Article 63 of the Constitution of the Republic of Azerbaijan, no one can be considered guilty of a crime if a verdict of a court in respect of that person has not taken legal effect. From the perspective of this provision, ensuring legality, soundness and fairness of a court verdict as the most important act of the court of justice has particular importance for democratic states based on the rule of law.

According to Article 1.1 of the Code of Criminal Procedure (henceforth “CCP”), criminal procedure law of the Republic of Azerbaijan defines criteria for determination of whether acts displaying criminal features can be considered criminal offences and whether persons accused in committing those acts can be found guilty of crimes as well as sets legal procedures for criminal prosecution and defence of persons suspected or accused in committing acts falling under purview of criminal law.

A court verdict decided a matter of vital importance: whether a person is guilty of crime. For this reason, a court verdict must be lawful and sound (CCP Article 349.3).

A court verdict is considered lawful only if it has been passed in compliance with the Constitution, the Code of Criminal Procedure, criminal law and other laws of the Republic of Azerbaijan (CCP Articles 10.1 and 349.4). A court verdict is lawful if it corresponds to requirements set forth in criminal, criminal procedure and other legislation of the Republic of Azerbaijan from the point of both its form and substance. Any matter raised in a verdict shall be resolved in strict conformity with the law.

A court verdict is considered sound (substantiated) only if conclusions drawn by a court are based on evidence duly examined at a trial, if this evidence is sufficient for assessing an indictment, and if circumstances determined by a court correspond to evidence it has examined (CCP Article 349.5).

In line with the provision of this Article, a key condition of a sound court verdict requires that conclusions drawn by a court be based on evidence examined at a trial meaning that a court verdict may exclusively refer to evidence examined during a court trial in accordance with provisions of CCP Articles 325 to 337. A verdict must refer to evidence both supporting and refuting a specific conclusion.

Another key condition of a sound verdict is that evidence examined during a trial should be sufficient for assessing an indictment, i.e. it should correspond to the requirements set forth in CCP Article 146.

To be sound, a verdict must match circumstances of the case with evidence examined at a trial. It means that a court decision finding a person guilty in committing a crime cannot be based on assumptions but must be corroborated by a set of credible evidence where each proof is compatible with all others (CCP Article 28.5).

The Plenum of the Constitutional Court of the Republic of Azerbaijan is of the opinion that the verdict in the case of Bayramov et al lacks correspondence to the afore-stated legal requirements.

Instead of examining and assessing the evidence directly available at the trial, including through testimony of Eyvazov as the offended party, defendants Bayramov, Valiyev and Gunashli, witnesses S.Huseynov, A. Eyvazova, A.Nuriyeva, I.Aghayev, F.Qasimov and others, the court simply copied conclusions of the investigating agency from the indictment to the verdict without even attempting to assess the evidence obtained.

According to CCP Article 351.2, a court verdict of guilty cannot be based on hypotheses and is only pronounced if at the trial defendant’s guilt is positively and definitely proven beyond any doubt. Proving the guilt is conditioned by presumption of innocence, substantiation through trial examination of charges in compliance with CCP rules, substantiation by credible and admissible evidence, and interpretation of any remaining doubt about culpability of a person in his/her favour (CCP Article 351.3).

It should be stressed that a verdict that breaches any of the above conditions shall be considered unlawful or unsound.

Article 63 of the Constitution of the Republic of Azerbaijan defines presumption of innocence as a key personal right. Section II of the same Article states that no one can be found guilty of a crime if there is serious doubt about guilt.

According to Article of the European Convention of Human Rights and Basic Freedoms and Article 14 of the International Pact of Civil and Political Rights, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. Provisions of he above Articles and principles underwriting them have been widely expounded in domestic legislation. Availability of procedural guarantees for protection of defendants and defence attorneys, examination of all evidence and arguments presented by prosecution and defence at a trial considering the substance of a case and conducted under procedural equality of the arms has utmost importance from the point of ensuring compliance with the principle of presumption of innocence.

Based on Article 63 of the Constitution, CCP Article 21.1 establishes presumption of innocence as one of the chief principles and conditions of judicial process. CCP Article 21.2 states that any remaining doubts in proving an indictment (charges) within any legal procedure shall be resolved in favour of a defendant (a suspect). If doubts in proving an indictment cannot be removed by other evidence, they are resolved in favour of a defendant or suspect (CCP Article 145.3). In consideration of presumption of innocence, guilt of a defendant must be proven by incontrovertible evidence.

Criminal procedure law defines the requirements to evidence collection, examination and assessment as well as to sufficient evidence. Each element of evidence is assessed from the point of origin, admissibility and credibility (CCP Articles 143, 144 and 145).

The essence of criminal procedure law of the Republic of Azerbaijan requires that if doubts in proving an indictment cannot be overcome by other evidence, they are resolved in favour of a defendant or suspect. Sufficiency of evidence collected in support of prosecution is understood as such extent of admissible evidence about circumstances of the case that would allow reaching a credible conclusion about determination of guilt (CCP Article 146).

Despite serious contradictions between testimonies of the injured party and the defendants as well as inconsistency with other evidence, the court verdict in the criminal case of Bayramov et al did not substantiate why it favoured evidence of prosecution and what credible and admissible evidence was used to refute arguments of the defence thus disregarding provisions of CCP Articles 138, 143, 144, 145, 146 and 351, which in turn led to violation of the principle of presumption of innocence as stipulated in Article 63 of the Constitution and CCP Article 21.

The Code of Criminal Procedure establishes main principles and conditions of judicial process and importance of compliance therewith. Key guarantees of these principles and conditions consists of determination of rules of criminal process underlining conduct of criminal prosecution, ensuring protection against unlawful restriction of human and civil rights and freedoms, and maintaining legality and soundness of criminal prosecution (CCP Article 9).

Breach of the afore-mentioned principles and conditions may prompt cancellation of the entire completed procedure, annulment of decisions taken during the course of such procedure or invalidation of evidential effect of all materials collected (CCP Article 9.2).

In this respect, it should be noted that the appellate court reviews examination of factual circumstances and application of the norms of criminal and criminal procedure law done by the first-instance court (CCP Article 397.1). The appellate court must review compliance of the first-instance court with procedural norms regardless of argumentation presented in an appeal or an appellate motion (CCP Article 397.2).

During the examination of the case on appeal of Bayramov et al, the appellate court failed to implement the above-stated provisions of law and provide extensive test of arguments of the defence. Instead, it confirmed legality and soundness of the verdict reached by the first-instance court by a single period: “offences committed by the defendants were thoroughly proven at the trial through their own testimonies as well testimony of the offended party, witnesses and experts.”

Under criminal procedure legislation, the cassation court, based on a cassation complaint or a cassation motion, reviews only legal issues in application of relevant criminal and criminal procedure law (CCP Article 419.1). CCP Article 416 defines grounds for reversal or modification of a court verdict or decision.

According to CCP Articles 416.0.1 and .2, a verdict or a decision of the appellate court shall be voided or modified if the appellate court refused to consider evidence important for comprehensive, full and impartial examination of the case for no sound reason or if it failed to examine evidence in compliance with requirements set forth in CCP Articles 143 to 146.

In the criminal case in question, the cassation court failed to review application of substantive and procedural norms by the appellate court and, by replicating in its decision errors allowed by the appellate court in an abridged version, violated provisions of CCP Articles 416 and 419.

Hence, failure of the court in the criminal case against Bayramov et al to follow standards set in criminal procedure law in respect of criminal process caused violation of defendants’ right to judicial protection provided in Article 60 of the Constitution and requirements of CCP Articles 1.1, 10.1, 21.2, 145.3, 349, 351, 352, 353, 397.1 and .2, 416 and 419.

Additionally, it was determined in the case that on 5 September 2002 the disputed property was legally sold by Bayramov to Farzaliyev for USD 210,000 and the deal was certified by of the notary public office No. 5. Based on available lawful documents, the said property was registered in the name of Farzaliyev as his private property. Although these documents continue in full legal force, recognition of Farzaliyev as an offended party during pre-trial investigation was terminated and thus his rights were violated. During the further process, Farzaliyev was interviewed as a witness without regard to his interests as an offended party. In effect, he was reduced in status from an interested party to a disinterested one. Pre-trial investigation and court trials confirmed absence of criminal association between Farzaliyev and the defendants. Nevertheless, rights of Farzaliyev as a proprietor were in fact afforded no legal protection.

The Plenum of the Constitutional Court of the Republic of Azerbaijan also deems important to point out that the Code of Criminal Procedure defines rules of review of court verdicts and decisions under additional cassation procedure. According to these rules, a decision about a motion or a complaint filed under additional cassation procedure can be decided only by the Plenum of the Supreme Court. In line with the Code of Criminal Procedure, the Chairperson of the Supreme Court is not entitled to pass any decision on the outcome of such motion or a complaint (CCP Articles 426 and 427). In contravention of this provision, the additional cassation complaint filed by Bayramov et al was responded by the Chairperson of the Supreme Court.

In consideration of the foregoing, the Plenum of the Constitutional Court has come to a conclusion that the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 23 March 2004 in the criminal case against Vaqif Bayramov, Vaqif Valiyev and Ali Gunashli concerning charges under Article 178.3.2 of the Criminal Code of the Republic of Azerbaijan shall be deemed contravening Article 60 and Article 63 Section II of the Constitution of the Republic of Azerbaijan and Articles 416 and 419 of the Code of Criminal Procedure of the Republic of Azerbaijan.

Guided by Article 130 Sections V 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. As the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 23 March 2004 in the criminal case against Vaqif Bayramov, Vaqif Valiyev and Ali Gunashli concerning charges under Article 178.3.2 of the Criminal Code of the Republic of Azerbaijan contravenes Article 60 and Article 63 Section II of the Constitution of the Republic of Azerbaijan and Articles 416 and 419 of the Code of Criminal Procedure of the Republic of Azerbaijan, the said decision shall be deemed void. In accordance with the present Decision, the case shall be tried again in the manner and at times prescribed by the criminal procedure law of the Republic of Azerbaijan.
2. The Decision shall become effective from the day it is announced.
3. The Decision shall be published in the newspapers Azerbaycan, Respublika, Xalq Qazeti and Bakinskiy Rabochiy 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.