**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 18 and 83.1 of the Criminal Code*

*of the Republic of Azerbaijan*

**6 September, 2010 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev (Reporter-Judge), Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze (Reporter-Judge) and Isa Najafov;

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: Shahin Yusifov, Judge of Supreme Court of the Republic of Azerbaijan, Veli Abdullayev, Judge of Kyapaz District Court of Ganja city;

the experts: professor Firuddin Samandarov, Head of the Law Department of Baku State University, Doctor of Legal Sciences;

specialist: Sahibhan Mirzoyev, Judge of the Court of Appeal of Baku city, Gazanfar Bayramli, deputy head of Department of the Prosecutor’s General Office on Public Prosecution,

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session via special constitutional proceeding the constitutional case on inquiry of Supreme Court of the Republic of Azerbaijan and Kyapaz District Court of Ganja city on interpretation of Articles 18 and 83.1 of the Criminal Code of the Republic of Azerbaijan;

having heard the report of Judges F.Babayev and R.Gvaladze, the reports of legal representatives of the interested subjects, conclusion of experts and opinion of visiting specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

By a sentence of Hatai District Court of Baku city of August 25, 2009 Mardan Ibragimov was found guilty under Article 221.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) and the Article 70 of CC was applied and he was condemned on suspended sentence by imprisonment for a period of 3 years, 2 years of corrective term were appointed.

In its inquiry the Prosecutor’s Office of the Republic of Azerbaijan (hereinafter referred to as Prosecutor’s Office) asks Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) to give interpretation of provision of Article 182.2.4 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) “committed with causing damage to a victim in significant size”.

Before entering into force of sentence of Hatai District Court Mardan Ibragimov on September 8, 2009 had committed criminal act specified in Article 132 of CC – intended body injuries - and by Surakhani District Court of Baku city was sentenced on January 13, 2010 to imprisonment for a period of 5 months. The court regarded commission of a new crime by M. Ibragimov till the entering into force of a sentence of August 25, 2009 as the circumstance excluding second offense and at appointment to him punishment according to Article 132 of CC refused to consider the second offense as the circumstance aggravating punishment.

The judicial board on criminal cases and cases of administrative offenses of the Court of Appeal of Baku city, considering the case on the basis of a protest of the state accuser, by the decision of March 3, 2010 disagreed with a position of court of the first instance in issue connected with repeated commission, established the repeated commission and having accepted it as the circumstance aggravating punishment based on Article 65 of CC, extended the punishment established by Article 132 of CC for 6 months, and in the aggregate imposed the final sentence in the form of imprisonment for a period of 3 years and 1 month.

The Supreme Court of the Republic of Azerbaijan (hereinafter referred to as Supreme Court) having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) asks for interpretation of the Articles 18 and 83.1 of the Criminal Code. The inquire was proved by fact that in practice the provision “the person having previous conviction” in one case is connected with the date of entering into force of conviction provided by the Article 83.1 of CC while in other case is connected with date of the announcement of such sentence according to requirements of the criminal procedure legislation.

Kyapaz district court of Ganja city, having applied with request to the Constitutional Court in connection with the case in procedure on Namik Dzhafarov's charge under the Articles 221.2.1 and 221.3, also asked to give interpretation of the Articles 18 and 83 of CC.

In the request it is noted that N. Dzhafarov was brought to trial due to the fact in spite of being earlier sentenced (on August 20, 2007) by Hanlar (Gogol) district court under Article 221.1 of CC to one year of correctional labor, he did not improve and repeatedly on March 1, 2009 had committed deliberate hooliganism.

At consideration of case it was established that N. Dzhafarov because of absence of a workplace actually did not have punishment inflicted by the first sentence (correctional labor), and according to the amnesty act by decision of law-enforcement officers’ group as of August 8, 2009 was exempted of punishment. In this connection the court in its request asks for clarification of the issue on whether persons found guilty by court’s sentence which nevertheless for certain reasons did not have punishment and further - according to amnesty – were exempted from punishment, also can be included into the list of people exempted from punishment (as well as for clarification of occurrence or non-occurrence of second offense).

Plenum of the Constitutional Court for the correct solution of the issue brought up in the inquiry of the Supreme Court first of all considers important to clear up the status of the condemned person established in the criminal and criminal procedure legislation.

Legal status of subjects – the main feature of legal activity. In the criminal and criminal procedure law a condemned person acts as one of subjects. However in each branch of this right there is a peculiar legal status of condemned person.

In criminal law a condemned person is a person concerning whom there is a sentence of court which entered into force and concerning whom the punishment provided by the criminal law is imposed.

Thus, according to Article 83.1 of CC a person condemned for commitment of a crime is considered as convicted from date of entering of a decision of court into force up to moment of clearing or cancellation of a previous conviction.

It should be noted that in many norms of CC (Articles 56.1.3, 79.1, 79.4, 80.1, 80.2, 82.2, 83) the phrase “the condemned person” is used, and these phrases have an identical sense.

And in criminal procedure law condemned is a person concerning whom conviction is pronounced.

In Articles 353.4.12, 358.1.1 and 383.1.1 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) the person concerning whom is pronounced the conviction which did not come into force is also called as the accused or condemned.

According to Article 18.1 of CC commission of a deliberate crime by the person having a criminal record for earlier commitment of deliberate crime creates repetition of offences. And as for an issue of interpretation of the provision “the condemned person” of this article from the point of view of provisions of norms of the CPC, first of all, determination of purposes and tasks of the criminal and criminal procedure legislation plays an important role.

Criminal legislation pursues at least three goals. First of all it provides for peace and safety of humans, protection of rights and freedom of person and citizen, of property, protection of economic activities, of social order and public safety, protection of environment and constitutional order of the Republic of Azerbaijan from criminal encroachments, and also for prevention of crimes. For implementation of the tasks the Criminal Code of the Republic of Azerbaijan specifies grounds and principles of the criminal liability, defines what is dangerous to a person, to society and state by actions admitted as crimes and establishes types, limits and sizes of punishments and another measures of criminal - legal nature for committing these crimes (Articles 2.1 and 2.2 of CC).

And legislation on criminal procedure of the Republic of Azerbaijan determines whether acts which appear to be offences are criminal or not and whether a suspect is guilty or not, and determines legal procedures governing criminal prosecution and defense of suspects or accused persons as provided for by criminal law (Article 1.1 of CPC).

Purpose of the CPC serves for disclosure of any act recognized as a crime, to exposure and condemnation of the persons who committed a crime, to prevention of prosecution and condemnation of innocent persons. In other words, the Criminal Procedure Code establishes procedural means for application of norms of criminal law.

Norms of the CPC cannot make change or correction to norms of CC, they have to be directed only on realization of norms of CC. And therefore at identification of collisions between norms, first of all, it has to be cleared up provisions of the relevant norms of CC and after that the Criminal Procedure Code needs to be used.

In this sense at a criminal and legal assessment of act of the person the provision “condemned person” of Article 18.1 of CC, first of all, has to be interpreted from the point of view of requirements of the criminal legislation.

As it is specified, the notion the condemned person in CC is given in Article 18.1 of the Code. Therefore the provision “condemned person” of Article 18.1 of CC has to be interpreted according to Article 83.1 of this Code. Other approach can lead to violation of the principle of a presumption of innocence enshrined in Article 63 of the Constitution of the Republic of Azerbaijan, an unreasonable assessment of act as repeated commission, imposing to the person of more heavy punishment, aggravation of its situation in the absence of legal basis.

Due to the matter which is brought up in the inquiry of Kyapaz district court of the Ganja city concerning existence, according to repeated commission, influences on rules of purpose of punishment at commission of a new crime, cancellation of a criminal record for the previous crime before pronouncement of sentence, once again there is a need of clarify the nature of a criminal record and concept of repeated commission.

Criminal record by the legal nature – the criminal and legal institute consisting of establishment and implementation of social and legal control over actions of the person which gave out the public danger by means of commission a crime. Implementation of such control for the purpose of prevention of new crimes is expressed in restriction in a certain degree of the rights and freedoms of the condemned. A criminal record is also a peculiar type of the warning to condemned person, made by justice with the purpose of prevention of a new crime.

Commission of a new crime by the person having a previous conviction, as a rule, attest to his stable criminal bent, to ignoring of the warning made by court, and it finally indicates his increased public danger. For commission of a new crime the law provides application against such person of more drastic criminal and legal compensatory remedies.

The repeated commission acts as more dangerous type of repeated commission of crime.

As evident from the contents and sense of Article 18.1 of CC, repeated commission arises not from the moment of criminal prosecution or condemnation but from the moment of new commission of deliberate criminal action by the person having not cleared or cancelled criminal record.

Unlike the previous criminal law the acting CC did not provide interruption of a current of term of a criminal record with commission of a new crime. And it shows that at commission of a new crime the course of a cancellation of conviction period of a criminal record for serving of punishment proceeds. However this circumstance cannot prevent the determining of again committed crime as repeated commission in the cases established by the law and the application of rules of infliction of punishment for repeated commission. So, elimination of all legal consequences connected with clearing or cancellation of a criminal record after commission of a new crime belongs to criminal legal relations which will arise only after that. For the reason that the anew commission by person of a deliberate crime without cancellation of a criminal record testifies the insufficiency of corrective action of the previous punishment, not achievement of the purpose of punishment, high public danger of the personality guilty person, the legislator prescribed application to this person of more serious punishment.

In the decision of the Plenum of Constitutional Court of May 25, 2009 “On interpretation of Article 83 of the Criminal Code of the Republic of Azerbaijan in connection with inquiry of the Court on Grave Crimes” it was noted that previous conviction is reasoned not only the fact of condemnation of the person and imposing of punishment. The previous conviction expresses a legal status of condemned person leading to the legal consequences established by the criminal legislation at repeated commitment of crime; the pending and not cleared previous conviction possessed by a person constitutes special social-legal relations which are formed between him and the state on the basis of the criminal-legal regulation serving for appraisal of person to in case if he commits new crimes and the crimes committed by him which represent big public danger and consequently imposing regarding concerning him of more austerity measures of legal character.

Thus, existence at the person of not cancelled criminal record at the time of commission of a new deliberate crime in the subsequent stage of criminal trial independently of cancelation of a criminal record does not exclude the imposing to him the punishment for repeated commission prescribed by the law.

As for the inquiry of Kyapaz district court of Ganja city concerning clearing of a criminal record at release of the person without departure of the imposed sentence by any procedural document, according to the act of amnesty, it should be noted that the act of amnesty is adopted by Milli Majlis of the Republic of Azerbaijan in attitude individually and not certain circle of persons. By amnesty act persons who have committed crimes, can be released from a criminal liability. The persons, condemned for commitment of crimes can be released from punishment, or term of the punishment imposed on them can be reduced or deserved part of punishment can be replaced with mitigate kind of punishment, or such persons can be released from additional punishment. From the persons who have been released from punishment by amnesty act the previous conviction can be cleared(Article 81 of CC).

The question which is raised in the inquiry of court found the solution in the decision of Plenum of the Constitutional Court of July 8, 2008 “On interpretation of Article 83.2 of the Criminal Code of the Republic of Azerbaijan”. In this decision it is mentioned that Article 83.2 of CC only on the basis of a conviction of court provides cases of not imposing of punishment for missing of time limitation of criminal prosecution and release from punishment on the basis of the act of amnesty.

The person released from punishment (completion of sentence), in all cases, except for the cases specified in the mentioned decision of the Constitutional Court and directly provided in the act of amnesty of clearing of a criminal record, has to be recognized as the condemned.

Thus, Plenum of the Constitutional Court in connection with the questions which are raised in inquiry of the Supreme Court and Kyapaz district court of Ganja city comes to the following:

- the provision “condemned person” of Article 18.1 of CC covers, according to Article 83.1 of the same Code, the person concerning whom there is a conviction of court which entered into force and existence of outstanding or not cleared criminal record;

- the existence for a person of outstanding or not cleared criminal record at time of commission of new deliberate crime in the subsequent stage of criminal trial, independently of cancellation of a criminal record does not prevent imposing to this person - in cases established by law - of punishment for repeated commission.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 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 provision “condemned person” of Article 18.1 of CC covers, according to Article 83.1 of the same Code, the person concerning whom there is a conviction of court which entered into force and existence of outstanding or not cleared criminal record.

2. The existence for a person of outstanding or not cleared criminal record at time of commission of new deliberate crime in subsequent stage of criminal trial, independently of cancelation of a criminal record, does not exclude the imposing to him a punishment for repeated commission prescribed by law.

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 can not be cancelled, changed or officially interpreted by any body or official.