**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

On interpretation of provision “if the public prosecutor or private accuser withdraws the criminal prosecution” provided by Articles 43.1.1 and 314.2 of the Criminal Procedure Code of the Republic of Azerbaijan on inquiry of the Office of Public Prosecutor of the Republic of Azerbaijan

# 15 February, 2008 Baku city

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

attended by the Court Clerk I.Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: I.Jafarov, Head of Department of state prosecution of General Prosecutor’s Office of the Republic of Azerbaijan, I.Jafarov, senior adviser of department of the administrative and military legislation of Milli Meclis of the Republic of Azerbaijan;

the expert: F.Abbasova, associate professor of (sub)department of criminal procedure of Baku State University;

visiting experts: M.Aghazade, Judge of the Supreme Court of the Republic of Azerbaijan, S.Mirzoyev, Judge of Court of Appeal of Baku city

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open judicial session via special constitutional proceedings the case on inquiry of Office of Public Prosecutor of the Republic of Azerbaijan of 17 October 2007, N 13/214 concerning interpretation of provision “if the public prosecutor or the victim bringing a private prosecution withdraws the criminal prosecution” provided by Articles 43.1.1 and 314.2 of the Criminal Procedure Code of the Republic of Azerbaijan,

having heard and discussed the report of Judge B. Garibov, the statements of legal representatives of the subjects interested in special constitutional proceedings, opinion of specialist and visiting experts, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Office of Public Prosecutor of the Republic of Azerbaijan in the inquiry specifies that according to reflected in the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) a principle of competitiveness of parties fixed in Article 127.7 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution), the court, released from accusatory powers, turned from body of criminal prosecution into fair and impartial arbitrator considering at court sessions the criminal cases and the materials connected with criminal prosecution.

In inquiry, referring to Articles 21.3, 32.2.3, 32.2.8, 38.4 and 41.3 of the CPC, establishing powers of prosecuting party, noted also that according to requirements of Article 43.1 of this Code if during proceedings the public prosecutor and a private accuser withdraws the criminal prosecution the court shall adopts the decision on termination of criminal prosecution against accused person.

The body which directed an inquiry, being based on Article 318.1 of CPC establishing the limits of judicial proceedings, specifies that the court has the right to classify the act committed by the accused as a less serious offence and to remove specific points from the charge brought. From this point of view and taking into account that its powers are connected only with facilitation of position of accused, it is limited to the volume of supported charge brought by the public prosecutor and there cannot be graver penalty than specified in the charge. Otherwise it can become the reason of transfer of accusatory powers to court, infringements of some principles and balance between the prosecution and defence parties.

In inquiry it is noted that during legal investigation in court, in rare cases, despite partial withdrawal of charge made by public prosecutor, such refusal is not accepted by court and the court imposes the punishment on the basis of a charge brought during preliminary investigation.

Thus, the Office of Public Prosecutor of the Republic of Azerbaijan asks to give interpretation whether partial withdrawal of participants of process of prosecution party in the provision “if the public prosecutor or the a private accuser withdraws the criminal prosecution”, provided in articles 43.1.1 and 314.2 CPC (requalification of corresponding article of the Criminal Code of the Republic of Azerbaijan comprising of qualified *corpus delicti* into criminal action of simple structure providing responsibility for the same action, or bringing of a charge to the accused person for commitment of crimes on the various articles provided in the Criminal Code of the Republic of Azerbaijan, withdrawal of charge under one or several articles).

Plenum of the Constitutional Court in connection with the solution of the questions lifted in inquiry, considers necessary to analyse some provisions of the criminal-procedure legislation concerning the role of court, the status, the rights and duties of the parties of defence and prosecution in criminal legal proceedings.

In the Republic of Azerbaijan, as well as in any democratic and legal state, the recognition of the rights and freedoms of the person and the citizen, their maintenance and protection are declared by the state as prime purpose.

From this point of view in all regulated legal relationships including criminal-procedure legal relationships one of the main conditions is to follow to the main principles provided by Constitution and fundamental rights fixed therein.

According to provisions of Constitution, the judicial power of the Republic of Azerbaijan can only be exercised by courts through a fair trial (Articles 125.1 and 127.7 of the Constitution). This principle provides for creation to the parties of prosecution and defense of equal procedural possibilities to realise the rights and legitimate interests during proceedings.

According to Article 125.4 of the Constitution the Prosecutor's Office of the Republic of Azerbaijan and the defense are parts of the criminal court proceeding.

The Office of Public Prosecutor of the Republic of Azerbaijan also maintain the public prosecution in court (Article 133.1 of the Constitution).

Being guided by norms of the Constitution, the legislator according to provisions of CPC which along with other principles is based on a competitiveness principle, has differentiated the functions of prosecution, defense and the settlement of a case (by adopting of corresponding judicial acts) and clearly established their purpose, a direction and the maintenance, as well as a circle of subjects and scope of authority.

According to provisions of CPC, power of proof of charge, refutations of the arguments which have been put forward for defense of accused, are completely assigned to the prosecution party. The prosecution seeks to prove the criminal action, the ingredients of the statutory offence, the involvement of the accused in committing this offence and the possible criminal responsibility of the accused and offers the suggestions as to the legal classification of the accused person’s action and the final decision of the court. The defense refutes the prosecution’s arguments concerning the criminal charge, draws the attention of the judicial authority to the circumstances which preclude or mitigate the criminal responsibility and offers suggestions as to the legal classification of the accused person’s action and the final decision of court (Articles 21.3, 32.2.3, 32.2.4 of CPC).

The analysis of system of norms of the procedural legislation establishing the institutions which possess the qualitatively new legal nature and also a role of the public prosecutor as the public prosecutor within the stage of judicial examination of criminal legal proceedings admits to come to such conclusion that the public prosecutor is the independent procedural person possessing important powers, capable to affect the further destiny of the charge brought by the prosecution party.

According to Article 32.2.8 of CPC the public prosecutor and private accuser shall bring prosecution or withdraw the prosecution. In article 41.3 of this Code it is provided that if the public prosecutor finds circumstances which preclude criminal prosecution in court, he should withdraw the criminal prosecution of the accused. If the private accuser bringing a private prosecution continues to uphold the charge, the position of the public prosecutor on exempting the accused from criminal prosecution should not prevent the criminal case or other prosecution material from being examined in court.

Article 43.1.1 of CPC provides the discontinuing of criminal prosecution during the trial if the public prosecutor or private accuser bringing a private prosecution withdraws the criminal prosecution.

Criminal prosecution on public charge is carried out concerning criminal actions which affects, as a rule, not only the rights and legitimate interests of the suffered person, but also as a whole cause a damage to a society and the interests of the state representing the public importance. Criminal prosecution of the persons who have committed such crimes, depending on character and crime severity level, and also the proof of charges as a duty is assigned not to the victim but on a corresponding state structure. According to CPC, during criminal prosecution via public charge the victim is not recognized as subsidiary accuser along with the public prosecutor, his behavior concerning the charge does not depend on its will. Such provision makes insignificant the disagreement of the suffered person with the position of the public prosecutor as to withdrawal of criminal prosecution during proceedings and is not an obstacle in termination by court of criminal prosecution. Coincidence of positions of the public prosecutor and a private accuser concerning the refusal to support a charge in a course of judicial consideration is sought only on publicly-private charge (Article 41.3 of CPC).

According to the content of Article 43 of CPC, the court unconditionally stops the judicial consideration on criminal cases with public charge (except for the cases provided by Article 43.3 of CPC) if the public prosecutor during judicial consideration on such sort of cases withdraws his criminal prosecution.

Along with it, it is necessary to take into account that, according to Article 63.1 of the Constitution, everyone is entitled for presumption of innocence. Everyone who is accused of crime should be considered innocent until his guilt is proved legally and if no verdict of law court has been brought into force. And according to Article 63.2 a person under suspicion of crime must not be considered guilty.

Article 21.2 of CPC also provides constitutional norm reflecting that even if there are reasonable suspicions as to the guilt of the person, this should not cause the latter to be found guilty.

According to norms of CPC concerning an estimation of proofs, all evidence should be assessed as to its relevance, credibility and reliability. The content of all evidence collected for the purposes of prosecution should be assessed in terms of whether it is sufficient to substantiate the charge. The preliminary investigator, investigator, prosecutor, judge and jury should assess the evidence according to their personal conviction on the basis of a thorough, full and objective examination of its content, guided by the law and their conscience. If suspicions which emerge during the process of proving the charge cannot be removed by other evidence, they should be interpreted in favour of the suspect or accused (Articles 145.2 and 145.3 of CPC). The analysis of these articles gives the grounds to come to such conclusion that the function of the public prosecutor as public prosecutor is not limited only to maintenance of charge. He also possesses the power to prevent punishment of the accused person in case of insufficiency of proofs.

According to requirements of Article 84.4 of CPC, a prosecutor who has carried out the investigation on the criminal case or been in charge of the procedural aspects of the investigation may not take part in the court hearing as a public prosecutor. Such order, creating a guarantee of prevention of a concentration of functions of pre-judicial criminal prosecution, maintenance of charge and procedural powers at one person, at the same time, excludes the possible negative influences which could affect on objectivity and independence of the public prosecutor. From the procedural point of view non-participation of the public prosecutor in pre-judicial stages of criminal legal proceedings is the positive factor influencing its impartiality and justice. In this sense the discrepancy of his position on charge to the indictment is formed only on the basis of the proofs investigated at judicial sessions but also on internal belief at observance of a principle of competitiveness. And this includes the possibility of withdraw of maintenance of charge both in full and in partial volume.

The legislator, considering the influence of the public prosecutor during judicial consideration on validity or an absence of proof of the materials important for criminal case, proceeding from a competitiveness principle, on the basis of Article 314.1 of CPC defines its obligatory participation in judicial consideration on public or publicly-private charge. According to Article 314.2 of CPC, during the court’s examination of the case, the public prosecutor should be guided by the requirements of the law and by his own conscience on the basis of the evidence examined by the court. If the charge brought against the accused during the pre-trial proceedings is not proved during the court’s examination of the case, the prosecutor have the right to withdraw the charge.

It is necessary to note that taking into account that the provisions of above-stated Articles 41.3, 43.1.1 and 314.2 of CPC do not provide for differentiation of volume of powers concerning the withdrawal (full or partial) by the public prosecutor of his charge (criminal prosecution), one may conclude that the withdrawal should cover all charge. Such approach, leading to negation of principles of competitiveness and equality of the parties by judicial consideration, can lead to limitation of procedural independence of the future charge of the public prosecutor.

As it has been specified above, the proofs established during judicial examination and internal belief of the public prosecutor create a basis of formation of a position of charge. Therefore if the public prosecutor, being based on internal belief, does not come to opinion that the charge brought against the accused person on the basis of the established proofs partially is not confirmed, he has the right to withdraw it partially. Otherwise, on the one hand, this can cause the suspicion as to his objectivity, and on the other hand, can create conditions for unreasonable charge and punishment of the accused person.

As a whole, the concept of withdrawal of charge, not only full, but also representing an element of its component, partial withdrawal was reflected in the Law of the Republic of Azerbaijan “On Office of Public Prosecutor”. So, in Article 19.4 of this Law the power of the public prosecutor of full or partial withdrawal of charge has been established.

Thus, provided by Articles 43.1.1 and 314.2 of CPC the withdrawal of the public prosecutor and private accuser of charge (criminal prosecution) includes both full, and partial withdrawal (including withdrawal during judicial consideration from one or several articles of the charge to accused person for commission of crime provided by various articles of Criminal Code of the Republic of Azerbaijan).

Also it is necessary to note that the public prosecutor as the representative of the state possessing imperious powers during judicial consideration, along with powers of maintenance of charge on behalf of the state and withdrawal of charge (full or partial), also possesses the possibility to define the future of a charge via other procedure.

One of the rights which are fall within the procedural powers of the public prosecutor is the right to propose qualification of norm of punishment provided in charge for the criminal action brought against accused or presented to court, on the norm of the criminal law providing softer punishment.

Plenum of the Constitutional Court concerning the question put forward in inquiry considers necessary to underline that the withdrawal of charge (criminal prosecution) and a requalification of action by norm of the criminal law providing softer punishment, by the nature and legal consequences are various procedural actions.

Article 32.2 of CPC for the purpose of ensuring of competitiveness of the parties in criminal trial provides granting to the parties of charge (Article 32.2.3) and defense (article 32.2.4) of the right to state the offers concerning legal qualification of action of the accused and total judgement. At the same time the parties to the proceedings may submit a draft of the court’s final decision to the court on the basis of the results of the court’s examination of the case (Article 343 of CPC).

It is necessary to note that withdrawal of charge (full or partial) starts with internal belief of the public prosecutor which is formed under conditions of all-round, full and objective examination of all aspects of a case in a course of judicial investigation, and on the basis of proofs.

In this sense the application by the public prosecutor of the right provided in the criminal-procedure legislation to withdraw from maintenance (full or partial) of charges (criminal prosecution) and also to propose the requalification, as a rule, includes the full research of the collected proofs and necessity of their legal estimation. Such necessity is also coordinated with power of court to adopt the verdict of not guilty confirming innocence of accused, if no criminal action has been committed, if the action has no criminal content, if there is no link with the offence committed (Article 42.1 of CPC).

According to sense of provisions of the Constitution and the criminal-procedure legislation regulating the above-stated questions the functions of court and the prosecution party on the settlement of criminal case strictly differ from each other and each of them is assigned on corresponding subject. The beginning of criminal prosecution, indictment and defense in court are realised by bodies and officials established by the law, and also by victims in the cases provided by the law. The court which is carrying out judicial authority by means of judicial criminal legal proceedings on the basis of competitiveness and equality of the parties, during process, having incurred procedural powers of the prosecution party and defense should not support any of the parties or replace them, and should remain the objective and impartial arbitrator during all process.

Such approach originates also from requirements of Article 318.1 of CPC establishing limits of judicial proceedings. According to these provisions, during the court’s examination of a case, the criminal case file, the file on simplified pre-trial

proceedings or the complaint lodged with a view to a private prosecution may be examined only within the limits of the charge laid against the accused or brought before the court.

Thus, the legal position of Plenum of the Constitutional Court in connection with the aforesaid consists in that unconditional result of withdrawal of the public prosecutor from charge (criminal prosecution) during judicial consideration on public charge is the termination of judicial criminal prosecution. In case of full withdrawal by public prosecutor of a charge (criminal prosecution) (before court moves to consultative room to adopt the final judgment) the court on the basis of provisions of Article 43.1 of CPC shall adopt the decision on the full termination of criminal prosecution, and in case of partial withdrawal – the withdrawal of a part of charge. At the same time in case of the statement the public prosecutor of the offer on requalification an act on softer the court cannot adopt the judicial act concerning application of norm of the criminal law providing more heavy punishment than in the charge. Otherwise, already having assigned to itself the maintenance of charge, which the public prosecutor has refused, court actually replaces the body supporting charge, and in other words carries out function not attributable to its nature.

At the same time the offer of the public prosecutor on withdrawal of charge or softening of qualification of action should be proved according to the sense of the constitutional norms (Articles 125 and 127 of the Constitution), some principles of criminal legal proceedings (Articles 8-12, 21, 28, 32, 36 of CPC), and also norms of CPC, establishing power of the public prosecutor as the public prosecutor to assess the evidence according to personal conviction on the basis of a thorough, full and objective examination of its content, guided by the law and conscience (Article 145.2).

Plenum of the Constitutional Court of the Republic of Azerbaijan in connection with powers of the public prosecutor concerning change of qualification of action also notes that in Articles 32.2.3 and 343 of CPC it is established that he being the party of charge in criminal trial possesses the right to offer suggestions as to the legal classification of the accused person’s action and the final decision of the court. Along with it the legislator when regulating the status, the right and a duty of the public prosecutor participating in a role of the public prosecutor in judicial review (Article 84 of CPC), has not adjusted his right to propose the softening of qualification of action. Including, the analysis of the legal theory, the existing practice and corresponding legislations of some countries show that qualification of action of the accused person by norm of the criminal legislation providing less heavy punishment can be carried out in the different way including the exception in legal qualification of action of the signs aggravating the punishment, qualification of criminal action by article providing less heavy punishment and other ways. However, the uncertainty in CPC of all these cases during realization of the granted right by the public prosecutor becomes the reason of occurrence of some questions which require the regulation via legislative procedure.

According to Article 94.1.6 of the Constitution, legal proceedings, execution of court verdicts are in the list of the general rules established by Milli Mejlis of the Republic of Azerbaijan.

From this point of view it should be recommended to Milli Mejlis of the Republic of Azerbaijan to settle in CPC the rights of the public prosecutor of qualification of act of the accused person during judicial review by norm of the criminal law providing for softer punishment and ways of its realisation.

Being guided by Article 130.4 of the Constitution of the Republic of Azerbaijan, Articles 60, 62, 63, 65, 66, 67, and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provided by Articles 43.1.1 and 314.2 of Criminal Procedure Code withdrawal of the public prosecutor and private accuser of charge (criminal prosecution) includes both full and partial withdrawal.

2. Within judicial review of withdrawal of the public prosecutor of charge (criminal prosecution) and qualification of action of accused person by norm of the criminal law providing for softer punishment by character and legal consequence are different procedural actions. Proposal of public prosecutor on qualification of action of accused person by norm of the criminal law providing for softer punishment cannot be considered as withdrawal of charge (criminal prosecution).

3. The legal position of the Constitutional Court concerning the qualification by public prosecutor of action of accused person by norm of the criminal law providing softer punishment consist in the following:

- the public prosecutor should substantiate his proposal as to qualification of act of accused person by norm of the criminal law providing for softer punishment;

- since the court cannot undertake an accusatory functions, the proposal on qualification of the action of accused person by norm of the criminal law providing for softer punishment, shall exclude the possibility of court to adopt the judicial act in accordance with norm of criminal law providing for more heavy punishment than in charge brought by public prosecutor.

4. To recommend to the Milli Mejlis of the Republic of Azerbaijan to settle in Criminal Procedure Code of the Republic of Azerbaijan the right of public prosecutor on qualification of the action of accused person by norm of the criminal law providing for softer punishment and the means of its realization.

5. The decision comes into force from the date of its publication.

6. The decision is a subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of Azerbaijan Republic”.

7. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.