Constitutional judgment 3-4-1-9-03

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-9-03
Date of judgment	25 November 2003
Composition of court	Chairman Uno Lõhmus and members Tõnu Anton, Eerik Kergandberg, Lea Kivi and Villu Kõve
Court Case	Review of constitutionality of the minimum sanction of § 215(2) of the Penal Code.
Basis of proceeding	Judgment of the Jõgeva County Court of 1 August 2003 in criminal case no. 1-140/03
Court hearing	Written proceeding
Decision	**Not to declare the minimum sanction of § 215(2) of the Penal Code invalid, and to dismiss the petition of the Jõgeva County Court.**

FACTS AND COURSE OF PROCEEDING

1. By its judgment of 1 August 2003 the Jõgeva County Court convicted Aleksander Tamm pursuant to § 195(2) of the Criminal Code (hereinafter "the CrC"); § 25(2), clauses 4),7),and 8) of § 199(2), and clauses 1) and 3) of § 215(2) of the Penal Code (hereinafter "the PC"). By the same judgment Werko Laaneväli was convicted pursuant to § 25(2), clauses 4),7),and 8) of § 199(2) and clauses 1) and 3) of § 215(2) of the PC.

2. Pursuant to clauses 1) and 3) of § 215(2) of the Penal Code A. Tamm and W. Laaneväli were convicted for having committed the following acts.

In the night before 30 November 2002, in Jõgeva city, A. Tamm, who has an earlier punishment for larceny, broke into automobile VAZ 21021, which belonged to Valeri Lauk, started the automobile by connecting the leads of ignition lock and drove the motor vehicle to a parking lot next to a shop in Jõgeva small town, in Jõgeva County, and left the automobile there. During the same night and in the same parking lot W. Laaneväli, together with A. Tamm, attempted to start the automobile of V. Lauk, which A. Tamm had previously used without authorisation, with the intention of temporary use of the movable, but as they did not succeed, the attempt was not completed.

In the night before 23 January 2003, in Jõgeva small town, A. Tamm and W. Laaneväli illegally broke into automobile VAZ 2106, belonging to Ahto Kallais, with the intention of temporary use of movable property of another, broke the ignition lock and the plastic pad under the steering column and pushed the automobile away from the place it was parked.

In the night before 7 March 2003, A. Tamm and W. Laaneväli committed the attempts of unauthorised use of the property of another, breaking into the automobiles of Eha Lindus, Madis Õunapuu and Sven Stamm. The unauthorised use of the automobiles of E. Lindus and M. Õunapuu was not completed, because the automobiles did not start. The attempt against the automobile of S. Stamm was not completed because of the interference of the owner.

3. For the commission of the acts described in clauses 1) and 3) of § 215(2) of the Penal Code the court punished A. Tamm by imprisonment of 8 months and W. Laaneväli by the imprisonment of 7 months and 15 days. The county court declared the minimum sanction - two years' imprisonment - of § 215(2) of the Penal Code unconstitutional and did not apply it.

For the commission of several crimes the county court imposed on A. Tamm the aggregate punishment of one year imprisonment, of which 4 months and 24 days spent in custody pending trial were deducted. The aggregate punishment imposed on W. Laaneväli pursuant to § 64(1) and § 65(2) of the PC for the aggregate of criminal offences and court judgments was 1 year imprisonment, of which 2 months and 13 days spent in custody pending trial were deducted.

OPINIONS OF THE COUNTY COURT AND PARTICIPANTS IN THE PROCEEDING

Opinion of the Jõgeva County Court

4. The county court found that the application of the minimum sanction prescribed by § 215(2) of the PC would disproportionately restrict W. Laaneväli's and A. Tamm's right to liberty, established in § 20 of the Constitution. Weighing on the one hand the damage caused by the accused at trial and the need to protect legal order, and on the other hand individual's fundamental right to liberty, the county court formed an opinion that the punishment of at least two years for the unauthorised use of a thing, committed by A. Tamm and W. Laaneväli, was not proportional in the strict sense. The court pointed out that ownership is protected by imprisonment from 30 days up to 5 years (§ 199(2) of the PC), whereas possession - a right deriving from ownership - is protected by imprisonment from 2 to 10 years. The county court is of the opinion that the more stronger protection of one right deriving from ownership as compared to the protection of ownership as a whole is not in conformity with the spirit of the Constitution, because by violating ownership all the rights (or possession as a factual state) embraced by ownership are violated.

The Jõgeva County Court formed an opinion that the proportionality of the legal consequence provided by § 215(2) of the PC should be assessed in conjunction with § 61(1) of the PC. The court is of the opinion that in the present criminal matter § 61(1) of PE is not applicable, because taking into account the judicial practice of applying § 39 of the CrC the exceptional circumstances justifying the imposition of punishment less onerous than the minimum sanction shall be "related to the commission of criminal offence, not only to the personality of the offender".

The county court came to the conclusion that because on the basis of § 61(1) of the PC it is not possible to

impose on A. Tamm and W. Laaneväli imprisonment that would restrict their liberty (§ 20(1) of Constitution) proportionally with the objective of punishment, the minimum sanction of § 215(2) of the PC should be declared to be in conflict with §§ 20(1) and 11 of the Constitution.

Opinion of the Riigikogu

5. The Constitutional Committee, speaking in the name of the Riigikogu, is of the opinion that the minimum sanction of § 215(2) of the PC is not in conflict with the Constitution.

It is pointed out in the opinion of the Constitutional Committee that the constitutionality of § 215(2) of the PC depends on whether the provision allows to impose a punishment proportional to an offence. Within the frames of concrete norm control proportionality can not be assessed in comparison with punishments imposable for other offences. Only a concrete act and punishment provided for that can be analysed. In a situation where, due to special circumstances, it is possible to impose less onerous punishment than the minimum term or rate, the courts have very limited possibilities to find that a punishment is disproportionate to an offence and thus, unconstitutional. This requires a manifestly disproportionate relation between an offence and the punishment provided for that. The committee is of the opinion that in the given case there is no such disproportion. Determination of punishable acts and gravity of punishments is a value judgment, for the making of which the people have given a mandate to the Riigikogu. It is underlined in the opinion that it was necessary to increase the sanction of § 215(2) of the PC by the Act passed on 18 September 2002, because the crimes described in the referred subsection are committed very often. The Constitutional Committee points out that the list of aggravating circumstances established in clauses 1) to 3) of § 215(2) of the PC includes, in addition to repeated commission and commission by a group or a criminal organisation, also commission by using violence. That is why the scope of application of § 215(2) of the PC is restricted to § 200(1) of the PC, which provides for two to ten years' imprisonment for taking away, by using violence, movable property of another, with the intention of illegal appropriation.

The Constitutional Committee does not agree with the opinion of the Jõgeva County Court that the special circumstances stipulated in § 61(1) of the PC, the existence of which serves as a basis for the imposition of a less onerous punishment than the minimum term or rate provided by law, must be "related to the commission of criminal offence, not only to the personality of the offender". The Constitutional Committee considers this an erroneous allegation, because in § 61(1) of the PC the restricting conditions of § 39 of the CrC, such as the personality of the offender and facts considerably extenuating the degree of criminal offence, have been abandoned. Thus, when adjudicating the matter the court could have imposed on the offender, pursuant to § 61(1), a punishment less onerous than the minimum term provided by § 215(2) of the PC.

In its additional opinion the Constitutional Committee of the Riigikogu points out that the norms of the special part of the Penal Code have been structured so that for the necessary elements of offences, having different qualifying characteristics, uniform minimum and maximum punishments are established. This is a legal policy choice of the legislator. The Act is an abstract one, but enables the courts to impose a just punishment on every concrete person for a concrete act. This possibility is created by the courts' right to impose a punishment less onerous than the minimum term, impose a conditional sentence or to substitute the punishment. The Riigikogu is of the opinion that the Penal Code would be unconstitutional if the courts were not allowed to impose a punishment less onerous than the minimum term, impose a conditional sentence or to substitute the punishment.

The Riigikogu argues that it can not be alleged that upon the commission of acts described in clauses 1), 2) and 3) of § 215(2) of the PC the gravity of guilt of the offender is essentially different depending on the necessary elements of an offence. To prove such an allegation one should present the only possible hierarchy of values or a flawless reflection of value judgments established in Estonian society. An objective hierarchy of values can not be constructed through formal-logical analysis of various legal rights, nor on the basis of subjective assessments by the courts or the Chancellor of Justice when comparing the necessary elements of different crimes.

Opinion of the Chancellor of Justice

6. The Chancellor of Justice argues that the minimum sanction of § 215(2) of the PC in regard to persons meeting the characteristics established in clauses 1) and 3) of § 215(2), is in conflict with the right to liberty and security of person, established in § 20 of the Constitution in conjunction with § 11 of the Constitution.

The Chancellor of Justice is of the opinion that on the basis of the second sentence of § 14(2) of the Constitutional Review Court Procedure Act and the practice of the Supreme Court it is not possible to assess, within a constitutional review proceeding, whether the finding of the Jõgeva County Court of non-applicability of § 61(1) of the PC in the present matter is correct. Thus, within the constitutional review proceeding one has to proceed from the presumption that § 61(1) of the PC is not applicable in the concrete case.

When assessing the proportionality of the infringement of the right of liberty caused by the minimum sanction of § 215(2) of the PC, the Chancellor of Justice points out that the offence determined in § 215(2) of the PC is essentially a criminal offence against property. But the general necessary elements of the crime are less damaging to legal rights than for example larceny referred to in § 199 of the PC or robbery referred to in § 200 of the PC. This is because of the fact that in the case of unauthorised temporary use of a thing without the intention of appropriation the characteristic of the necessary elements of crime is not appropriation or violence. Consequently, in the case of unauthorised use of a thing the minimum and maximum punishments should not exceed those prescribed for the above referred criminal offences against property. The Chancellor of Justice is of the opinion that the limits of punishment must be in conformity to the essence and gravity of an act and must prescribe more severe terms or rates of punishment, including minimum punishment, for more serious crimes. The Chancellor of Justice admits that from the point of view of infringement of legal rights the unauthorised use of another person's movable, by using violence (§ 215(2)2) of the PC), is close to the necessary elements of robbery and in this light the implementation of a minimum sanction similar to that imposable for robbery is perhaps justified. But the imposition of the minimum term of imprisonment provided for in § 215(2) of the PC on those persons who have used another person's property without authorisation, who have previously committed certain criminal offences against property or who commit the act in a group, should be viewed in a different light. The Chancellor of Justice points out that when applying § 215(2) of the PC a situation arises where, for an unauthorised use of a thing in the case when the person has previously committed a crime against property or acts in a group, the possible minimum rate or term of punishment is considerably higher than that for the necessary elements of a crime qualified as larceny. At the same time, the infringement of legal rights upon unauthorised use of a thing is potentially smaller, because of the lack of the intention of depriving the owner of the thing permanently.

The Chancellor of Justice argues that as qualifying bases provided for in § 215(2) of the PC are different, the proportionality thereof should be evaluated separately, proceeding from the different bases. When in regard to § 215(2)2) of the PC, bearing in mind the dangerousness of the necessary elements of crime formulated therein to legal rights, it may be concluded that a 2 year's imprisonment as a minimum sanction is proportional, then in regard to clauses 1) and 3) of § 215(2) of the PC the minimum sanction clearly constitutes a disproportional infringement of the right of liberty (§ 20(1) of Constitution), and is therefore unconstitutional.

Opinion of the Minister of Justice

7. The Minister of Justice is of the opinion that the minimum sanction of § 215(2) of the PC is constitutional. The regulation of the general part of the Penal Code enables the courts to assess the gravity of an act and on the basis thereof to decide on the proportionality of punishment, which can be expressed also in imposition of a punishment less onerous than that provided by a concrete provision of the special part of the Penal Code. It is pointed out in the opinion that when comparing the sanction of § 215 of the PC (unauthorised use of a thing) with the sanction of § 199 of the PC (larceny), the Jõgeva County Court has ignored the fact that

the qualifying characteristic referred to in § 215(2)2) of the PC - violence - determines the need of comparison also with the sanction of § 200 of the PC (robbery). The Minister points out that the special part of the Penal Code has been drafted so that the limits of a sanction take into account the most serious qualifying characteristics. When individualising punishments in each concrete case a judge has in his disposal sufficient number of instruments provided for in the general part of the Penal Code.

The Minister of Justice also argues that the comparison of the wordings of §§ 39 and 61(1) of the CrC clearly shows the intent of the legislator to give the courts wider discretion in imposing punishments less onerous than those provided by the sanctions of the special part of the Code.

Opinion of the Public Prosecutor's Office

8. The Public Prosecutor's Office is of the opinion that the minimum term of punishment provided for the acts determined in § 215(2) of the PC is not in conflict with §§ 11 and 20 of the Constitution, because the legislator has not exceeded its constitutional limits when providing for the minimum term.

It is pointed out in the opinion of the Public Prosecutor's Office that because of the abstract nature of law the necessity of different regulations is to be assessed on a general level. The legislator's freedom in choosing the category and rate and term of punishment is comparatively wide, whereas the possibilities of judicial review are limited. In addition, the Public Prosecutor's Office is of the opinion that the activities of the legislator must not be assessed only on the basis of whether a punishment provided for a certain crime is in conformity with the objectives of imposition and execution of the punishment. For example, upon imposing and enforcing punishments the negative general presumption is no longer taken into account, yet it has a comparatively important role in determining the terms and rates of punishments as an argument of criminal policy.

The Public Prosecutor's Office is of the opinion that the two year's imprisonment is a suitable, necessary and proportional measure for the achievement of the desired aim - prevention of unauthorised use of movables. The legislator, when deciding on the category and term and rate of a punishment, is bound not only by the value of the protected legal right as compared to other legal rights, but the legislator may also take into account, for example, the frequency and dynamics of a given category of crime, the criminological characteristics thereof and considerations of general prevention, which may differ in regard to different acts.

The Public Prosecutor's Office shares the opinion of the Riigikogu and the Minister of Justice that differently from § 39 of the CrC, § 61 of the PC makes imposition of punishment less onerous than the minimum rate dependent not only on special circumstances of the case but also other possible circumstances can be considered. The Public Prosecutor's Office argues that one of the special circumstances would be a situation where even the imposition of the minimum rate of punishment would not correspond to the guilt of the person and would not help to achieve the objectives of punishment.

The Public Prosecutor's Office argues that the legislator could be reproached for extreme strictness of the minimum sanction of § 215(2) of the PC if in real life it would become a rule in the case of § 215(2) of the PC to impose punishments less onerous than the minimum rate.

THE NORM NOT APPLIED

9. § 215(2) of the Penal Code (RT I 2001, 61, 364; 2002, 86, 504; 105, 612; 2003, 4, 22), which entered into force on 24 October 2002 (RT I 2002, 82, 480):

"215. Unauthorised use of thing

(1) Temporary unauthorised use of movable property of another without the intention of embezzlement is punishable by a pecuniary punishment or up to 3 years’ imprisonment.

(2) The same act, if committed:

1) by a person who has previously committed larceny, embezzlement or unauthorised use of a thing;

2) by using violence, or

3) by a group or a criminal organisation,

is punishable by 2 to 10 years' imprisonment."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

I.

10. The Jõgeva County Court held that imposition of at least two years' imprisonment, pursuant to clauses 1) and 3) of § 215(2) of the PC, on A. Tamm for repeated unauthorised use and attempted use of a motor vehicle, and on W. Laaneväli, who has previously been punished pursuant to criminal procedure, for unauthorised use and repeated use of a motor vehicle, would disproportionately infringe these persons' right to liberty. The Jõgeva County Court also found that in the given matter § 61(1) of the PC, allowing to impose punishments less onerous than the minimum term, is not applicable, because pursuant to the application practice of § 39 of the CrC the special circumstances justifying the imposition of a punishment less onerous than the minimum rate must be "related to the commission of criminal offence, not only to the personality of the offender". The county court declared the minimum sanction of § 215(2) of the PC - two years' imprisonment - to be in conflict with §§ 20(1) and 11 of the Constitution and did not apply the minimum sanction.

The county court considered it correct, pursuant to clauses 1) and 3) of § 215(2) of the PC, to impose on A. Tamm the imprisonment of eight months and - pursuant to the same provisions - on W. Laaneväli the imprisonment of 7 months and 15 days.

11. When reviewing the petition of the court that did not apply the Act the Constitutional Review Chamber of the Supreme Court shall firstly check whether the provision which was declared unconstitutional is pertinent to the adjudication of the case. Such a check is justified and necessary, because pursuant to § 14(2) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") the Supreme Court is entitled to declare only pertinent provisions unconstitutional or invalid.

The determining factor upon assessing the relevance is whether the provision, which was declared unconstitutional, was of decisive importance for the solution of the case. A provision is of decisive importance if in the case of unconstitutionality of an Act the court had to make a judgment different from a judgment in the case of constitutionality of the Act. (See *mutatis mutandis* judgment of the Constitutional Review Chamber of the Supreme Court of 2 December 2002 in matter no. 3-4-1-11-02 - RT III 2002, 35, 376, paragraphs 13-14; Judgment of the Supreme Court *en banc* of 28 October 2002 in matter no. 3-4-1-5-02 - RT III 2002, 28, 308, paragraph 15.)

12. The Chamber points out that to decide on the relevance of a provision in some cases it is necessary to assess whether the court who initiated concrete norm control has correctly interpreted the norm, which it declared unconstitutional, and also the norms determining the conditions and extent of the norm, which was declared unconstitutional. If the court which initiated constitutional review has declared a provision of law unconstitutional and has not applied it on the basis of wrong interpretation, it will create a situation where the constitutional review court must review the constitutionality of a norm which is not pertinent.

Considering the aforesaid the Chamber is of the opinion that the second sentence of § 14(2) of the CRCPA can only mean that the Supreme Court shall not, by way of constitutional review, solve the legal dispute which is the subject of the initial court case and shall not ascertain the facts already ascertained in the course of the proceeding of the initial court case.

II.

13. When deciding on the relevance of a norm of penal law it has to be considered that the general and special parts of the Penal Code form a whole. The general part formulates the principles of penal law, which are essential for the application of all or many norms of the special part. This structure of the Penal Code enables a judge, taking into consideration the circumstances of a criminal offence or an offence and data characterising the offender to impose a punishment on the offender which is less onerous than prescribed by the section or subsection of the special part of the Penal Code, pursuant to which the person is found guilty. Also, it is possible to release a person from punishment or substitute a punishment by community service.

The Chamber is convinced that the constitutionality of a punishment provided by a section or subsection of the special part can be reviewed only if it is not possible, in a criminal matter, to apply a mitigating regulation provided by the general part, which provides for a possibility to impose punishment less onerous than that established by the minimum sanction and application of which would result in a punishment which is considered correct by the court. The provisions of the general part extend the scope of discretion of a judge upon punishing the offender.

14. The Constitutional Review Chamber is of the opinion that in the present case the minimum sanction of § 215(2) of the PC can be regarded as pertinent for the purposes of § 14(2) of the CRCPA only if, without the declaration of unconstitutionality of the referred minimum sanction, it would be impossible, taking into account the provisions of the general part of the Penal Code, to impose on A. Tamm the imprisonment of 8 months and on W. Laaneväli the imprisonment of 7 months and 15 days for the unauthorised use of a thing committed by them repeatedly and in a group.

15. In the present case it is § 61(1) of the PC that could be regarded as the mitigating regulation of the general part, pursuant to which a court may, taking into consideration special circumstances, impose a less onerous punishment than the minimum term or rate provided by law. If the provision were applicable, the imprisonment of at least 30 days should have been imposed on A. Tamm and W. Laaneväli, taking into consideration the provisions of § 45(1) of the PC. Thus, the applicability of § 61(1) of the PC in the matter would exclude the pertinence of the minimum sanction of § 215(2) of the PC for the purposes of § 14(2) of the CRCPA.

16. The Jõgeva County Court found that § 61(1) of the PC was not applicable in the present case. The court justified its view by the allegation that taking into consideration the application practice of § 39 of the Criminal Code the special circumstances referred to in § 61(1) of the PC shall be "related to the commission of criminal offence, not only to the personality of the offender".

17. The Constitutional Review Chamber points out the fact that § 61(1) of the PC offers broader possibilities than § 39 of the CrC for imposition of punishments less onerous than the minimum term or rate provided by law. When on the basis of § 39 of the CrC it is possible to impose on a person a punishment less onerous than the minimum term or rate provided by a sanction of the special part of the Criminal Code only "taking into consideration the special circumstances essentially alleviating the gravity of criminal offence, and also the personality of the offender", then § 61(1) of the PC enables a court to impose punishment less onerous than the rate or term provided by law every time "special circumstances" exist.

18. The bases for punishing persons are established in § 56(1) of the PC. Pursuant to this provision punishment shall be based on the guilt of the person. In imposition of a punishment the mitigating and aggravating circumstances, the type of intent or negligence in the commission of the act, and also the possibility to influence the offender not to commit offences in the future, and the interests of the protection of public order, are taken into consideration.

Some of the bases for punishment referred to in § 56(1) of the PC are related to the circumstances of

commission of an offence, some are related to the personality of the person who committed an offence. It does not proceed from § 61(1) of the PC that if only personality-related special circumstances exist, there shall be no possibility to impose a punishment less onerous than the term or rate provided by law.

19. Such interpretation of special circumstances is further supported by what has been said about § 61 (in the initial version of the draft § 63) of the draft in the explanatory letter to the draft of the Penal Code:

"The objective of the section […] is to alleviate the rigidity of imposition of punishments proceeding from the fact that the sections of the special part of Penal Code provide for minimum terms or rates of punishments, thus offering the courts an additional possibility to impose a punishment less onerous than the term or rate provided by the special part in the cases that can not be foreseen by law. The imposition of a punishment less onerous than the minimum term or rate shall be reasoned by the courts."

20. It is probably because of the fact that the county court gave a restricting interpretation to special circumstances established in § 61(1) of the PC that the court failed to analyse in its judgment whether there were special circumstances in the criminal matter based on the personalities of A. Tamm and W. Laaneväli, which could have served as a basis for imposition of a punishment less onerous than the term or rate provided by law, for the criminal offence qualified under clauses 1) and 3) of § 215(2) of the PC. The existence or not-existence of the special circumstances referred to in § 61(1) of the PC is a fact that has to be ascertained in criminal proceedings. Proceeding from the second sentence of § 14(2) of the CRCPA the Constitutional Review Chamber of the Supreme Court is not competent to solve the issue itself. That is why the Supreme Court shall not declare the minimum sanction of § 215(2) of the PC invalid, and shall dismiss the petition of the Jõgeva County Court.

III.

21. The Constitutional Review Chamber points out that the legislator has wide discretion in determining a punishment corresponding to necessary elements of an offence. Terms and rates of punishments are based on value judgments accepted by society, which the legislator is competent to express. Also, this way the parliament can form the penal policy of state and influence criminal behaviour.
