Constitutional judgment 3-4-1-1-04

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-1-04
Date of decision	25 March 2004
Composition of court	Chairman Uno Lõhmus, members Eerik Kergandberg, Lea Kivi, Villu Kõve, Jüri Põld
Court case	Review of constitutionality of § 191(10) of the Code of Misdemeanour Procedure.
Basis of proceeding	Ruling of the Viru Circuit Court of 9 December 2003, in misdemeanour matter no. 2-3-19-03
Court hearing	Written proceeding
Decision	**To declare that § 191(10) of the Code of Misdemeanour Procedure (in the wording in force from 1 September 2002 until 31 December 2003) was in conflict with the Constitution to the extent that it excluded the filing of an appeal against a ruling on refusal to accept or hear an appeal in the appeal proceedings in a county or city court.**

FACTS AND COURSE OF PROCEEDING

1. By the decision of 18 June 2003 of the Narva Police Prefecture - the body conducting extra-judicial proceedings -punished Viktor Andrejev for the breach of public order by a fine of 6000 kroons pursuant to § 262 of the Penal Code.

2. On 16 September 2003 V. Andrejev filed an appeal with the Narva City Court, requesting that the punishment decision of the Narva Police Prefecture by annulled. The appellant pointed out that he had not received the decision of the Narva Police Prefecture of 18 June 2003 and that he had learned about the imposition of the fine only on 2 September 2003 from the bailiff in the course of an enforcement proceeding. To his appeal filed with the city court V. Andrejev annexed the copies of the misdemeanour report, bailiff's notice and the envelope.

3. By the ruling of 19 September 2003 the Narva City Court decided not to proceed with V. Andrejev's appeal and set a deadline of 1 October 2003 to him for elimination of deficiencies thereof. According to the ruling V. Andrejev had failed to append to his appeal the decision of the police prefecture he was complaining against, did not refer to the evidence he wanted to be examined and did not inform the court of the name and contact information of his counsel, although he wanted the participation of a counsel. The city

court further pointed out that V. Andrejev had not filed the complaint on time, failing to justify why it had not been possible for him to examine the contested decision on time and to go to the police prefecture to fetch it. The city court was of the opinion that V. Andrejev should have justified in his appeal also how his rights had been violated in the misdemeanour procedure.

4. In the annex to the complaint filed with the Narva City Court V. Andrejev pointed out that the Narva Police Prefecture had not sent him the contested decision and had not explained to him his rights. He learned about the punishment from the bailiff and he filed an appeal within 15 days as of the date when he became aware of the decision of punishment made in misdemeanour procedure. He could not go to the Narva Police Prefecture himself, because he is an elderly person, an old age pensioner and a sick person. V. Andrejev found that his rights had been violated in misdemeanour procedure because the amount of fine exceeds his pension five times. At the same time V. Andrejev also submitted a request that a counsel be appointed to him and that the Narva Police Prefecture be required to submit the documents of the misdemeanour matter. A copy of pension certificate was added to the annex of the complaint.

5. By the ruling of 3 October 2003 and on the basis of clauses 1) and 3) of § 118(2) of the Code of Misdemeanour Procedure (hereinafter "the CMP") the Narva City Court decided to dismiss the appeal of V. Andrejev against the decision of the Narva Police Prefecture of 18 June 2003. The city court held that the annex to the appeal did not fulfil the requirements imposed by the court ruling of 19 September 2003 and that the deficiencies of the appeal had not been fully eliminated. The city court pointed out that contrary to the requirements of § 115(5)1) of the CMP V. Andrejev had failed to submit a copy of the decision of the body conducting extra-judicial proceedings. Irrespective of the fact that V. Andrejev filed his appeal violating the term prescribed in § 114(4) of the CMP he has not submitted application for restoration of the term. Neither has V. Andrejev submitted to the city court any evidence that during the whole term of appeal he had had no possibility to examine the decision of the body conducting extra-judicial proceedings.

6. V. Andrejev filed an appeal against the ruling of city court of 3 October 2003 with the Viru Circuit Court, requesting that the ruling of the city court be annulled and the appeal filed against the decision of the Narva Police Prefecture of 18 June 2003 be accepted.

7. By its ruling of 9 December 2003 the Viru Circuit Court declared § 191(10) of the CMP unconstitutional and did not apply it and accepted the appeal of V. Andrejev against the ruling of the Narva City Court of 3 October 2003.

OPINIONS OF THE CIRCUIT COURT AND THE PARTICIPANTS IN THE PROCEEDING

8. The circuit court pointed out that § 15 of the Constitution establishes the right of every person of recourse to the courts if his or her rights and freedoms are violated. § 191(10) of the CMP is not in conformity with the Constitution, because it causes unequal treatment of complainants in misdemeanour proceedings in comparison to the complainants in criminal, civil or administrative court proceedings. Also, the circuit court held that § 191(10) of the CMP prevents the proceeding of a matter on its merits and thus the provision is of decisive importance and therefore pertinent.

9. In the reply submitted to the Supreme Court the Legal Affairs Committee of the Riigikogu did not express its opinion on the issue of constitutionality of § 191(10) of the CMP, which was declared unconstitutional by the ruling of the Viru Circuit Court. The Legal Affairs Committee confined itself to pointing out that on 17 December 2003 the Riigikogu had adopted the Code of Criminal Procedure, Penal Code and Code of Misdemeanour Procedure Amendment Act, which had entered into force on 1 January 2004. By this Act the wording of § 191(10) of the CMP had been amended, leaving out the words "or hear the appeal". Also, the Legal Affairs Committee delivered extracts of all the materials that reflect the legislative proceeding of the disputed provision of the CMP in the Riigikogu.

10. The Chancellor of Justice is of the opinion that as the wording of § 191(10) of the CMP, which was in force until 31 December 2003, did not allow to contest a judgment of a first instance court in a circuit court,

thus rendering appeals against decisions of bodies conducting extra-judicial proceedings unheard, the referred provision infringed upon the general right of recourse to the courts as established in the first sentence of § 15(1) of the Constitution, as well as the right to appeal to a higher court for the review of a court judgment or ruling, established in § 24(5) of the Constitution. The wording of § 191(10) of the CMP, which was in force until 31 December 2003, restricted the fundamental rights established in the first sentence of § 15(1) and § 24(5) of the Constitution disproportionally and was therefore unconstitutional.

The Chancellor of Justice points out that in the given case the right to file an appeal against the decision of the body conducting extra-judicial proceeding with a county or city court was guaranteed. Thus, in the formal sense the general right of recourse to the courts was guaranteed. But the decision of county or city court not to accept the appeal was final and could not be appealed against. When assessing the constitutionality of the wording of § 191(10) of the CMP, which was in force until 31 December 2003, the principal issue is whether the regulatory framework which excludes the possibility of appeal was a sufficient guarantee for ascertaining the truth in a court case and for achieving a fair resolution. The Chancellor of Justice is of the opinion that the contested regulation did not guarantee sufficient protection to a person's rights, as there was a possibility that a misdemeanour matter would not be heard on its merits by the court. In a situation where the judgment of a first instance court upon assessing the conformity of an appeal to formal requirements proves erroneous, yet there is no judicial review of such a judgment, there is a serious risk that the objective of ascertaining the truth will not be achieved in the proceeding. In this context it has to be born in mind that from the constitutional aspect the CMP does not provide for specifically high guarantees in extra-judicial proceedings. Neither do such guarantees exist in the proceedings before the first instance courts, when the court decides on the conformity to formal requirements of an appeal filed against a decision of a body conducting extra-judicial proceedings. Also, it has to be taken into consideration that in Estonia legal aid is not fully available to all social groups and therefore the lack of skill in drafting an appeal may endanger correctness of the result of a proceeding. What is also important is the fact that in the given case we are dealing with a punitive proceeding, the decisions made in the course of which may essentially restrict person's rights. The economy of court proceedings and the speed of reaching a final judgment are not the constitutional values that could counterbalance the possible harm arising from the wording of § 191(10) of the CMP, in force until 31 December 2003, that may occur when an erroneous decision in a misdemeanour matter remains in force.

11. The Minister of Justice agrees with the opinion of the Viru Circuit Court that the wording of § 191(10) of the CMP, which was in force until 31 December 2003, disproportionally restricted person's right of recourse to the courts if his or her rights were violated (§ 15(1) of the Constitution), because there was no possibility to dispute a court's refusal to hear a complaint.

The Minister of Justice is of the opinion that the referred provision is in conflict with § 15(1) as well as with § 24(5) of the Constitution. The Constitution provides for the right of appeal against court judgments as well as against other rulings. The restriction of the fundamental right established in § 24(5) of the Constitution, arising from § 191(10) of the CMP, was not necessary in a democratic society. The Minister argues that a ruling to refuse to hear an appeal filed with the court, irrespective of the content of the appeal, amounts to a material restriction of the right of recourse to the courts, and the review of legality of this restriction by way of appeal against a court ruling is necessary for guaranteeing fundamental rights of a person.

12. The Ida Police Prefecture is of the opinion that the ruling of the Viru Circuit Court declaring § 191(10) of the CMP is correct and justified.

RELEVANT PROVISION

13. § 191(10) of the Code of Misdemeanour Procedure (RT I 2002, 50, 313; 110, 654; 2003, 26, 156; 83, 557; 88, 590; 593) in the wording in force from 1 September 2002 until 31 December 2003 reads as follows:

"§ 191. Court rulings not subject to contestation pursuant to procedure for adjudication of appeals against court rulings

Appeals shall not be filed against the following court rulings:

[…]
10) a ruling on refusal to accept or hear an appeal in appeal proceedings in a county, city or circuit court."

Opinion of the Constitutional Review Chamber

I.

14. § 189 of the Code of Misdemeanour Procedure establishes that appeals may be filed against a ruling made in the proceedings of a court of the first or second instance or in enforcement proceedings if contestation of the ruling is not precluded pursuant to § 191 of the Code. § 192(1) of the Code of Misdemeanour Procedure stipulates that an appeal against a court ruling shall be filed with the court which made the contested ruling. If the panel of a court which made a contested court ruling considers the appeal against the ruling justified, the panel shall annul the ruling and, if necessary, shall make a new ruling (first sentence of § 195(2) of the CMP). If the panel of a court which made a contested court ruling considers the appeal against the ruling unjustified, the panel shall forward the contested court ruling and the appeal against the ruling immediately to a higher court with appropriate jurisdiction (§ 195(3)). An appeal against a ruling made by a county or city judge shall be heard by the circuit court judge sitting alone (§ 196(2)).

V. Andrejev filed an appeal against the ruling of the Narva City Court of 3 October 2003 directly to the Viru Circuit Court, not to the Narva City Court. The Viru Circuit Court decided to hear V. Andrejev's appeal irrespective of what is provided by § 192(1) of the CMP.

15. The Chamber is of the opinion that § 191(10) of the CMP in force from 1 September 2002 until 31 December 2003 was relevant to the adjudication of the case to the extent that it excluded the possibility of filing of appeals against a ruling on refusal to accept or hear an appeal in appeal proceedings in a county or city court. The referred provision should be regarded as relevant irrespective of the fact that the procedure provided for in Chapter 16 of the Code of Misdemeanour Procedure was not observed either upon filing the appeal against the ruling or during further proceeding of the appeal. Even if V. Andrejev had observed the procedure established by § 192(1) of the CMP and had filed an appeal with the Narva City Court, the acceptance of the appeal would have depended on the assessment of constitutionality of § 191(10) of the CMP.

It would have been necessary to additionally examine whether § 191(10) of the CMP had been relevant for making the ruling of the Viru Circuit Court of 9 December 2003 if what is provided for in §§ 195 and 196 of the CMP could be regarded as judicial appeal proceedings independent of each other. Systematic interpretation of what is established in Chapter 16 of the Code of Misdemeanour Procedure leads to the conclusion that a review of an appeal against a ruling by the court who made the contested ruling, and by a higher court, are different stages of proceeding an appeal against a court ruling. That is, at least in those cases when the court who has made the contested ruling does not consider it possible to satisfy the appeal and change its ruling. The same position can be deducted from the ruling of the Criminal Chamber of the Supreme Court of 9 June 2003, in case no. 3-1-1-93-03 (RT III 2003, 22, 215). According to what is pointed out in this ruling the court who has made the contested ruling and does not satisfy the appeal against it, does not have to make a new ruling to express its unchanged position once again, instead the court may refer the appeal against the ruling, with an accompanying letter, to a higher court.

II.

16. The Constitutional Review Chamber is of the opinion that § 191(10) of the CMP in the wording in force from 1 September 2002 until 31 December 2003 was partly unconstitutional.

17. V. Andrejev, whom the Narva Police Prefecture punished by a fine of 6000 kroons for the breach of public order, did not achieve the hearing of his case in the Narva City Court. V. Andrejev did file an appeal

against the punishment decision with a court, but first the court did not accept it and then dismissed it (see paragraphs 3 to 5 of the judgment). The Narva City Court checked neither the facts, the conclusions drawn on the basis of the facts nor the way law had been applied. The contested provision of the Code of Misdemeanour Procedure did not offer a possibility to contest the ruling on refusal to hear the appeal. The Chamber is of the opinion that the rule included in § 191(10) of the CMP infringed a person's right of recourse to the courts, established in the first sentence of § 15(1) of the Constitution in conjunction with the right of appeal to a higher court for the review of a court judgment, established in § 24(5) of the Constitution.

18. The Court points out that the procedural rights of persons charged with a criminal offence are laid down in §§ 22 to 24 of the Constitution. These provisions contain the rights to effective legal protection, which are realised through a fair proceeding. But in addition to the Constitution national legislation must also take into consideration the principle of fair trial, established in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"). The Chamber shares the opinion that the Constitution should be interpreted in a manner which guarantees the application of the Constitution in conformity with the Human Rights Convention and the application practice thereof. Otherwise effective national protection of a person's right would not be guaranteed.

19. The European Court of Human Rights gives meaning to the concept of "criminal offence" on the basis of criteria developed in its case-law. That is why the criminal charges referred to in Article 6 of the ECHR may not be the same as understood by national law under criminal charges. As, in addition to classification of offences under a state's law, the criteria of the European Human Rights Court take also into account the nature of offence and the nature and degree of severity of the penalty that the person concerned risks incurring (*see Engel et all v Holland, judgment of 8 June 1976, paragraph 82*), then under these criteria some misdemeanours can be classified into the category of criminal offences. In such cases a person must be guaranteed all the procedural guarantees that a person charged with a criminal offence enjoys.

It has to be taken into consideration that the pecuniary punishment that can be imposed on a person for a misdemeanour in an extra-judicial proceeding may be several times higher than the minimum pecuniary punishment imposed by way of criminal proceedings. The fine imposed on V. Andrejev for a misdemeanour (6000 kroons) exceeded the minimum amount imposable in a criminal offence matter by four times. In addition it has to be born in mind that the qualification of an act as a misdemeanour or as a criminal offence may depend on such circumstances like the existence or lack of a previous criminal record and commission of the act either alone or in a group. Also, the necessary elements of crime stipulated in § 262 of the Penal Code, under which V. Andrejev was punished, are close to those of a criminal offence established in § 263 of the Penal Code.

20. According to § 22(1) of the Constitution a person may be convicted only by a court. It is in conformity with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms that in regard of minor offences the imposition of punishments is entrusted with an official or an administrative body. But pursuant to the case-law of the European Court of Human Rights a person must have an opportunity to challenge any decision concerning his or her punishment, which will guarantee him or her the rights required by Article 6 of the ECHR (*see Kadubec v Slovakia, judgment of 2 September 1998, paragraph 57*).

21. The Code of Misdemeanour Procedure provides for a possibility of recourse to the courts if the person, punished for a misdemeanour by a body conducting extra-judicial proceedings, considers the punishment incorrect. If the requirements described in §§ 114 and 115 of the Code of Misdemeanour Procedure are not fulfilled, a court has the right to refuse to hear an appeal. Until 31 December 2003 such a judgment of a court was final and there was no appeal against it. Because of such a restriction the effective protection of individuals' subjective rights was not guaranteed, as the hearing of a misdemeanour matter on its merits by a court may very well not have taken place at all.

A judge, like any other human being, can make mistakes. The institute of right of appeal, established in § 24(5) of the Constitution, is based on the very assumption that it is necessary to guarantee the review of

correctness of court judgments and rulings. Proceeding from the fact that a result of a misdemeanour proceeding amounts to a strong infringement of a person's rights, it should be considered necessary that there must be a possibility to check the correctness of final solutions in misdemeanour matters – both judgments and rulings. That is why the Chamber is of the opinion that the economy of court proceedings and guarantee of speedy resolution of cases, presumably a reason for excluding the possibility to appeal, do not counterbalance the possible damage caused to the legal system by an incorrect judgment in a misdemeanour matter.

22. The Chamber is of the opinion that the wording of § 191(10) of the Code of Misdemeanour Procedure, which was in force until 31 December 2003, did not guarantee judicial protection of a person's rights, because it did not allow appeals against rulings on refusal to hear an appeal. The provision was in conflict with the first sentence of § 15(1) of the Constitution and § 24(5) of the Constitution in their conjunction.
