Constitutional judgment 3-1-1-37-07

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-1-1-37-07
Date of judgment	12 June 2008
Composition of court	Chairman Märt Rask and 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, Julia Laffranque, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu.
Court Case	Criminal case of the charges against T. Tiiki under § 424 of the Penal Code.
Contested judgment	Judgment of the Viru Circuit Court of 22 March 2007 in criminal case no 1-06-14475.
Appellant and type of hearing	Appeal in cassation of Toomas Tiiki's defence counsel Anti Aasmaa, clerk of sworn advocate.
Date of hearing	26 February 2008
Persons participating at hearing	The Chief Public Prosecutor Norman Aas; T. Tiiki's defence counsel Anti Aasmaa, clerk of sworn advocate; and representative of the Ministry of Justice Heili Sepp, head of division of penal law and procedure of the department of criminal policy.

DECISION	**1. To uphold the judgment of the Viru Circuit Court of 22 March 2007 concerning the charges against Toomas Tiiki under § 424 of the Penal Code.** **2. To dismiss the appeal in cassation.** **3. To order that the Republic of Estonia pay 7750 (seven thousand seven hundred and fifty) kroons and 83 cents, including 1182 kroons and 33 cents of value-added tax, for the benefit of OÜ Advokaadibüroo Uno Feldschmidt for the provision of state legal aid to Toomas Tiiki in the cassation proceedings.** **4. To order that Toomas Tiiki pay 7750 (seven thousand seven hundred and fifty) kroons and 83 cents of the referred procedure expenses for the benefit of the Republic of Estonia.**

FACTS AND COURSE OF PROCEEDING

1. By the judgment of the Viru County Court of 6 February 2007 Toomas Tiiki was convicted under § 424 of the Penal Code (hereinafter "the PC") in, being a person who has a punishment in force for driving wile intoxicated, he had again driven a motor vehicle while intoxicated on 8 October 2006. On 21 September 2006 T. Tiiki had been punished under § 424 of the PC by 5 months' imprisonment, which was suspended on probation for eighteen months under § 74(1) and (3) of the PC, and by deprivation of driving privileges for eight months under § 50(1) of the PC. As T. Tiiki committed another offence within the period of probation, the county court imposed on him, under § 65(2) of the PC, an aggregate punishment of 9 months' imprisonment, whereas the court substituted the imprisonment – under § 69(1) of the PC by 540 hours of community service. Under § 50(1)1) of the PC, as a supplementary punishment, T. Tiiki was deprived of driving privileges for one year, and under § 83(1) of the PC the automobile which had been the object used to commit the offence was confiscated from him.

2. T. Tiiki's defence counsel Anti Aasmaa, law clerk of sworn advocate, submitted an appeal against the county court judgment, applying for the annulment of the county court judgment in regard to the term of supplementary punishment and application of confiscation. The defence counsel argued that the county court had failed to justify why T. Tiiki was to be deprived of driving privileges for such a long period. Considering the guilt of T. Tiiki and his personal characteristics the deprivation of driving privileges for six months would suffice. The appellant is of the opinion that the court had no legal basis to apply the confiscation of the automobile belonging to T. Tiiki, and the appellant argues that the confiscation of the object used to commit a criminal offence, provided for in § 424 of the PC, does not serve the interests of legal order and creates injustice. The application of penal law measures must be proportional, i.e. each measure must be suitable, necessary and reasonable in relation to the desired aim.

3. By its judgment of 22 March 2007 the Viru Circuit Court upheld the county court judgment and dismissed the appeal of the defence counsel.

3.1. In regard to the appellant's application to shorten the term of supplementary punishment imposed on T. Tiiki the circuit court pointed out that under § 50(1) of the PC, as a supplementary punishment, the driving privileges may be deprived for up to three years in the case of a criminal offence. T. Tiiki was deprived of driving privileges for one year, consequently the supplementary punishment was imposed not even to the average permissible extent. The court pointed out the fact that T. Tiiki had already been deprived of driving privileges for eight months by a previous court judgment, and he committed a new offence in two weeks after the previous court hearing, that is while he was on probation.

3.2. The circuit court argued that T. Tiiki's automobile was confiscated as the object which was used to commit a criminal offence. The county court justified the confiscation with the fact that within the period of

less than one year T. Tiiki had three times been driving a motor vehicle while intoxicated. The fact that he was deprived of driving privileges did not prevent him from driving the automobile while intoxicated and without a driving permit.

3.3. In regard to confiscation as a measure creating injustice in legal order the circuit court pointed out that the legal issues and issues of fairness of uniform application of different provisions of law are not within its competence, and the court only adjudicates a concrete criminal case in regard to the guilt of a concrete person and the punishment applicable to the person. The circuit court did not form an opinion concerning the allegation of the defence counsel that leased cars and cars in joint ownership could not be confiscated and that the prices of cars may differ, but the court pointed out that this fact could not serve as a ground for the cancellation of the confiscation of T. Tiiki's vehicle.

4. T. Tiiki's defence counsel A. Aasmaa submitted an appeal in cassation against the circuit court judgment, applying for the annulment of the county and circuit court judgments in regard to application of confiscation. The defence counsel is of the opinion that the courts have violated the criminal procedural law and have wrongly applied substantive law for the following reasons.

4.1. There is no legal ground for the confiscation of the automobile from T. Tiiki. The legislator has deemed confiscation a measure infringing fundamental rights to such a substantial extent that it has established the possibility of confiscation in the cases of criminal offences provided for in certain sections of the special part of the Penal Code. § 424 of the PC does not provide for this possibility. Therefore the automobile must not be confiscated under § 83(1) of the PC. The confiscation of the vehicle is not permissible also for the reason that this is not a proportional measure. This measure is not suitable, necessary or reasonable. Confiscation is not suitable because a person has a possibility to obtain a new automobile at once or use a vehicle belonging to someone else. Confiscation is not necessary because the same aim can be achieved by a measure less burdening – deprivation of driving privileges, which – pursuant to present judicial practice – is inevitable in the case of traffic offences. Despite of the opinion of the Prosecutor's Office that the punishments established for the criminal offence provided for in § 424 of the PC have not had the required effect in the society, double punishment can not be the aim of confiscation and that is why in the present case confiscation is not proportional in the narrow sense, either. Confiscation results in unequal treatment, because only an automobile owned by the person who committed the offence could be confiscated, and not an automobile in joint ownership or a leased automobile.

4.2. The appellant in cassation argues that the courts must interpret the laws in conformity with the Constitution. The circuit court ought to have cancelled the confiscation of T. Tiiki's vehicle for the reason that this measure creates injustice in the society and is, thus, unconstitutional. The circuit court ought to have also considered the necessity of initiating a constitutional review proceeding, instead of confining itself to formal justifications.

5. The prosecutor submitted a response to the appeal in cassation, in which he applied for the upholding of the county and circuit court judgments and dismissal of the appeal in cassation. The response to the appeal in cassation contains the opinion that the confiscation of objects used to commit offences is based on § 83(1) of the PC and requires no further legitimisation in the special part of the Penal Code. The prosecutor did not agree with the allegation of the appellant in cassation that confiscation was not proportional in the case under discussion. T. Tiiki repeatedly drove a motor vehicle while intoxicated. He had been punished for this act earlier and had been deprived of driving privileges. None of the sanctions imposed brought about the results desired.

6. The Criminal Chamber of the Supreme Court heard the appeal in cassation on 21 September 2007 in the panel of three justices. As the members of the panel differed in matters of principle upon adjudicating the appeal in cassation, the criminal case was referred – under § 354 of the Code of Criminal Procedure (hereinafter "the CCP") to the Criminal Chamber en banc foe a hearing.

7. By the Criminal Chamber en banc ruling of 14 January 2008, on the basis of § 356(3) of the CCP, the

criminal case was referred to the Supreme Court en banc for adjudication. The Criminal Chamber en banc doubted whether § 83(1) of the PC to the extent that it allows for the confiscation of an object, which is in unrestricted commerce and can be freely obtained in the market and was used to commit an offence, was in conformity with § 32 of the Constitution in conjunction with the second sentence of § 11 of the Constitution.

The Criminal Chamber is of the opinion that an automobile is an object used to commit an offence, provided for in § 424 of the PC, the ground for confiscation of which is established in § 83(1) of the PC. This amounts to imposition of a sanction which inevitably results in the infringement of the ownership right established in § 32 of the Constitution. The Chamber is of the opinion that when considering the facts of the criminal case the doubt arises that the confiscation of a thing which is in unrestricted commerce as an object used to commit an offence may constitute a disproportional infringement of the fundamental ownership right and the right of equality before the law (the first sentence of § 12(1) of the Constitution). Consequently, the adjudication of the criminal case requires answering the question whether the expropriation without compensation of a thing which is in unrestricted commerce and can be freely obtained in the market serves the purpose of confiscation; whether there are some other as effective but more lenient measures for the achievement of this aim, and whether the utility of a measure imposed in public interests overweighs the restriction of a person's fundamental right. Also, it is necessary to ascertain that the existing regulatory framework does not result in differential treatment of persons who are in a similar situation without a reasonable justification. As the effect of confiscation of an object, which is in unrestricted commerce and can be freely obtained in the market, used to commit an offence, can be achieved with another measure – a pecuniary punishment, upon the imposition of which the facts of a concrete case can be more specifically taken into account, and which is a measure less burdening on fundamental rights, the question arises whether the confiscation of an object used to commit an offence, meeting the characteristics described above, is necessary for the purposes of the second sentence of § 11 of the Constitution.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

8. T. Tiiki's defence counsel A. Aasmaa, clerk of sworn advocate, is of the opinion that confiscation of a vehicle from a person who was driving while intoxicated is not a suitable measure, because the person has a possibility to obtain a new vehicle at once or to use a vehicle belonging to some other person. The defence counsel does not consider the measure necessary, either, because the same aim can be achieved by a measure less burdening – deprivation of driving privileges. The appellant in cassation argues that the expected increase of road safety achieved through confiscation does not overweigh the consequences that the imposition of such a measure may bring about for persons. The defence counsel argues that for these reasons the application of confiscation in the present case is not proportional. The defence counsel is of the opinion that the confiscation also violates the principle of equal treatment of persons, because only motor vehicles belonging to a person can be confiscated, and not leased vehicles or vehicles in joint ownership.

9. The prosecutor points out in his opinion that the confiscation of a vehicle as an object used to commit an offence from a person who has been driving while intoxicated is a proportional restriction of a fundamental right and does not violate the principle of equal treatment. The confiscation of an object used to commit a criminal offence is a suitable measure, because it serves a preventive aim. Confiscation proves necessary when a person has shown with his systematic unlawful behaviour that the motor vehicle in his use continues to constitute a great danger to other road users because of the peculiarities of his own behaviour, and when other measures have had no influence on the person. The effect of temporary deposit of a motor vehicle is not comparable to that of confiscation. As the proportionality in the narrow sense of the confiscation of an object used to commit an offence depends on the circumstances of each case, the legislator has provided for this as a possibility and not as an mandatory consequence of an offence. The proportionality in the narrow sense of confiscation can not be evaluated within abstract norm control. The prosecutor is of the opinion that the differences in ownership relations of vehicles are sufficient to legitimise the different regulation of confiscation and to prevent the violation of the principle of equal treatment, arising from § 12 of the Constitution, in a situation where confiscation is not possible when an offence is committed by the use of a motor vehicle which the person uses on a basis different from the right of ownership.

10. The Minister of Justice is of the opinion that § 83(1) of the PC is in conformity with the Constitution and the application of confiscation in regard to objects used to commit offences, which are in unrestricted commerce and can be freely obtained in the market, is reasonable, necessary and proportional. The minister is of the opinion that the withdrawal of an object used to commit a criminal offence can not be the only and final aim of the confiscation provided for in § 83(1) of the PC. As these are not the things in themselves but only certain things in the use of certain persons that endanger public security, the deprivation of an object used to commit a criminal offence must have both general and specific preventive effect. It is justified to confiscate a vehicle from a person who has repeatedly driven a motor vehicle while intoxicated, because such a person has clearly shown with this behaviour that due to his unlawful behaviour the motor vehicle in his possession constitutes a big danger to other road users. In Europe as well as in the rest of the world the confiscation of objects used to commit criminal offences constitutes one of the most elementary instruments in the consistent fight against crime. The influence of confiscation of objects used to commit offences is substantially stronger than in the case of confiscation of money with the same value. In more general sense confiscation has a general preventive effect, because every potential offender runs the risk of being deprived of an object used to commit an offence. The minister admits that confiscation of motor vehicles infringes the freedom to use one's property, established in § 32 of the Constitution. Nevertheless, he is of the opinion that the confiscation proceeds from the prohibition arising from the third sentence of § 32(2) of the Constitution to use property contrary to the public interest, and from the necessity to protect the life, health and property of other road users. In such cases the application of confiscation and restriction of ownership right is necessary, suitable and proportional, because it is based on the considerations of road safety as a legal right much more important than the right to freely use one's property. The confiscation of an object used to commit a traffic offence does not bring about unequal treatment of equal persons to an unreasonable extent. The confiscation of an object should be viewed as one of the components of the set of sanctions, the use of which the Penal Code allows in the case of traffic offences. The comparability and equality of consequences of penal law could be achieved in the general sense when in each individual case both punitive and non-punitive sanctions are applied as necessary.

11. The Legal Affairs Committee of the Riigikogu is of the opinion that the right given to the courts by § 83(1) of the PC to confiscate an object used to commit an intentional offence does not result in a disproportional infringement of the ownership right and is constitutional. The Committee is of the opinion that confiscation should not be used instead of principal or supplementary punishments. The court adjudicating a concrete case can form an opinion on the preventive effect of confiscation and, if necessary, impose an effective punishment.

12. The Constitutional Committee of the Riigikogu points out that right of the courts provided for in § 83(1) of the PC to confiscate an object used to commit an intentional offence constitutes a proportional infringement of the fundamental ownership right even in the case of such objects which are in unrestricted commerce and can be freely obtained in the market. The Committee deems this measure suitable, necessary and proportional in the narrow sense. In the present case there can be no question of violation of the fundamental right to equality, established in § 12 of the Constitution, because there is no reference group who is treated unequally and in comparison to whom it could be analysed whether it is justified to prefer one group to the other.

13. The Chancellor of Justice is of the opinion that § 83(1) of the PC is not in conflict with § 32 of the Constitution in conjunction with the second sentence of § 11 of the Constitution. The Chancellor of Justice reasons as follows. Confiscation as expropriation of property without the consent of the owner thereof constitutes an infringement of the fundamental right established in the first sentence of § 32(1) of the Constitution. The second sentence of § 32(1) allows for the restriction of the inviolability of property in the public interests, for fair and immediate compensation. The Penal Code does not provide for the payment of compensation for the confiscation of an object used to commit an offence under § 83(1) of the PC. The fair and immediate compensation included in the second sentence of § 32(1) of the Constitution has to be interpreted abstractly. Upon confiscation the fair compensation depends on whether the confiscation is proportional. Proportional confiscation amounts to fair compensation, disproportional confiscation amounts

to unfair compensation.

Although, in the formal sense, confiscation is not a punishment, the confiscation from an offender of the object used to commit the offence amounts, in a certain sense, to a reproach for the wrong use of his property, as well as to a measure aimed at influencing his further behaviour. Furthermore, this amounts to elimination of danger. This should exclude the possibility that a thing which is dangerous by nature (e.g. firearm) or a thing which is dangerous in the possession of the offender could be used for further violations.

The aim of the confiscation provided for in § 83(1) of the PC is a legitimate one, and also fulfils the additional criteria for the infringement of the fundamental ownership right arising from the second sentence of § 32(1) of the Constitution. Confiscation as a measure is suitable and necessary, and if it effectively contributes to further law-abiding behaviour and the enhancement of public security, it is also proportional in the narrow sense.

14. At the hearing of the Supreme Court en banc the participants in the proceeding adhered to the opinions expressed in their written opinions.

RELEVANT NORMS

The Penal Code (RT I 2001, 61, 364; 2008, 3, 21) provides as follows:

"[…]

§ 83. Confiscation of object used to commit offence and direct object of offence

(1) A court may apply confiscation of the object used to commit an intentional offence if it belongs to the offender at the time of the making of the judgment or ruling.

[…]"

OPINION OF THE SUPREME COURT EN BANC

15. By the Criminal Chamber of the Supreme Court ruling of 14 January 2008 in case no 3-1-1-37-07, on the basis of § 356 of the CCP and the second sentence of § 3(3) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") the criminal case of charges against T. Tiiki under § 424 of the CP was referred to the Supreme Court en banc for a hearing. The Criminal Chamber had doubts whether § 83(1) of the CP to the extent that it allows to confiscate as object used to commit an offence a thing which is in unrestricted commerce and can be freely obtained in the market, was in conformity with § 32, the second sentence of § 11 and the first sentence of § 12(1) of the Constitution.

According to § 14(3) of the CRCPA the Supreme Court en banc shall adjudicate all relevant issues, applying appropriate procedural laws and the Constitutional Review Court Procedure Act.

That is why the Supreme Court en banc shall first examine whether an automobile constitutes an object used to commit an offence provided for in § 424 of the CP, or a direct object of the offence (I). Thereafter the Supreme Court en banc shall set out its opinion on the constitutionality of the regulatory framework (II and III), and finally, on the issue of lawfulness and validity of the confiscation of the automobile from T. Tiiki (IV).

I.

16. An object used to commit an offence is a thing used to attack the object of offence or which the offender uses in any other way for his act. Consequently, an object used to commit an offence is a thing, which serves as an instrument to facilitate the commission of an act which comprises the necessary elements of an offence. The direct object of an offence, on the other hand, is a substance or a thing which is the object of a

person's behaviour, a thing towards the operation or handling of which the act comprising the necessary elements of an offence is directed. Consequently, a direct object is a thing the passive existence of which in the possession of a person – in the cases prescribed by law – is in itself sufficient to trigger the confiscation thereof from the person. The differentiation between a direct object of an offence and an object used to commit an offence can be reduced to whether an act is directed towards the thing or an act can be committed with the help of this thing. At the same time it is irrelevant whether the thing is referred to among the necessary elements of an offence or not. A person who drives a motor vehicle while intoxicated uses the vehicle for participating in road traffic and thus also for the commission of an offence. That is why the Supreme Court en banc consents to the opinion of the county court, the circuit court and the Criminal Chamber that a motor vehicle is an object used to commit a criminal offence described in § 424 of the PC.

17. It is argued in the appeal in cassation that an automobile may not be confiscated from the person who has committed the act provided for in § 424 of the PC, because the special part of the Penal Code does not contain a provision allowing this. The Supreme Court en banc points out that the existence of such a provision is required under § 83(2) of the PC for the confiscation of the direct object of an offence. However, the confiscation of an object used to commit an offence under § 83(1) of the PC does not require additional legitimisation in the special part of the Penal Code. Consequently, the Penal Code enables to confiscate the automobile used to commit an offence provided for in § 424 of the PC.

II.

18. According to the first sentence of § 14(2) of the CRCPA, within the constitutional review proceedings the Supreme Court shall review the constitutionality of only relevant legislation of general application. An Act which is of decisive importance for the adjudication of a case is relevant (see judgment of the Supreme Court en banc of 22 December 2000 in case no 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 10). An Act is of decisive importance when in the case of unconstitutionality of the Act a court should render a judgment different from that in the case of constitutionality of the Act (see judgment of the Supreme Court en banc of 28 October 2002 in case no 3-4-1-5-02 – RT III 2002, 28, 308, paragraph 15).

19. § 83(1) of the PC enables the court to confiscate the object used to commit an intentional offence if it belongs to the offender at the time of the making of the judgment or ruling, irrespective of whether a thing is in restricted or unrestricted commerce. Consequently, § 83(1) of the PC does not preclude the confiscation of the automobile from T. Tiiki. On the other hand, if § 83(1) was in conflict with the constitution to the extent that it enables to confiscate things which can be freely obtained in the market, the confiscation of the automobile from T. Tiiki would not be permissible. The Supreme Court en banc is of the opinion that § 83(1) of the PC is a norm of decisive importance in the present case and a relevant one.

III.

20. The right of ownership arises from § 32 of the Constitution, pursuant to the first sentence of which the property of every person is inviolable and equally protected. An automobile as a thing in unrestricted commerce is protected by the ownership right established in § 32 of the Constitution. Consequently, the Supreme Court shall have to evaluate whether the confiscation of an automobile as an object used to commit an intentional offence from its owner, constituting an infringement of the inviolability of property, is in conformity with the Constitution or not.

21. The third sentence of § 32(2) of the Constitution prohibits the use of property contrary to the public interest. While intoxicated a person's ability to control a motor vehicle deteriorates and the risk of traffic accidents increases. Thus, driving while intoxicated endangers the life, health and property of other road users. The state is obliged to react to such use of property contrary to public interest and to take measures to protect the referred values. The deprivation of an offender of the object used to commit offences prevents the person from committing new offences of the same type, especially in the case of things that have been specially created or adapted for the commission of offences. This is true also when the object used to commit an offence is a thing in free commerce.

21.1. A device, object or substance acquired without relevant permission may be confiscated if the person has committed at least an unlawful act (§ 83(4) and (5) of the PC). An object used to commit an offence may be confiscated from the offender only if the act committed comprises the necessary elements of an offence, is unlawful and wrongful. Consequently, the prerequisites for the confiscation of an object from the offender are the same as the prerequisites for punishment (see § 2(2) of the PC). On the basis of the above the Supreme Court en banc holds that the confiscation from the offender of the object used to commit an offence is also based on the guilt of the person, and the deprivation of a person of the thing used to commit an offence also expresses condemnation for the act committed. In the case of confiscation of a thing of comparatively big value which is in free commerce, such as an automobile, the punitive effect can be considered dominant.

21.2. The Supreme Court reiterates the opinion that the question of whether a coercive measure of the state could be deemed a punishment for the purposes of § 23(3) of the Constitution can not be answered solely on the basis of what is provided for in the Penal Code. It needs to be checked whether a coercive measure which is not considered a punishment in the formal peal law could still be deemed a punishment by nature, i.e. in the substantive sense. The fundamental rights must be guaranteed even upon imposition of such state coercive measures which are not provided for as punishments in the formal penal law but which can be regarded as such in the substantive sense. Consequently, in the substantive sense the confiscation of an object used to commit an offence constitutes a punishment (see also the judgment of the Supreme Court en banc of 25 October 2004 in case no 3-4-1-10-04 – RT III 2004, 28, 297, paragraphs 17 and 18).

21.3. The fact that the confiscation of an object used to commit an offence as a sanction in the formal sense but punishment in the substantive sense is provided for in Chapter 7 “Other sanctions” of the Penal Code can be justified by the fact that confiscation does not always have a punitive effect. The confiscation of an object used to commit an offence constitutes a sub-category of confiscation. Confiscation as a general term denotes the deprivation of a person of his property against his will and without compensation, as a result of which, under § 85(1) of the PC, the confiscated property shall be transferred into state ownership or, in the cases provided for in an international agreement, shall be returned. At the same time, the Penal Code provides for the possibility of confiscation of different objects – in addition to objects use to commit offences also the direct objects of offences as well as substances or objects used for the preparation of offences and assets acquired through offences. The purposes of confiscation differ depending on the objects.

22. The Supreme Court en banc is of the opinion that the purpose of § 32 of the Constitution is not to preclude punishments infringing the fundamental ownership right, because the Constitution also authorises the legislator to provide for such punishments. As already referred before, the third sentence of § 32(2) of the Constitution establishes that property shall not be used contrary to the public interest. It is clear that the state must have a possibility to react to the violations of this requirement, including the possibility of expropriate without compensation the property used contrary the public interest. The right of the state to decide which acts to declare criminal offences and to provide for punishments for such acts arises primarily from the first and second subsections of § 23 of the Constitution. It proceeds from § 113 of the Constitution that fines, i.e. punishments consisting in the infringement of ownership right, may be a category of punishments. Although the term “fine” primarily means monetary sanctions, the confiscation of a motor vehicle differs from fines by the fact that in the case of confiscation the object is defined in kind, through the thing to be expropriated.

23. In its ruling of 14 January 2008 the Criminal Chamber has raised the question of whether the desired aim of confiscation of an object in unrestricted commerce which can be freely obtained in the market and used to commit an offence – in the case under discussion the guarantee of road safety – could be achieved by some other measures less infringing the ownership right (e.g. temporary deposit of objects used to commit offences) and whether the aim overweighs the consequences that may arise for the person whose automobile is expropriated without compensation.

The Supreme Court en banc refers to its earlier practice and points out that the legislator has a wide margin

of appreciation in defining punishments corresponding to offences. Terms of punishment are based on the values accepted in the society which the legislative power is competent to express. Also, this way the parliament can form the penal policy of the state (see also judgment of the Supreme Court en banc of 27 June 2005 in case no 3-4-1-2-05 – RT III 2005, 24, 248, paragraph 57). Driving a motor vehicle while intoxicated is among the widespread causes of serious traffic accidents. Bearing in mind the significant preventive effect of confiscation (see paragraph 21 of this judgment) the confiscation of an automobile as an object used to commit an offence can be considered as corresponding to the offences.

As the Supreme Court en banc is of the opinion that confiscation of an object used to commit an offence constitutes a punishment in the substantive sense, the effect thereof on the offender can not be assessed separately. To impose a fair and reasonable punishment which would prevent further criminal offences the court must take into account all the legal consequences imposed on the offender in their conjunction. The confiscation of a motor vehicle as an object used to commit an offence can be regarded justified only when there is sufficient and justified ground to believe that the person will commit similar offences in the future, whereas more lenient measures (e.g. deprivation of driving privileges as supplementary punishment) have not succeeded in influencing the person to refrain from the commission of new similar offences.

24. The appeal in cassation raised also the issue of the right to equality, i.e. whether the persons who commit a criminal offence with the automobile they own and the persons who use automobiles owned by other persons or by joint owners, are treated equally upon confiscation. The Supreme Court en banc is of the opinion that upon the confiscation of objects used to commit offences the owners of automobiles and those who are not owners but use automobiles are not comparable, because when the confiscation of objects used to commit offences is deemed a punishment in the substantive sense, the court deciding whether confiscation is justified must take into account the specific circumstances of each concrete case.

IV.

25. By the Viru County Court judgment of 6 February 2007 T. Tiiki was convicted under § 424 of the PC in that having been punished under § 424 of the PC he, once again, drove an automobile while intoxicated. The courts justified the confiscation of the automobile from him with the fact that he committed another analogous criminal offence within less than two weeks since the previous court hearing, i.e. within the period of probation. Neither the principal nor the supplementary punishment imposed on him prevented him from again driving while intoxicated.

26. The Supreme Court en banc consents to the referred justifications, and on the basis of §§ 14(3) and 15(1)6) of the CRCPA and § 361(1) of the CCP upholds the Viru Circuit Court judgment of 22 March 2007 and dismisses the appeal in cassation.

27. The defence counsel has submitted an application for the determination of the amount of the state legal aid fee. The amount applied for by the defence counsel comprises the costs of the following acts performed as defence counsel and subject to reimbursement pursuant to “The bases for the calculation of fees payable for the provision of state legal aid, the procedure for the payment and the amount of such fees, and the extent of and procedure for compensation for the state legal aid costs” (hereinafter “the procedure”) approved by the Minister of Justice. For the preparation for the cassation proceeding the counsel claims 900 kroons under § 8(2) of the procedure, and for the participation in the court hearings of 29 August 2007, 14 November 2007 and 26 February 2008 he applies for the order of payment of 1125 kroons under § 8(4) and (5) of the procedure. The defence counsel requests that these amounts be multiplied, on the basis of § 2(2)1) of the procedure, by the coefficient 1.7, and applies for the order of payment of 1530 kroons of counsel’s fee for the preparation for the cassation proceedings and of 1912 kroons and 50 cents for the participation in court hearings. For the time spent on travelling to and back from the location of providing state legal aid the defence counsel requests the order of payment of 1650 kroons on the basis of § 18(1)3) of the procedure, and for the compensation for the costs of use of sworn advocate’s automobile to travel to and from the location of provision of state legal aid the order of payment of 1476 kroons on the basis of § 21(3) of the procedure. The defence counsel requests that the total amount of 6568 kroons and 50 cents be ordered to be paid for the

provision of state legal aid, plus 18% of VAT. The Supreme Court en banc is of the opinion that the application of the defence counsel is justified and is to be satisfied.

According to § 180(1) of the CCP, in the case of a conviction, procedural expenses shall be compensated for by the convicted offender. According to § 25(4) of the State Legal Aid Act a person who has received state legal aid in criminal and misdemeanour proceedings shall compensate for the state legal aid fee and state legal aid costs pursuant to the procedure prescribed in the Code of Criminal Procedure. When a contested judgment is upheld and appeal in cassation is dismissed in the cassation proceedings, according to § 186(2) of the CCP the procedural expenses shall be reimbursed by the person who filed the appeal in cassation, and thus T. Tiiki is to be ordered to pay the amount paid for state legal aid.

Dissenting opinion of justice Eerik Kergandberg
to the Supreme Court en banc judgment no 3-1-1-37-07,
joined by justice Indrek Koolmeister

I am of a dissenting opinion concerning the Supreme Court en banc judgment no 3-1-1-37-07 (hereinafter "the judgment") and I explain the difference of my opinion from that set out in the Supreme Court en banc judgment as follows.

1. First of all, I do not find the justifications set out in paragraph 16 of the judgment that a motor vehicle used by an intoxicated driver is an object used to commit an offence for the purposes of § 424 of the PC, convincing. The source of this erroneous legal conclusion may perhaps be the fact that a motor vehicle is indeed a vehicle [liiklusvahend – a means of transport to be used in road traffic]. Upon defining an object used to commit an offence – a legal concept – it is evidently not always sufficient to be confined to the conceptions deriving from the everyday life. Well, how could it be possible to think that a vehicle [means of transport] is not an object [means] used to commit a traffic offence? I am of the opinion that only such objects can be deemed objects used to commit a criminal offence which, in abstract, can be removed (mentally "taken away") from the aggregate of the elements of that particular criminal offence so that the necessary elements of the criminal offence will still continue to exist. In other words – as in fact epigrammatically pointed out in paragraph 16 of the judgment – an object used to commit a criminal offence must indeed only facilitate the commission of a criminal offence. A motor vehicle used by an intoxicated driver does not merely facilitate the commission of the criminal offence under discussion, indeed it constitutes one of the obligatory elements of the crime, which can not be mentally "taken away" from the crime without the composition thereof deceasing to exist. The judgment in its present wording has, in principle, opened up a possibility for the courts to confiscate, in addition to motor vehicles of intoxicated drivers, also motor vehicles of such drivers who have exceeded the speed limit or in any other way violated the rules of use of motor vehicles. Because in all the referred cases, pursuant to the spirit of the judgment, a motor vehicle has to be deemed an object used to commit an offence. In conclusion: I am of the opinion that from the penal law aspect a motor vehicle used by an intoxicated driver should be regarded as a direct object of the criminal offence provided for in 424 of the PC, and it should be subject to the regulatory framework established in § 83(2) and (3) of the PC. This would mean, inter alia, that had the legislator wanted to legalise the confiscation of motor vehicles used by intoxicated drivers, it should have clearly expressed this possibility in the wording of § 424 of the PC. Nevertheless, all of the above are primarily penal law issues, the examination of which will not give an answer to "the question of higher level" – the question of constitutionality of confiscation of a thing in unrestricted civil commerce.

2. I consent without hesitation to the opinion set out in the judgment that an automobile as a thing in unrestricted civil commerce is within the sphere of protection of the fundamental ownership right established in § 32 of the Constitution and that the third sentence of § 32(2) of the Constitution prohibits the use of property contrary to the public interest. Neither is there any doubt that property is used contrary to the public interest when a motor vehicle is driven while intoxicated, because this endangers the life, health and property of other road users. For me the problem is how is it allowed –pursuant to the spirit of the entirety of

§ 32 of the Constitution – to react to the violation of the prohibition included in the third sentence of § 32(2) of the Constitution and the use of property contrary to the public interest. According to the judgment the state is allowed to react to the violation under discussion (i.e. to the use of property contrary to the public interest) so that it entirely forgets what is set out in the second sentence of § 32(1) of the Constitution, pursuant to which property may be expropriated without the consent of the owner only in the public interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. I deem it necessary to point out in parenthesis that the Chancellor of Justice has not afforded himself such forgetfulness and in his written opinion has expressed the conviction that upon termination of right of ownership of a thing the provisions of the second sentence of § 32(1) of the Constitution (only for fair and immediate compensation) must in no way be ignored. At the same time the Chancellor of Justice has argued that the fair and immediate compensation provided for in the second sentence of § 32(1) of the Constitution must be interpreted in the abstract sense and that in the case of confiscation the fairness of compensation depends on whether the confiscation is proportional or not. The Chancellor of Justice is of the opinion that a proportional confiscation amounts to fair compensation and disproportional confiscation to unfair compensation. I find that irrespective of how universal an instrument we consider proportionality to be in the constitutional review context, it will still be rather complicated to explain to an owner that in the constitutional sense he has been afforded fair compensation for his motor vehicle through the fact that the confiscation was proportional, was it not? In conclusion: The judgment does not set out a convincing justification of the opinion arising from paragraph 21 that an automobile as a thing in unrestricted commerce may also be confiscated without compensation on the basis of what is provided for in § 32 of the Constitution alone.

3. Although the wording of § 32 of the Constitution does not sufficiently take into account the inevitable necessity to allow the infringements of the fundamental ownership right inter alia for the exercise of the state's penal authority, this can not be a reason to consider the punishments infringing the fundamental ownership right unconstitutional, because this would mean inter alia the increase of the proportion of punishments infringing personal liberty. I am of the opinion that the permissibility of punishments infringing the fundamental ownership right arises from § 113 of the Constitution only, that such punishments must in essence be interpretable as fines, and upon establishing such punishments (as infringements of fundamental ownership right) the provisions of § 11 of the Constitution must be taken into account. The latter means that a punishment infringing the fundamental ownership right must not distort the nature of the fundamental ownership right. In this context I find that nothing is left of the nature of the fundamental right to own an automobile after the confiscation thereof. In conclusion: I find that confiscation can not be regarded as a fine, and that it is not in conformity with the spirit of our Constitution that as a result of a punishment infringing the fundamental ownership right the ownership of a concrete delimited thing is terminated. Let me add in this context that according to an opinion which is almost generally recognised even life imprisonment can not be deemed conforming to modern human rights paradigm if the person who is punished by life imprisonment lacks any legal possibility to be relieved from the punishment after having served an imprisonment of certain length. A person whose motor vehicle is confiscated has – as we know – absolutely no possibility to have the ownership right restored.

4. I did give my vote in favour of the view that if confiscation of a motor vehicle – which is in unrestricted civil commerce and can be freely obtained in the market – as an object used to commit an offence is not unconstitutional (as the majority of the Supreme Court en banc found), such confiscation has to be deemed as punishment in the substantive sense and that upon such confiscation exactly the same action must be taken as upon imposition of formal punishments. Nevertheless, regarding confiscation as a punishment in the substantive sense raises a new issue of constitutionality – namely the question whether proceeding from the requirement of legal clarity and the requirement that penal law be determinate it would be possible to deem constitutional a punishment which is in fact exactly the same as a punishment (this is what the phrase "punishment in substantive sense" reflects) but is not regarded as punishment in the formal sense in the Penal Code.

5. Also, it is difficult to consent to what is set out in paragraph 24 of the judgment – that when regarding the

confiscation under discussion as a punishment in the substantive sense the issues of equality right can not arise because the courts have the right of discretion when applying confiscation. I am of the opinion that the issues of equality right inevitably arise because very many motor vehicles used for driving while intoxicated – e.g. leased automobiles – can not be confiscated.

6. In brief, I do not think there is any doubt that driving while intoxicated constitutes a serious problem in contemporary society, yet the confiscation of a motor vehicle used by an intoxicated driver is not a suitable, necessary or reasonable measure to solve the problem.

Dissenting opinion of justice Jüri Põld
to the Supreme Court en banc judgment in case no 3-1-1-37-07,
joined by justice Tõnu Anton

1. I do not consent either to the principal positions, the reasoning or the conclusion of the majority of the Supreme Court en banc. I argue that in the present case § 83(1) of the PC ought to have been declared invalid due to unconstitutionality to the extent that it allows to confiscate a thing, which is in unrestricted commerce and legally obtained, as an object used to commit a criminal offence. At the same time it ought to have been explained to the legislator in the reasoning of the judgment that the legislator may provide for the confiscation of such objects used to commit criminal offences expressly as a punishment in the Penal Code.

2. The difference of my opinion from that of the majority of the Supreme Court en banc begins with the fact that the majority of the Supreme Court en banc regards the motor vehicle confiscated in this case as an object used to commit the criminal offence, whereas I regard it as the direct object of the criminal offence. As I regard a motor vehicle driven by an intoxicated driver as a direct object of a criminal offence, it may seem that my opinion is an inconsistent and one may ask how can I hold that § 83(1) of the PC ought to have been declared invalid due to unconstitutionality to the extent that the provision allows to confiscate a thing, which is in unrestricted commerce and legally obtained, as an object used to commit a criminal offence. I should have been of the opinion that § 83(1) of the PC was not a relevant provision and that § 83(2) was relevant instead. However, there is no inconsistency: while adjudicating a case it is inevitable that the Supreme Court en banc vote and form a common starting point for the examination of the matter. In this case the starting point supported by the majority is that the referred thing constitutes an object used to commit a criminal offence.

3. As regards why a motor vehicle, the driver of which was intoxicated, ought to have considered as the direct object of a criminal offence I agree with my colleague Eerik Kergandberg, who justifies this position – in my mind convincingly in his dissenting opinion. I also consent to several other views expressed in E. Kergandberg’s dissenting opinion, but not all. Instead of joining my colleague’s opinion with reservations I consider it better to explain why I do not consider the confiscation of motor vehicles under § 83(1) of the PC constitutional.

4. Unlike the majority of the Supreme Court en banc (paragraphs 21 and 22 of the judgment) I am of the opinion that the possibility of expropriation of a thing which is in unrestricted civil commerce and was used to commit a criminal offence can not be justified with the help of the third sentence of § 32(2) of the Constitution, which prevents the use of property contrary to the public interest. The second section of § 32 in its entirety pertains only to the possession, use and disposition of property and the restrictions thereof. Restriction can consist only in the imposition of restrictions and not in confiscation without compensation of things used contrary to the public interest. Otherwise the sphere of application of the second sentence of § 32(1) of the Constitution would be significantly narrowed. Namely, I think that the way the majority of the Supreme Court en banc understands the third sentence of § 32(2) of the Constitution leaves a dwelling in danger of collapse, which the owner is incapable of repairing, out of the sphere of protection of the second sentence of § 32(1) of the Constitution.

5. If I agreed to the approach of the majority of the Supreme Court en banc to the third sentence of § 32(2) of

the Constitution, I still could not understand why the Supreme Court en banc is seeking further justification to the conclusion of its judgment through considering the confiscation under § 83(1) of the PC, which the legislator has not formally defined as a punishment, as a punishment in the substantive sense and through invoking §§ 23 and 113 of the Constitution. Namely, if the possibility of expropriation of a thing without compensation arises from the third sentence of § 32(2) of the Constitution, § 83(1) of the PC is constitutional for this very reason and further discussions about the punitive nature of confiscation are completely unnecessary.

6. If the third sentence of § 32(2) in conjunction with §§ 23 and 113 of the Constitution were considered absolutely necessary to justify confiscation, I would find it difficult to justify the constitutionality of taxation as infringement of fundamental ownership right. Namely, § 113 allows to provide for fines as well as for taxes. However, justification of taxation as infringement of the fundamental ownership right guaranteed by the first sentence of § 32(1) of the Constitution can in no way be related to the use of property contrary to the public interest. Otherwise people who behave lawfully should be exempted from taxes.

7. I am of the opinion that the constitutionality of the providing for taxes as well as fines – both constituting infringements of the fundamental ownership right guaranteed by the first sentence of § 32(1) of the Constitution arises directly from § 113 and requires no other justification.

8. I am of the opinion that § 113 which expressly refers to fines (punishment imposed in money) allows also to provide for proprietary punishments by way of confiscation. Namely, in the end it does not make much difference for a person whether the amount of the fine is determined to the extent of certain assets or the same thing is expropriated without compensation as a punishment. Let me point out that when a person fails to pay a fine the compulsory sale of a thing is constitutional and completely possible, and the consequences for the financial sphere of a person of such compulsory sale and of expropriation of a thing are similar in the end.

9. I find that the confiscation of a motor vehicle for driving it while intoxicated as a punishment is completely conceivable and constitutional, because the legislator has a wide discretion upon providing for punishments, and the establishment of a possibility of punitive confiscation falls within this sphere of discretion.

10. Like the majority of the Supreme Court en banc I can regard the confiscation of motor vehicles presently applicable under § 83(1) of the PC as a punishment in the substantive sense. Considering the value of the property this amounts to a repressive measure. I only want to point out that the expropriation of a motor vehicle without compensation can not prevent the driving of some other vehicle while intoxicated. This constitutes primarily a repression.

11. But I can not consent to the majority of the Supreme Court in the opinion that confiscation under § 83(1) of the PC as a punishment is constitutional. I am of the opinion that only such punishments can be constitutional which have been formally defined as punishments by the legislator, i.e. which have been established as punishments, have been deemed punishments in the law. Providing for punishments is within the competence of the legislator. Proceeding from the principle of separation of powers the court must not substitute for the legislator. That is why the court can not say that a repressive measure which – indeed—has been provided for by the legislator but has not been defined as a punishment by the legislator is a punishment in the substantive sense, and as it is a punishment in essence and has been provided for by the legislator, it is also constitutional. Let me point out that the legislator's obligation to define criminal punishments clearly as punishments can be derived from the second sentence of § 23(2) of the Constitution.

Dissenting opinion of justices Jüri Ilvest and Hannes Kiris
to the Supreme Court en banc judgment in criminal case no 3-1-1-37-07

1. We consent to the opinion expressed in paragraphs 16 and 17 of the Supreme Court en banc judgment that

a motor vehicle is to be regarded as an object used to commit the criminal offence described in § 424 of the PC, and that § 83(1) of the PC allows to confiscate the vehicle from the person who has committed the unlawful and wrongful act comprising the necessary elements of the offence described in § 424 of the PC (driving a motor vehicle while intoxicated). And this is possible without supplementary legitimisation in the special part of the Penal Code.

2. But we do not consent to the opinion of the Supreme Court en banc concerning the constitutionality of this regulatory framework, and we shall reason our dissenting opinion as follows.

2.1. Confiscation of objects used to commit intentional offences (i.e. the things for the possession of which the law does not establish restrictions and which can be freely obtained in the market) means that the object is taken away, i.e. is expropriated without compensation. The first and second sentences of § 32(1) of the Constitution establish that the property of every person is inviolable and equally protected, and that property may be expropriated without the consent of the owner only in the public interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. Confiscation of a motor vehicle is provided by law and most certainly this is in the public interest (there is no dispute that the measure used to decrease the number of cases of driving while intoxicated serves the public interest, because driving a motor vehicle while intoxicated endangers the life, health and property of road users), but the regulatory framework of confiscation precludes the payment of fair and immediate compensation for the expropriated vehicle.

2.2. It is true that interference with the inviolability of property is also justified by § 32(2) of the Constitution, which establishes that "[e]veryone has the right to freely possess, use and dispose of his or her property. Restrictions shall be provided by law. Property shall not be used contrary to the public interest." Although the referred provisions allow interfering into the inviolability of property both with and without compensation, they do not allow for the total deprivation of a thing or a proprietary right.

2.3. Thus, we are of the opinion that § 32(1) and (2) do not allow to expropriate a motor vehicle as an object used to commit an intentional criminal offence. According to § 32(1) of the Constitution the expropriation of a motor vehicle would be possible only for fair and immediate compensation. Under the second subsection of § 32 the expropriation of a motor vehicle is not possible at all; what can be done is the restriction of the ownership right (e.g. it would be possible to enact a regulatory framework under which a person who had been driving a motor vehicle while intoxicated could be temporarily – and why not on his expense deprived of the motor vehicle and the vehicle could be deposited or such devices would be installed in the vehicle that preclude it being driven by intoxicated persons).

2.4. We consent to the view expressed in the Supreme Court en banc judgment that the confiscation – under § 83(1) of the PC of an object used to commit an offence from the person who has committed an intentional offence constitutes a punishment in the substantive sense, and that "in the case of confiscation of a thing of comparatively big value which is in free commerce, such as an automobile, the punitive effect can be considered dominant." (see paragraph 21.1. of the judgment). At the same time we find that the explanation that the confiscation applicable under § 83(1) of the PC is primarily of punitive nature does not, in itself, render the imposition of this sanction constitutional. Proceeding from the requirement that penal law be determinate, a measure which is punitive in substance must also formally be declared a punishment. Until this has not been done there is no question of whether the constitutionality of the confiscation under § 83(1) of the PC arises e.g. from §§ 32 and 113 of the Constitution in their conjunction. Such confiscation as a punishment in the proprietary sense (monetary/proprietary punishment) can be regarded as "fine" for the purposes of § 113 of the Constitution only after the legislator itself has declared such a measure "a fine". This has not been done.

2.5. We can not consent to the reasoning of the Supreme Court en banc that "[b]earing in mind the significant preventive effect of confiscation) the confiscation of an automobile as an object used to commit an offence can be considered as corresponding to the offences." (see subsection 2 of paragraph 23 of the judgment). If the confiscation referred to in § 83(1) of the PC is a punishment is substance, such confiscation should be applied in accordance with § 56 of the PC, according to which punishment shall be based on the

guilt of the person. And upon application of such confiscation as imposition of punishment the alleviating and aggravating circumstances must be taken into account, as well as the possibility to influence the guilty person to refrain from the commission of further offences, and the interests of protection of legal order. All these circumstances can be ascertained and taken into account separately in each concrete case and not in general.
