Constitutional judgment 3-1-2-2-11

JUDGMENT
OF THE SUPREME COURT *EN BANC*

on behalf of the Republic of Estonia

No. of the case	3-1-2-2-11
Date of judgment	10 April 2012
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Ivo Pilving, Jüri Põld and Harri Salmann
Court Case	Criminal matter of conviction of Henrik Antsov pursuant to § 184(2)1) and 2) of the Penal Code.
Contested judgment	Judgment of the Tartu County Court of 19 November 2007 and of the Tartu Circuit Court of 22 May 2008 in criminal matter no. 1-07-1404
Appellant and type of appeal	Sworn advocate Monika Mägi, the criminal defence counsel of Henrik Antsov; petition for review
Other parties to the review procedure	Kristiina Laas, district prosecutor of the Southern District Prosecutor's Office

DECISION

1. To declare § 366 of the Code of Criminal Procedure to be in conflict with the Constitution to the extent it does not prescribe as a ground for review the entry into force of a court judgment made in a general procedure which establishes the lack of a criminal act if in the criminal matter subject to review the court judgment made in a general procedure has imposed imprisonment on the person as a punishment for participation in that criminal act.
2. To satisfy the petition for review filed by Henrik Antsov's criminal defence counsel.
3. To annul in part the judgment of the Tartu County Court of 19 November 2007 and of the Tartu Circuit Court of 22 May 2008, i.e. concerning conviction and punishment of Henrik Antsov pursuant to § 184(2)2) of the Penal Code.
4. To acquit Henrik Antsov of the charges pursuant to § 184(2)2) of the Penal Code.
5. To impose on Henrik Antsov as punishment pursuant to § 184(2)1) of the Penal Code five years and ten months of imprisonment.

FACTS AND COURSE OF PROCEEDINGS

1. By its judgment of 19 November 2007 the Tartu County Court convicted Henrik Antson and punished him pursuant to § 184(2)1) and 2) of the Penal Code (PC) with six years' imprisonment. On the basis of § 68(1) of the PC, the time spent in provisional custody was included in the term of the punishment and the start of service of the punishment was deemed to be 17 August 2006.

2. H. Antsov was convicted of acquiring on 16 August 2006 around 11 p.m. in a group with Anatoli Rjabov from Vladislav Šipov in Tallinn at XXXXXXX X-XX unlawfully at least 997.6 grams of amphetamine and carrying it on the same day in a group with A. Rjabov by car from Tallinn to Tartu where the police detained them on 17 August 2006 around 1:10 a.m.

3. H. Antsov was also convicted of unlawful trafficking of a narcotic drug in a large quantity by a person who had previously committed offences related to narcotic drugs. In 2006, H. Antsov acquired from unidentified persons and in an unidentified manner, and on four or five occasions unlawfully trafficked to Siim Raidma narcotic drugs in a large quantity (200 grams of amphetamine and 453 ecstasy pills). In convicting H. Antsov of that criminal offence the court relied on the testimony of S. Raidma as a witness by which he admitted to buying narcotic drugs from H. Antsov.

4. In the pre-trial proceedings of the criminal matter the materials concerning S. Raidma were severed on the ground that he did not commit criminal offences together with the other suspects in the same criminal matter.

5. An appeal was filed against the Tartu County Court judgment of 19 November 2007 by the sworn advocates Monika Mägi and Toomas Alp – the criminal defence counsels of H. Antsov – who requested the annullment of the county court judgment and the acquittal of H. Antsov.

6. By its judgment of 22 May 2008 the Tartu Circuit Court upheld the Tartu County Court judgment of 19 November 2007 and did not satisfy the appeals. The circuit court judgment entered into force on 8 September 2008 when the Supreme Court did not accept the appeals in cassation of the criminal defence counsels of the convicted offenders.

7. On the basis of the Viru County Court ruling of 9 September 2009 H. Antsov was released on parole on 21 September 2009 with a probationary period up to 16 August 2012.

8. By its judgment of 30 September 2010 the Tartu County Court convicted S. Raidma pursuant to §

184(2)2) of the PC of repeatedly and unlawfully acquiring amphetamine and ecstasy in a large quantity from H. Antsov in 2006 and of trafficking thereof to unidentified persons.

9. An appeal against the Tartu County Court judgment of 30 September 2010 was filed by Vello Luik, a senior clerk of sworn advocate and the criminal defence counsel of S. Raidma, who requested the annulment of the county court judgment convicting S. Raidma pursuant to § 184(2)2) of the PC and acquittal in that respect of the person being defended.

10. The Tartu Circuit Court annulled in part by its judgment of 17 December 2010 the Tartu County Court judgment of 30 September 2010 convicting S. Raidma pursuant to § 184(2)2) of the PC of repeatedly and unlawfully acquiring amphetamine and ecstasy in a large quantity from H. Antsov in 2006 and of trafficking thereof to unidentified persons. The circuit court acquitted S. Raidma of that criminal offence.

11. In giving a testimony in court concerning charges brought pursuant to § 184(2)2) of the PC, S. Raidma confirmed that he has never received narcotic drugs from H. Antsov. S. Raidma claimed that while giving a testimony in the criminal matter of H. Antsov and in the pre-trial proceedings of his own criminal matter he was under pressure from the police and for that reason he gave a false testimony about acquiring narcotic drugs from H. Antsov. The circuit court held that the testimony of S. Raidma is not reliable due to contradictions therein. The circuit court was of the opinion that in the criminal matter there was not enough evidence that S. Raidma acquired narcotic drugs from H. Antsov in 2006.

12. The Tartu Circuit Court judgment of 17 December 2010 entered into force without any appeals.

PROCEEDINGS IN THE SUPREME COURT

13. On 22 March 2011 sworn advocate M. Mägi, the criminal defence counsel of H. Antsov, filed with the Supreme Court a petition for review in which she requests the annulment of the Tartu County Court judgment of 19 November 2007 and of the Tartu Circuit Court judgment of 22 May 2008 convicting H. Antsov pursunt to § 184(2)2) of the PC of acquiring in 2006 from unidentified persons and in an unidentified manner, and on four or five occasions unlawfully trafficking to S. Raidma narcotic drugs in a large quantity, total of 200 grams of amphetamine and 453 ecstasy pills. The criminal defence counsel requested from the Supreme Court the rendering of a new judgment and acquittal of H. Antsov of that criminal offence and the mitigation of the punishment imposed on him.

14. The criminal defence counsel of H. Antsov relied in the petition for review on § 366 5) of the Code of Criminal Procedure (CCP). The criminal defence counsel found that since in the Tartu Circuit Court judgment of 17 December 2010 it was established that S. Raidma has not acquired narcotic drugs from H. Antsov in 2006, H. Antsov was falsely convicted of repeated unlawful handling of narcotic drugs in a large quantity. The criminal defence counsel was of the opinion that the acquittal of S. Raidma must bring about also the acquittal of H. Antsov pursuant to § 184(2)2) of the PC. Since the repetitiveness of the criminal offences which H. Antsov was accused of thereby ceases to exist, the punishment imposed on H. Antsov should be mitigated. Considering that no new facts need to be established in the criminal matter, the new judgment may be made by the Supreme Court.

15. [Not translated.]

16. In a reply to the petition for review the Southern Prosecutor's Office found that the criminal matter of H. Antsov cannot be reviewed under § 366 5) of the CCP. The reliability of the testimony of S. Raidma was assessed in the criminal matter of H. Antsov as well as in the criminal matter of S. Raidma, and in the court hearing in the criminal matter of S. Raidma no facts which the courts were not aware of in convicting H. Antsov became evident. The courts deemed the severance of the materials of the criminal matter with regard to S. Raidma justified and necessary.

17. The Criminal Chamber of the Supreme Court deliberated the petition for review filed by the criminal defence counsel of H. Antsov in a panel of three members in a public hearing on 18 May 2011. In the court

hearing the parties to the review procedure upheld their requests and opinions.

18. The members of the panel hearing the criminal matter encountered dissenting opinions of principle upon applying the law, for which reason the Criminal Chamber referred the criminal matter by a ruling of 20 June 2011 to be reviewed by the full panel of the Criminal Chamber.

19. In its ruling of 12 October 2011 the Criminal Chamber of the Supreme Court agreed with the person who filed the petition for review in that respect that the conclusions of the Tartu Circuit Court judgments of 22 May 2008 and of 17 December 2010 contradict each other. The Criminal Chamber referred to the Supreme Court *en banc* judgment of 24 April 2000 in criminal matter no. 3-1-2-1-00 where the Supreme Court *en banc* deemed a conflict of conclusions in the court judgments as a ground for review within the meaning of § 77^1(3)5) of the Code of Criminal Court Appeal and Cassation Procedure (CCCACP) (paragraph 10 of the judgment). In the current legal order the content of § 77^1(3)5) of the CCCACP is reflected in § 366 5) of the CCP.

20. The Criminal Chamber noted that pursuant to the Supreme Court *en banc* judgment of 24 April 2000, a conflict between different judgments in respect of the existence of a criminal act can only be eliminated so that one court evaluates all the evidence in aggregate in one proceeding and thereafter renders a judgment according to its conscience with regard to all accused at trial (paragraph 13 of the judgment). However, in case the criminal matter of H. Antsov is reviewed, it is not possible to hear the criminal matters of H. Antsov and S. Raidma together.

21. Pursuant to § 366 8) of the CCP which entered into force on 1 September 2011, a ground for review is the entry into force of a court judgment by which the accused is acquitted of a criminal offence of which a joint principal offender or an accomplice has been convicted in simplified proceedings in a criminal matter subject to review. If to see in the aforesaid the legislator's intention to provide a conflict of conclusions contained in court judgments as a ground for review only in a situation where a judgment of acquittal was rendered in a general procedure and a judgment of conviction in simplified proceedings, a conflict of conclusions of court judgments rendered in a general procedure can no longer constitute a ground for review.

22. By finding that for the purposes of uniform application of the law it is necessary to refer the criminal matter to be heard by the Supreme Court *en banc* and decide whether after the Supreme Court *en banc* judgment of 24 April 2000 in criminal matter no. 3-1-2-1-00 the procedural law has changed to the extent which requires the amendment of the opinions expressed in that judgment of the Supreme Court *en banc*, the Criminal Chamber of the Supreme Court referred the criminal matter by a ruling of 12 October 2011 to be heard by the Supreme Court *en banc*.

23. By its ruling of 22 December 2011 the Supreme Court *en banc* initiated constitutional review proceedings in the court case. The Supreme Court *en banc* had suspicions whether § 366 of the CCP which provides for an exhaustive list of the grounds for review of criminal matters provides for a ground for review in case of a conflict of judgments rendered in a general procedure as is the case in the criminal matters of H. Antsov and S. Raidma. The Supreme Court *en banc* held that if the law does not provide for a ground for review in such a situation, the Code of Criminal Procedure may be in conflict with the Constitution in that respect.

24. The Supreme Court *en banc* involved in the constitutional review proceedings as participants in the proceedings the Legal Affairs Committee of the Riigikogu, the Constitutional Committee of the Riigikogu, the Chancellor of Justice, the Minister of Justice, the Public Prosecutor's Office and the Estonian Bar Association. The Supreme Court asked for the opinion of the participants in the proceedings on whether the applicable law includes a legal basis which would enable to review the criminal matter of H. Antsov and whether the applicable regulatory framework is constitutional.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING
Legal Affairs Committee of the Riigikogu
25.

[Not translated.]

Constitutional Committee of the Riigikogu
26. [Not translated.]

Sworn advocate Monika Mägi, the criminal defence counsel of Henrik Antsov
27. [Not translated.]

Chancellor of Justice
28.-31. [Not translated.]

Minister of Justice
32. [Not translated.]

Public Prosecutor's Office
33.-34. [Not translated.]

Estonian Bar Association
35. [Not translated.]

PROVISION UNDER DISPUTE
36. § 366 of the Code of Criminal Procedure provides:
"§ 366. Grounds for review
The grounds for review are:
1) the unlawfulness or unfoundedness of a court judgment or ruling arising from the false testimony of a witness, knowingly wrong opinion of an expert, knowingly false interpretation or translation, or falsification of documents, or fabrication of evidence which is established by another court judgment which has entered into force;
2) a criminal offence which is committed by a judge in the hearing of the criminal matter subject to review and which is established by a court judgment;
3) a criminal offence which is committed by an official of the body that conducted pre-trial proceedings or a prosecutor in the proceedings of a criminal matter and which is established by a court judgment, if the criminal offence could have had an effect on the court judgment made in the criminal matter subject to review;
4) annulment of a court judgment or ruling which was one of the bases for making a court judgment or ruling in the criminal matter subject to review, if this may result in the making of a judgment of acquittal in the criminal matter subject to review, or in mitigation of the situation of the convicted offender;
5) any other facts which are relevant to the just adjudication of the criminal matter but which the court was not aware of while making the court judgment or a court ruling in the criminal matter subject to review and which independently or together with the facts previously established may result in a judgment of acquittal or in mitigation of the situation of the convicted offender or in mitigation of the situation of a third party whose property has been confiscated on the basis of a court judgment or ruling;
6) the Supreme Court declares, by way of constitutional review proceedings, the legislation of general application or a provision thereof on which the court judgment or ruling in the criminal matter subject to review was based to be in conflict with the Constitution.
7) satisfaction of an individual appeal filed with the European Court of Human Rights against a court judgment or ruling in the criminal matter subject to review filed with the European Court of Human Rights, due to violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or a Protocol belonging thereto if the violation may have affected the resolution of the matter and it cannot be eliminated or damage caused thereby cannot be compensated in a manner other than by review;
8) entry into force of a court judgment by which the accused is acquitted of a criminal offence of which a joint principal offender or an accomplice has been convicted in simplified proceedings in a criminal matter subject to review."

OPINION OF THE SUPREME COURT *EN BANC*
37.

The Supreme Court *en banc* reviews the petition for review filed by H. Antsov's criminal defence counsel in which the annulment of the Tartu County Court and the Tartu Circuit Court judgments, which have entered into force, is requested. The Supreme Court *en banc* notes that it addresses the conviction of H. Antsov only to the extent disputed in the petition for review – charges against him pursuant to § 184(2)1) and 2) of the PC regarding unlawful trafficking of narcotic drugs in a large quantity to S. Raidma.

38. First, the Supreme Court *en banc* settles the issue whether the Code of Criminal Procedure includes a ground for review of H. Antsov's criminal matter (I). Thereafter it ascertains which fundamental rights of H. Antsov could be infringed by the judgment made in the criminal matter subject to review (II) and whether his fundamental rights have been infringed (III). Then the Supreme Court *en banc* assesses the constitutionality of the infringement of fundamental rights by establishing the objective of the infringement (IV) and by weighing the proportionality of the infringement (V). Finally, the Supreme Court *en banc* adjudicates the petition for review filed by the criminal defence counsel of H. Antsov (VI).

I

39. First, the Supreme Court *en banc* settles the issue whether the Code of Criminal Procedure includes a ground for review of H. Antsov's criminal matter.

40. Pursuant to § 366 5) of the CCP, grounds for review are any other facts which are relevant to the just adjudication of the criminal matter but which the court was not aware of while making the court judgment or a court ruling in the criminal matter subject to review and which independently or together with the facts previously established may result in a judgment of acquittal or in mitigation of the situation of the convicted offender. With regard to the wording, § 366 5) of the CCP coincides to a great extent with § 77^1(3)5) of the CCCACP according to which grounds for review were other essential facts which become evident in the criminal matter being reviewed and which were not known by the court at the time of the making of a judgment or ruling and which, individually or in aggregate with the already established facts, would result in a judgment of acquittal or the application of a provision of the criminal law which prescribes a lesser punishment.

41. By its judgment of 24 April 2000 the Supreme Court *en banc* satisfied in criminal matter no. 3-1-2-1-00 the petition for review filed by the criminal defence counsel of J. Mäeots based on § 77^1(3)5) of the CCCACP. The petition for review adjudicated in that court case was filed under circumstances which in many respects resemble those in the present matter. According to the judgment of conviction, J. Mäeots had in a group with unidentified persons committed extortions and a fraud with regard to O. I. After the judgment of conviction made with regard to J. Mäeots entered into force in 1997, a judgment which acquitted A. S. and I. S. of charges of extortions and a fraud committed with regard to O. I. entered into force in 1999. In 1997, A. S. and I. S. were those unidentified persons who, according to the charges, committed extortions and a fraud with regard to O. I. in a group with J. Mäeots. The Ida-Viru County Court acquitted A. S. and I. S. of the charges of extortions and a fraud on the ground that in the opinion of the court, the commission of a criminal offence with regard to O. I. was not proven.

42. The Supreme Court *en banc* noted in paragraph 10 of the judgment referred to the following: "The Supreme Court *en banc* deems the conflict between conclusions contained in different judgments as a fact which pursuant to § 77^1(3)5) of the CCCACP can constitute a ground for review considering the course of the proceedings." Therefore, the Supreme Court *en banc* held that the new fact was that different compositions of court came to different conclusions in assessing the facts of the criminal offence. "At the time the petition for review was filed, the Ida-Viru County Court judgment of 7 July 1999 which had entered into force had established the lack of such facts, the existence of which had been established by the Criminal Chamber of the Viru Circuit Court judgment of 31 October 1997 and which were the basis for the conviction of J. Mäeots [---] of criminal offences committed with regard to O. I." (paragraph 10 of the judgment). However, the Supreme Court *en banc* found that such a conflict can only be eliminated so that one court evaluates all the evidence in aggregate in one proceeding and thereafter renders a judgment according to its conscience with regard to all accused at trial (paragraph 13 of the judgment). Consequently, the Supreme

Court *en banc* meant that a conflict in court judgments in respect of whether a criminal act has been established can only be eliminated so that both criminal matters are heard in one proceeding.

43. By admitting a significant conflict of the judgments made in the criminal matters of H. Antsov and S. Raidma, the Supreme Court *en banc*notes that the conflict cannot be eliminated by adhering to the opinion expressed in the Supreme Court *en banc* judgment of 24 April 2000 nor by applying § 366 5) or 8) of the CCP. First, at this time it is not possible to join the criminal matters of H. Antsov and S. Raidma into a joint proceeding because also the judgment of acquittal rendered with regard to S. Raidma has entered into force. No application to resume the proceedings of S. Raidma's criminal matter has been filed with the Supreme Court.

44. Second, the grounds for review have changed. § 366 8) of the CCP which entered into force on 1 September 2011 provides a conflict of judgments as a ground for review. Pursuant to § 366 8) of the CCP, a ground for review is the entry into force of a court judgment by which the accused is acquitted of a criminal offence of which a joint principal offender or an accomplice has been convicted in simplified proceedings in a criminal matter subject to review. Consequently, a ground for review is not any conflict of judgments, but a conflict only in a situation where first a joint principal offender or an accomplice is convicted in simplified proceedings which provide less procedural guarantees compared to a general procedure, and later in a general procedure the accused is acquitted. The legislator has not provided as a ground for review a conflict of judgments in a situation where both contradicting judgments have been made in a general procedure.

45. Judgments with regard to both H. Antsov and S. Raidma have been made in a general procedure. Also, the activity of a transferor and a transferee of a narcotic drug in unlawful handling of the narcotic drug cannot be deemed a joint offence or complicity in a criminal offence. Therefore, the entry into force of the judgment of acquittal made with regard to S. Raidma does not constitute a ground for review, within the meaning of § 366 8) of the CCP, of H. Antsov's criminal matter.

46. Based on the aforementioned reasons, the Supreme Court *en banc* holds that after the entry into force of the judgment made with regard to S. Raidma when a conflict with the judgment made in H. Antsov's criminal matter became evident H. Antsov did not have an option to contest the judgment of conviction made with regard to himself which had already entered into force. Pursuant to the Code of Criminal Procedure, resumption of proceedings in a criminal matter is possible only in a review procedure on the grounds provided for in the same Code. The Supreme Court *en banc* finds that § 366 of the CCP which provides exhaustively the grounds for review does not prescribe in this situation a ground for review of the criminal matter which terminated with a judgment which has entered into force with regard to H. Antsov.

II

47. The petition for review requests the review of such a criminal matter in which a judgment of conviction which has entered into force has imposed imprisonment on the person as punishment. The Supreme Court *en banc* ascertains which fundamental rights might be infringed in this case.

48. Pursuant to § 20(1) of the Constitution, everyone has the right to liberty and security of person. § 20 of the Constitution protects a person's physical liberty which is a prerequisite for the exercise of many other fundamental rights. The right to liberty is one of the most important fundamental rights in the Estonian Constitution.

49. The right to liberty provided for in § 20 of the Constitution is not unlimited, its objective is to protect everyone from arbitrary deprivation of liberty. § 20(2) of the Constitution lists the cases when liberty may be deprived pursuant to law. According to § 20(2)1) of the Constitution, liberty may be deprived to execute a judgmet of conviction. The Supreme Court *en banc* notes that an infringement of the fundamental right to liberty guaranteed by § 20(1) of the Constitution can be constitutional only in the case the proceedings which led to a judgment and deprivation of liberty on the basis thereof were constitutional.

50. Pursuant to § 14 of the Constitution, it is the duty of the legislature, the executive, the judiciary, and of local authorities, to guarantee the rights and freedoms provided in the Constitution. § 15(1) of the Constitution prescribes that everyone whose rights and freedoms have been violated has the right of recourse to the courts. From § 14 and § 15(1) of the Constitution in conjunction arises the fundamental right to efficient and fair proceedings for the protection of one's rights in court.

51. From § 14 and § 15(1) of the Constitution in conjunction arises a procedural fundamental right, the objective of which is to open the road for the exercise and protection of a person's fundamental rights. It also gives rise to the legislator's obligation to establish legal provisions which guarantee an efficient possibility for a person to protect his or her rights in court, and also the fairness of administration of justice. Although the legislator has extensive discretion to decide how to design efficient and fair proceedings, the lack of sufficiently efficient legal remedies infringes the fundamental right arising from § 14 and § 15(1) of the Constitution in conjunction for the protection of one's rights.

52. The Supreme Court *en banc* is of the opinion that the fundamental right to fair and efficient proceedings for the protection of one's rights in court may be infringed also by the lack of a possibility to contest a court decision which has already entered into force in order to eliminate a conflict of judgments made in a general procedure.

III

53. Next, the Supreme Court *en banc* assesses whether H. Antsov's right to efficient and fair proceedings for the protection of his rights has been infringed.

54. The Supreme Court *en banc* notes that the lawfulness of the judgment made in the criminal matter under review is not at issue. H. Antsov and his criminal defence counsel have exhausted all the means of appeal prescribed in the Estonian legal system for verification of lawfulness of a court judgment. The lawfulness of the Tartu County Court judgment was verified by the Tartu Circuit Court in an appeal procedure. The Supreme Court did not accept the appeal in cassation filed by H. Antsov's criminal defence counsel against the circuit court judgment and the judgment entered into force.

55. Regardless of the aforesaid, after the acquittal of S. Raidma it became evident that what had been established in the judgment of conviction which had entered into force with regard to H. Antsov is in significant conflict with what had been established in the judgment which has entered into force with regard to S. Raidma. The Supreme Court *en banc* recognises that the legal effect of a court judgment is a significant value, and its disruption and resumption of proceedings in a court case can only occur under exceptional circumstances. But in a situation where court judgments are in conflict regarding such a significant issue of whether or not a criminal act took place, it must be borne in mind that the objective of the review procedure is, inter alia, to ascertain whether in the matter under review any such new and significant facts have appeared which force the legal effect of the judgment and the principle of legal peace to retreat. The right to efficient and fair proceedings may be infringed also when after the entry into force of a court judgment a reasonable doubt regarding the lawfulness of the infringement of the fundamental right to liberty arises. Therefore, the Supreme Court *en banc* deems it necessary to resume proceedings in H. Antsov's criminal matter.

56. On 8 September 2008 a judgment of conviction entered into force with regard to H. Antsov whereby he was punished with imprisonment. The judgment which had entered into force was enforced and H. Antsov started to serve the punishment in prison. H. Antsov was convicted, inter alia, of trafficking narcotic drugs in a large quantity to S. Raidma. The fact that the criminal act took place was proved by the testimony of S. Raidma, the buyer of the narcotic drug.

57. At first, S. Raidma and H. Antsov were suspects in one and the same criminal matter. Later on the criminal matter of the suspect S. Raidma, a minor, was severed into separate proceedings. § 216(2) of the

CCP in force at the time of the severance provided that a criminal matter may be severed into a new file if this does not prejudice the comprehensiveness, thoroughness and objectivity of the criminal proceeding. Subsection (4) of the same section provided that if a minor is suspected or accused of committing a criminal offence together with an adult, the criminal matter concerning the minor may be severed into a separate criminal proceeding if severance does not prejudice the comprehensiveness, thoroughness or objectivity of the criminal proceeding and is in the interests of the minor. The Supreme Court did not accept the appeal in cassation filed in the interests of H. Antsov. Also in the judgment made with regard to S. Raidma the Tartu County Court deemed the severance of the criminal matters lawful. Since the Tartu Circuit Court annulled the county court judgment on the basis of an appeal filed by S. Raidma's criminal defence counsel, and acquitted S. Raidma on the ground that a criminal offence had not been proven, the judgment of the court of appeal did not give an assessment on the lawfulness of the severance of the criminal matters.

58. Due to the severance of the criminal matters, S. Raidma was heard in H. Antsov's criminal matter as a witness in a hearing on 3 May 2007 and he was warned against giving a false testimony and unfounded refusal to give a testimony (§ 68(2) of the CCP). At the same time, the testimony given by S. Raidma as a witness was the only evidence which confirmed that the criminal act took place. The testimony of S. Raidma proved the quantity of the narcotic drug, the trafficking and acquisition thereof as well as the repetitiveness of handling of a narcotic drug. H. Antsov has not confessed to trafficking of a narcotic drug to S. Raidma.

59. In a court hearing in his own criminal matter S. Raidma withdrew his earlier testimony and confirmed that he has not received a narcotic drug from H. Antsov. For that reason the Tartu Circuit Court deemed the testimony of S. Raidma unreliable and found that the criminal act has not been proven, and acquitted S. Raidma by a judgment of 17 December 2010.

60. Considering the aforesaid, after the judgment of acquittal made with regard to S. Raidma there is reasonable doubt as to the lawfulness of the deprivation of liberty from H. Antsov.

61. The Supreme Court *en banc* stated above (see part I of the judgment) that after the entry into force of the judgment made with reagrd to S. Raidma, H. Antsov had no option to contest the judgment of conviction made with regard to him. Pursuant to the Code of Criminal Procedure, resumption of proceedings in a criminal matter is possible only in a review procedure on the grounds provided for in the same Code. The Supreme Court *en banc* found that § 366 of the CCP which provides exhaustively the grounds for review does not, at this time, prescribe a ground which would enable to review the criminal matter of H. Antsov.

62. In keeping with the aforesaid, the Supreme Court *en banc* holds that § 366 of the CCP which does not prescribe an option to review H. Antsov's criminal matter infringes H. Antsov's fundamental right to efficient and fair proceedings for the protection of his rights in court (§ 14 of the Constitution in conjunction with § 15(1)). The lack of efficient proceedings infringes also the fundamental right to liberty (§ 20 of the Constitution).

63. The Supreme Court *en banc* admits that the possibility to protect one's rights need not be necessarily provided as a ground for review. The possibility to protect rights could be guaranteed by other efficient proceedings. However, the fact that in the current Estonian legal order the review procedure is the only procedure which allows a person after the entry into force of a judgment made with regard to him or her in a criminal matter to protect his or her rights in the same criminal matter shall be taken into account. Under these considerations the Supreme Court *en banc* deems it justified to review in a review procedure the petition filed by H. Antsov's criminal defence counsel and to see an infringement of fundamental rights in the lack of an appropriate ground for review.

IV

64. § 11 of the Constitution allows restriction of fundamental rights provided in the Constitution only if the restriction is constitutional. Restrictions of fundamental rights shall be necessary in a democratic society and they cannot distort the nature of the rights restricted. Having established the infringement of H. Antsov's

fundamental rights, the Supreme Court *en banc* assesses next the constitutionality of the infringement of the fundamental rights. For that purpose the Supreme Court *en banc* verifies first whether there is a legitimate objective for the infringement of the fundamental rights.

65. § 14 and § 15(1) of the Constitution do not provide for conditions for infringement of the rights therein. Consequently, the fundamental rights arising from these provisions are fundamental rights guaranteed without a reservation by law, and the said fundamental rights may be infringed for ensuring other fundamental rights or for protecting constitutional values.

66. After the exhaustion of means for appeal a judgment of conviction enters into force, i.e. it acquires legal effect (§ 408(1) of the CCP). The legal effect of a judgment ensures legal certainty which is the most important part of one of the basic principles of the Constitution – the principle of the state based on the rule of law (§ 10 of the Constitution). Legal certainty makes legal order trustworthy. One part of legal certainty protects the permanence of state decisions by guaranteeing that these cannot be changed later arbitrarily but only under justified exceptional circumstances. The legal effect of a judgment is especially important for guaranteeing legal certainty. A judgment shall create permanent legal peace in a situation where a dispute over what is right has lasted for quite some time.

67. In this case the lack of a ground for review supports the principle of legal certainty arising from § 10 of the Constitution. Consequently, the objective of an infringement of fundamental rights is to guarantee legal certainty, and the Supreme Court *en banc* is of the opinion that it is legitimate for infringing fundamental rights.

V

68. Next, the Supreme Court *en banc* assesses the constitutionality of the infringement of the fundamental rights by weighing the proportionality of the infringement.

69. Based on § 11 of the Constitution, restrictions of fundamental rights shall be proportional to their objective which is pursued with the restriction. The Supreme Court *en banc* assesses whether the need to ensure legal certainty is in this case so substantial to outweigh the infringements of H. Antsov's fundamental rights arising from the fact that he does not have an option to protect his rights in court.

70. The lack of an option for review is an appropriate and necessary measure for guaranteeing legal certainty. In deciding on the moderation of the measure for guaranteeing legal certainty (lack of a ground for review), the Supreme Court *en banc* weighs the significance of the objective in relation to the infringed fundamental rights.

71. On the side justifying the infringement is legal certainty which is an important constitutional principle. However, the fundamental right provided for in § 23(3) of the Constitution does not justify the infringement in this case. Pursuant to § 23(3) of the Constitution, no one may be prosecuted or sentenced for a second time for an act in respect of which he or she has been the subject of a final conviction or acquittal pursuant to the law. It is a special guarantee of legal certainty for penal law (*ne bis in idem* principle) guaranteeing that criminal decisions which have entered into force are final. § 23(3) of the Constitution provides, above all, for the fundamental right of person subject to proceedings. Since in this case the resumption of proceedings in a criminal matter is requested by the convicted offender himself, the resumption of the proceedings would not infringe his fundamental right guaranteed by § 23(3) of the Constitution.

72. In this case the infringements of the fundamental rights outweigh the objective of the infringement – the need to guarantee legal certainty. The fundamental rights infringed are substantial. The fundamental freedom to liberty is one of the most significant fundamental rights and imprisonment infringes the fundamental right to liberty very intensely. Respect for and protection of fundamental rights and fair proceedings for the protection of one's rights (§§ 14 and 15 of the Constitution) are important constitutional values which also strike roots in the principle of a state based on the rule of law.

73. In keeping with the aforesaid, § 366 of the CCP, to the extent it does not prescribe as a ground for review the entry into force of a judgment made in a general procedure whereby the lack of a criminal act is established if in the criminal matter under review imprisonment has been imposed on a person as punishment for participation in that criminal act by a judgment made in a general procedure, infringes disproportionately the fundamental rights guaranteed in § 20(1) and in § 14 and § 15(1) of the Constitution.

74. Based on § 15(1)2) of the Constitutional Review Court Procedure Act, the Supreme Court *en banc* declares § 366 of the CCP to be in conflict with § 11, § 14, § 15(1) and § 20(1) of the Constitution to the extent it does not prescribe as a ground for review the entry into force of a judgment made in a general procedure whereby the lack of a criminal act is established if in the criminal matter under review imprisonment has been imposed as punishment for participation in that criminal act by a judgment made in a general procedure.

VI

75. Finally, the Supreme Court *en banc* adjudicates the petition for review filed by the criminal defence counsel of H. Antsov.

76. Having declared the lack of a ground for review in the Code of Criminal Procedure to be unconstitutional, the Supreme Court *en banc*shall adjudicate next the petition for review filed by H. Antsov's criminal defence counsel. The criminal defence counsel requests for the annulment of the Tartu County Court judgment of 19 November 2007 and the Tartu Circuit Court judgment of 22 May 2008, and the acquittal of H. Antson of the charges pursuant to § 184(2)2) of the PC of trafficking a narcotic drug in a large quantity to S. Raidma. Alternatively, the criminal defence counsel requests the referral of the criminal matter to the Tartu Circuit Court for a new hearing.

77. The competence of the Supreme Court in review procedure is provided for in § 373 of the CCP. In the absence of the grounds for review, the Supreme Court shall dismiss the petition for review (subsection (1)). If a petition for review is justified, the Supreme Court shall annul the contested court decision by a judgment and send the criminal matter for a new hearing by the court which made the annulled decision or to the Public Prosecutor’s Office for a new pre-trial proceeding to be conducted (subsection (2)). If there is no need to ascertain new facts in the criminal matter subject to review, the Supreme Court may make a new judgment after the review of the criminal matter without aggravating the situation of the convicted offender (subsection (3)).

78. The Supreme Court *en banc* deems the petition for review filed by H. Antsov's criminal defence counsel justified. By its judgment of 19 November 2006 the Tartu County Court convicted H. Antsov of acquisition in 2006 from unidentified persons and in an unidentified manner, and of unlawful trafficking to Siim Raidma of narcotic drugs in a large quantity – 200 grams of amphetamine and 453 ecstasy pills. In its judgment of 17 December 2010 in S. Raidma's criminal matter the Tartu Circuit Court ascertained that S. Raidma has not acquired narcotic drugs from H. Antsov in 2006. The abovementioned gives rise to a reasonable doubt as to whether in 2006 H. Antsov unlawfully trafficked to S. Raidma narcotic drugs in a large quantity and committed thereby a criminal act qualified pursuant to § 184(2)2) of the PC. Based on the aforesaid, the Supreme Court *en banc* holds that the petition for review filed by H. Antsov's criminal defence counsel shall be satisfied and the Tartu County Court judgment of 19 November 2007 and the Tartu Circuit Court judgment of 22 May 2008 in conviction of H. Antsov pursuant to § 184(2)2) of the PC shall be annulled.

79. In order to adjudicate the criminal matter of H. Antsov it is not possible to ascertain new facts. In convicting H. Antsov of unlawful trafficking of narcotic drugs in a large quantity to S. Raidma, the Tartu County Court relied in its judgment of 19 November 2007 only on the testimony of S. Raidma. Considering that in hearing the criminal matter of S. Raidma the Tartu Circuit Court declared his testimony unreliable as evidence and that in the criminal matter of H. Antsov no other evidence vindicating H. Antsov in addition to

the testimony of S. Raidma has been collected, H. Antsov shall be acquitted, on the basis of § 7(3) and § 309(2) of the CCP, of the charges pursuant to § 184(2)2) of the PC.

80. By its judgment of 19 November 2007 the Tartu County Court convicted H. Antsov pursuant to § 184(2)1) and 2) of the PC also of unlawful acquisition, on 16 August 2006 around 11 p.m., in a group with A. Rjabov from V. Šipov at least 997.6 grams of amphetamine and carriage thereof on the same day in a group with A. Rjabov by car from Tallinn to Tartu. Since the Supreme Court *en banc* acquits H. Antsov of the charges of trafficking narcotic drugs in a large quantity, and H. Antsov had not been previously punished for commission of an offence related to handling of a narcotic drug, the conduct of H. Antsov in unlawful handling by a group of 997.6 grams of amphetamine shall be qualified pursuant to § 184(2)1) of the PC.

81. Considering that H. Antsov is to be partly acquitted of the charges brought against him, the Supreme Court *en banc* weighs next whether and to what extent the punishment imposed on H. Antsov should be amended. H. Antsov was convicted by the Tartu County Court judgment of 19 November 2007 and he was punished pursuant to § 184(2)1) and 2) of the PC for the commission of both criminal offences with imprisonment of six years, i.e. with less than the average sanction provided for in § 184(2) of the PC.

82. Due to the partial acquittal of H. Antsov, the volume of the charges brought against him and the extent of his guilt decrease. Based on the fact which mainly characterises the extent of H. Antsov's guilt – the large quantity of amphetamine handled by a group (997.6 grams) – the Supreme Court *en banc* holds that the extent of H. Antsov's guilt for the commission of the criminal offence pursuant to § 184(2)1) of the PC corresponds to imprisonment of five years and ten months.

83. In keeping with the aforesaid and following § 373(3) of the CCP, the Supreme Court *en banc* annuls the Tartu Circuit Court judgment of 22 May 2008 and the Tartu County Court judgment of 19 November 2007 in conviction of H. Antsov pursuant to § 184(2)2) of the PC and acquits H. Antsov to that respect. The Supreme Court *en banc* qualifies the activity of H. Antsov in unlawful handling by a group of 997.6 grams of amphetamine pursuant to § 184(2)1) of the PC and imposes on him as a new punishment imprisonment of five years and ten months. The Supreme Court *en banc* satisfies the petition for review filed by H. Antsov's criminal defence counsel.

A dissenting opinion of the justice of the Supreme Court Eerik Kergandberg
to the Supreme Court *en banc* judgment 3-1-2-2-11
For the reasons hereunder I disagree with the decision and reasoning of the Supreme Court *en banc* judgment 3-1-2-2-11 of 10 April 2012.

I

1. In the court case at hand the Supreme Court *en banc* has, after approximately 12 years (i.e. after the Supreme Court *en banc* judgment 3-1-2-1-00) tried to address again the following legal-political and legal-philosophical issues important for criminal procedure.
1.1. What should be done in Estonia as a state based on the rule of law in case of a substantive conflict of criminal decisions which have entered into force?
1.2. Are such conflicts in principle absolutely intolerable in respect of the state based on the rule of law, and if yes, then what is the main difference compared to civil and administrative court procedures where no significant problems are seen in a conflict of judgments?
1.3. If a substantive conflict of criminal decisions which have entered into force is absolutely intolerable for us, then in order to prevent these should legal, administrative and maybe even other measures be taken?
1.4. Could future measures aimed at elimination of conflicts of criminal judgments be in principle such which would preserve the independence, in administration of justice, of the court making a later judgment and at the same time a possibility to assess evidence pursuant to conscience as required by another principle generally recognised in a state based on the rule of law? The judicial independence and free evaluation of evidence cannot be talked about very seriously if the judge knows that an acquittal by him or her

automatically gives rise to the possibility of review of an earlier judgment. The work of this judge is inevitably accompanied by admonition. “Think hard, because by acquittal you are not settling just one court case!”

2. It should be clear that sacrificing judicial independence and free evaluation of evidence for judgments free of conflict probably cannot be taken seriously as a so-called overall solution: it is not possible to prohibit a court which adjudicates the later one of two severed criminal matters from making a judgment of acquittal. If so, then legal-politically there seems to be just one clean option: to accept also in criminal proceedings a conflict of judgments as something inevitably accompanying the nature of administration of justice. And especially under the conditions of adversarial court proceedings as justifiably noted by the Public Prosecutor's Office in its opinion. However, if this clean option does not satisfy us, we must strive towards combined solutions typical of a “society of proportionality”, and weigh whether some procedural positions up to the present time need legislative adjustment or would fast ad hoc solutions without thinking of (future) overall solutions suffice.

3. One principled change which according to the author of this opinion could be weighed instead of current comprehensions is a view that if there is absolutely no possibility to deprecate severance of criminal matters, for example, because two out of three persons accused of joint commission of criminal offences were wanted, then the existence of a criminal act established by a judgment, which has entered into force, convicting one person after the severance of criminal matters should be binding on the court which later makes a judgment regarding the other two accused. However, the court adjudicating the court case regarding the two accused should have the possibility to reach, as a result of evaluation of evidence, a conclusion that these two accused were not related to the previously established criminal act.

II

4. As mentioned above in paragraph 1, the Supreme Court *en banc* weighed a problem similar to this court case also 12 years ago in adjudication of a court case number 3-1-2-1-00 (so-called Mäeots judgment). In fact, the similarity between the court cases is what brought about the referral of the court case to be heard by the Supreme Court *en banc*. To make sure whether there have been any changes in the legal field over the last 12 years. In paragraphs 41 to 44 of the judgment the Supreme Court *en banc* has comparative-legally analysed the facts related to the Mäeots judgment. The result of that analysis may be summarised in a slightly different wording and interpretation as follows:

4.1. Pursuant to the Mäeots judgment, the ground for review was not within the meaning of § 366 5) of the Code of Criminal Procedure – CCP (at that time actually § 771(3)5) of the Code of Criminal Court Appeal and Cassation Procedure – CCCACP) a conflict of judgments in itself and individually but “in conjunction” (if to use the term used by the Supreme Court) with the then exceptional possibility to join again two severed criminal cases which resulted in judgments which entered into force at different times, and to refer them back to the county court for a new joint hearing. Such an exceptional possibility was brought about the existence of an institute of correction of court errors in our criminal procedure back then which allowed the Supreme Court to annul judgments (also of acquittal), which had entered into force, independently from the grounds for review. However, the paradox was that after the Supreme Court had annulled a later judgment (of acquittal) by way of correction of court errors, the conflict of judgments had obviously ceased to exist. But as noted, the ground for review in the then judgment of the Supreme Court is a conflict of the said judgments together with a possibility for a new joint hearing of the severed criminal matters.

4.2. The Supreme Court unambiguously notes that a conflict of judgments in itself cannot be deemed a ground for review for the purposes of § 366 5) of the CCP. And how could it! The ground for review in question bears in mind a situation where after the entry into force of the judgment, such a fact important to the adjudication of the criminal matter which the court that made the judgment in question was not aware of becomes evident. Deeming a conflict of judgments as a ground for review would mean recognition of a sentence like the following one as true: “Since the judge who made the first judgment was not aware that the second judge is actually planning to make a completely opposite judgment, then precisely due to such unawareness the entry into force of the judgment of acquittal is also a ground for review of the judgment of

conviction." Accepting such a ground for review could be deemed a serious paradox, not to say a denial of administration of justice.

4.3. Only an argument contained in paragraph 44 of the Supreme Court *en banc* judgment and borrowed from the legislator can be agreed with: pursuant to § 366 8) of the CCP valid as of 1 September 2011, for the first time in our criminal procedural law a ground for review may actually be also a conflict of judgments as a phenomenon (also without a possibility of return or any other additional conditions). But only under very specified circumstances as wished by the legislator: in case of an acquittal of an accused in a general procedure if previously in a criminal matter subject to review a joint principal offender or an accomplice had been convicted in simplified proceedings. It is important to keep in mind that the said ground for review differs by wording to a great extent from the ground for review provided for in clause 5) of section 366: clause 8) no longer mentions "a fact new to the judge who made the first judgment". As stated in the explanatory memorandum of the draft 599 which introduced the amendment of law at issue, the current situation constitutes a clear legal-political decision: a counterweight to expansion of possibilities of severance of criminal matters. Such a counterweight should presumably guarantee in addition that in criminal proceedings criminal matters of some accused would not be unjustifiably severed into simplified proceedings with lesser procedural guarantees.

4.4. The Supreme Court *en banc* summarises justifiably that the legislator has not wished to see as a ground for review a conflict of judgments made in general procedures. This in turn means that the legislator has not been able to read from the Mäeots judgment a message that a conflict of judgments would a priori include something unconstitutional.

5. Trying to assess afterwards also what really happened 12 years ago when the Supreme Court *en banc* made the judgment no. 3-1-2-1-00, it can be stated that speaking of the existence of a ground for review under the conditions formally added by the Supreme Court itself the latter initiated already in the hearing of that court case a so-called great individual constitutional appeal procedure, not knowing how or not daring to say it out loud directly and publicly. A situation where by a reference to the need to guarantee a fundamental right a criminal matter is heard and a judgment which has entered into force is annulled, although there is no legal possibility of appeal to the court, constitutes a constitutional appeal procedure by nature. The so-called substantive fundamental right, for the guarantee of which the Supreme Court initiated an individual constitutional appeal procedure at that time was the right to liberty.

6. It is remarkable that a few years later in making one of the most legendary decisions in the case-law of the Estonian constitutional review court procedure – the so-called Brussilov decision (3-1-3-10-02), the Supreme Court *en banc* states explicitly that in this case there are no lawful grounds for review and no other possibilities of appeal to the court. However, the right to liberty once again needs inevitable protection. The Supreme Court *en banc* found that in such a situation there is no other option but to rely on § 14 of the Constitution and to establish a new procedure – constitutional appeal procedure. It is important to notice that by that time the Supreme Court *en banc* had, unlike the ideology reflected in judgment no. 3-1-2-1-00, formed an opinion that it is not right to start to expand, develop etc. options, contained in the law, for appeal against a judgment which has entered into force (i.e. grounds for review).

III

7. However, in making the judgment 3-1-2-2-11 the Supreme Court *en banc* seems to have "forgotten" again what it stated in the Brussilov judgment (in the absence of a ground for review, infringement of fundamental rights shall be eliminated in a constitutional appeal procedure!) and has started to establish new grounds for review. The ground for review established for this criminal matter by the Supreme Court *en banc*reads as follows: the entry into force of a court judgment made in a general procedure which establishes the lack of a criminal act if in the criminal matter subject to review the court judgment made in a general procedure has imposed imprisonment on the person as a punishment for participation in that criminal act. Such a ground for review raises at least the following problems and issues:

7.1. First, the Supreme Court has opened for itself the road for future basicly unlimited expansion of grounds for review. From the aspect of protection of fundamental rights, expansion of options for appeal could be welcomed if it would not constitute unlimited expansion of the right of appeal after the entry into force of a

judgment. But that is precisely what this is. And on this seems to be based a need to redefine also the principle of legal effect of judgments.

7.2. By accepting once again (after denial for a while) as a ground for review also a conflict of judgments made in a general procedure, § 366 8) of the CCP as an exception according to the legislator's intention has essentially been made void and unnecessary.

7.3. The Supreme Court *en banc* has actually made the necessary elements of a criminal offence equal to a criminal act without specifying that such an option may be acceptable only under exceptional circumstances. But the Supreme Court *en banc* does not explain how it is actually possible to "eliminate" by one judgment which has entered into force a criminal act deemed established by another judgment which has entered into force.

7.4. Several issues are raised by the placement, by the Supreme Court *en banc*, of the type of punishment (imprisonment) among the grounds for review. For instance: Is it namely the imprisonment imposed in the first matter which is that legal fact which grants the judgment made in the second matter the "competence" to annul a criminal act established by the first judgment? Is the message of the Supreme Court *en banc*such that in order to preserve legal peace and avoid review, it should not be imprisonment that is imposed as punishment in case of severed matters but some other type of punishment?

IV

8. What is then the main problem in this court case, in the adjudication of which the Supreme Court *en banc* deemed it necessary to act as an activist and establish a new list of grounds for review? The author of these lines has no doubt that the main problem and in this specific case also the unconstitutionality lies with the severance of the criminal matters. Such a conclusion can also be easily reached by reading more carefully paragraphs 57 to 60 of the judgment. It is correctly stated in paragraph 57 of the judgment that § 216(2) of the CCP in force at the time of the severance of the criminal matters provided that a criminal matter may be severed into a new file if this does not prejudice the comprehensiveness, thoroughness and objectivity of the criminal proceeding. Subsection (4) of the same section provided that if a minor is suspected or accused of committing a criminal offence together with an adult, the criminal matter concerning the minor may be severed into a separate criminal proceeding if severance does not prejudice the comprehensiveness, thoroughness or objectivity of the criminal proceeding and is in the interests of the minor. Therefore, the main condition of the severance was that it was prohibited for it to damage the comprehensiveness, thoroughness or objectivity of the criminal proceeding. The Supreme Court *en banc* subsequently implies that the severance may not have been correct in this case but does so in paragraph 60 oddly enough by casting doubt on the lawfulness of the deprivation of liberty from H. Antsov. The real and honest assessment would have been as follows: if in essence there are two joint principle offenders of a criminal offence (i.e. we may, for a while, cast aside penal law equilibration pursuant to which there were formally no joint principle offenders) and no other evidence, then based on the principle of fair court proceedings it cannot be acceptable to sever the criminal matters of those joint principle offenders in essence in order to create for a former accused a possibility to give a testimony as a witness against his or her former co-accused and then later – based on the self-incrimination privilege in his or her own criminal matter – refuse to give a testimony.

9. Why the said severance had not been declared unlawful in previous proceedings could without a doubt be an independent subject of discussion. But this was not the object of our constitutional review procedure in question. However, the object of the constitutional review procedure could have been the unconstitutionality of the severance of the criminal matters previously addressed. This could have been eliminated within the individual constitutional appeal procedure by acquitting H. Antsov on the ground that by severing the criminal matter with regard to S. Raidma the principle of fair court proceedings was violated in hearing the criminal matter of H. Antsov.

10. I deem it necessary to additionally note also the following: Regardless of various ethical and also legal-political doubts, many countries accept in the criminal procedure a so-called institute of a crown witness – an option to terminate criminal proceedings with regard to a suspect who has provided substantial assistance in establishing the facts of a criminal offence. Such an option is usually called an inevitable measure of

discovering certain specific criminal offences, especially those covered by the definition of organised crime. The institute of a crown witness in our criminal procedural law is provided for in § 205 of the CCP, and a modification thereof in § 2051. The distinctive feature of our institute of a crown witness is the absoluteness of the discretion of the Prosecutor's Office – no restrictions arising from the type of punishment. After all, such an absolute discretion could be considered questionable. But so far no one has raised the issue of questionableness of the institute of a crown witness or the issue of its unconstitutionality. However, the basic interpretation logic of the Supreme Court *en banc*judgment in question forces one to ask whether the new ground for review established by the Supreme Court *en banc* is applicable also in other cases when a conflict between a judgment of conviction and a ruling on termination of criminal proceedings under § 205 of the CCP becomes evident?

A dissenting opinion of the justice of the Supreme Court Priit Pikamäe on the Supreme Court *en banc* judgment in criminal matter no. 3-1-2-2-11, which the justices of the Supreme Court Lea Laarmaa and Peeter Jerofejev have concurred with, and paragraphs 1 and 3 of which the justice of the Supreme Court Henn Jõks has concurred with.

1. I am of the opinion that there was no basis for declaring § 366 of the Code of Criminal Procedure (CCP) to be in conflict with the Constitution to the extent it does not prescribe as a ground for review the entry into force of a court judgment made in a general procedure which establishes the lack of a criminal act if in the criminal matter subject to review the court judgment made in a general procedure has imposed imprisonment on the person as a punishment for participation in that criminal act.

2. I find that if to consider that a conflict of conclusions of judgments concerning whether a criminal act has been established causes injustice to such a great extent that it forces the principle of legal effect of a judgment which has entered into force to retreat, the petition for review filed by H. Antsov's criminal defence counsel could have been satisfied under § 366 5) of the CCP. It is not the first case in the history of our case-law where the Supreme Court *en banc* has to decide on review of conflicting judgments made in criminal matters. Paragraphs 41 and 42 of the Supreme Court *en banc* decision made in the present case include a detailed review of the Supreme Court judgment of 24 April 2000 in matter no. 3-1-2-1-00 by which the Supreme Court *en banc* satisfied the petition for review filed by the criminal defence counsel of J. Mäeots by forming in paragraph 10 of that judgment an opinion that a conflict of conclusions contained in different judgments regarding whether a criminal act has or has not taken place can be deemed a ground for review for the purposes of § 771(3)5) of the Code of Criminal Court Appeal and Cassation Procedure (CCCACP) valid at that time. As the Supreme Court *en banc* itself states in the judgment made in the present case, § 771(3)5) of the former CCCACP corresponds to the currently valid § 366 5) of the CCP. I am not convinced by the reasoning of the Supreme Court *en banc* about the fact that in reviewing the petition for review filed by H. Antsov's criminal defence counsel the position assumed in paragraph 10 of the earlier judgment in matter no. 3-1-2-1-00 cannot be followed because at this time it is not possible to rejoin the criminal matters in which the judgments with conflicting conclusions were made, and because the legislator has, by the Act which entered into force on 01.09.2011, complemented § 366 of the CCP with a new clause 8) pursuant to which review is explicitly possible in case of establishment of a conflict of judgments made in a general procedure and in simplified proceedings. On the one hand, the existence or lack of a ground for review within the meaning of all the clauses listed in § 366 of the CPP (thus also within the meaning of clause 5) in question) cannot in any way depend on how the subsequent hearing of the criminal matter which was reviewed takes place, i.e. on the fact whether it is possible to join it with another criminal matter in the future. Because the grounds for review already exhaustively include all those prerequisites the appearance of which brings about the resumption of proceedings in the criminal matter with a judgment which has entered into force. If those prerequisites are met, the legal effect of the judgment which has entered into force shall be interrupted regardless of how the subsequent proceedings in the matter are handled. I also cannot agree with the opinion of the majority that the supplement of the grounds for review provided for in § 366 of the CCP with a new clause 8) brings about a change in the interpretation of § 366 5) of the CCP up to the present time. It is correct that the petition for review filed by H. Antsov's criminal defence counsel could not

have been satisfied in this criminal matter under § 366 8) of the CCP, but it cannot be automatically concluded from it that it would have been excluded also pursuant to clause 5) of the same provision. Consequently, the Code of Criminal Procedure included a ground for review of H. Antsov's criminal matter in the form of § 366 5) of the CCP.

3. I also hold that the judgment made in this matter lacks, in essence, justifications as to why in the opinion of the Supreme Court *en banc* the lack of an appropriate ground for review shall be deemed unconstitutional. It appears from paragraphs 47 to 52 of the judgment that since the judgment of conviction imposed on H. Antsov imprisonment as a punishment, the Supreme Court *en banc* finds that in this situation H. Antsov's fundamental rights primarily to liberty and security of person (§ 20(1) of the Constitution) and to efficient and fair proceedings for the protection of his rights in court (§ 14 and § 15 of the Constitution) have been infringed. From the aspect of adjudication of H. Antsov's petition for review, the more important one out of the specified two is probably the latter because as the Supreme Court *en banc* itself states in paragraph 49 of the judgment, an infringement of the fundamental right to liberty can be constitutional only in the case the proceedings which led to a judgment and deprivation of liberty on the basis thereof were constitutional. However, the Supreme Court *en banc* decision does not give substantive justifications as to why the legal effect of the entirely lawful judgment made with regard to H. Antsov (paragraph 54) must retreat if with regard to another person, S. Raidma, a judgment of acquittal was made in a separate criminal matter. The Supreme Court *enbanc* does not find anything unlawful in the severance of the criminal matters of S. Raidma and H. Antsov nor in considering the testimony of S. Raidma in the criminal matter of H. Antsov (paragraphs 57 and 58). Yet, a conclusion that the deprivation of liberty from H. Antsov is questionable is reached. The Supreme Court *en banc* has totally neglected the fact that also concerning the existence or lack of a criminal act the court can form an opinion only as a result of evaluation of evidence in a specific matter, which pursuant to current basic principles of proceedings takes place only according to the court's conscience and so that no evidence has predetermined weight (§ 61 of the CCP). The lawfulness of that principle has also not been questioned by the Supreme Court *en banc*. Consequently, the compositions of court which adjudicated the criminal matter of both H. Antsov and S. Raidma were equally entitled to evaluate evidence as a result of their inner decision-making process. Based on the course of deliberation of the Supreme Court *en banc* a comprehension is outlined that if the criminal matters of persons accused of joint commission of a criminal offence have been severed and the hearing thereof has been entrusted with different compositions of court, then the later judgment of acquittal always prevails before the judgment of conviction because the review of a judgment of acquittal is precluded. Completely unanswered in such a case is the question how should act the court which is, while making the judgment, aware of the fact that a co-accused of the same criminal offence has been acquitted by another composition of court due to the impossibility to establish a criminal act. Under the aforementioned considerations I find that the Supreme Court *en banc* judgment does not give reasons as to what the infringement of H. Antsov's fundamental right – the right to efficient and fair proceedings – consist of.
