Constitutional judgment 3-4-1-11-02

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-11-02
Date of decision	2 December 2002
Composition of court	Chairman Uno Lõhmus, members Tõnu Anton, Eerik Kergandberg, Lea Kivi and Ants Kull
Court case	Petition of the Tallinn Administrative Court to review the constitutionality of § 168(1)2) of the Code of Criminal Procedure
Date of court hearing	Written proceeding
Decision	**To dismiss the petition of the Tallinn Administrative Court**

FACTS AND COURSE OF PROCEEDING

1. By the public prosecutor's order of 22 July 1998 criminal proceedings were commenced in regard of V. Zaitsev concerning the elements of criminal offence defined in § 133 of the Criminal Code. On 12 July 2001 leading police inspector of the investigative division of the Ida police department of Tallinn Police Prefecture terminated the criminal proceeding by his order on the ground that the limitation period had expired, and refused to bring criminal charges against V. Zaitsev under § 133 of the Criminal Code.

2. By an order of a public prosecutor of the Tallinn Prosecutor's Office of 26 September 2001 the order on termination of the criminal proceedings was annulled and the proceeding was resumed, because V. Zaitsev applied for the resumption of the proceeding. This order was repealed by an order of the senior prosecutor of the Tallinn Prosecutor's Office of 15 November 2001, because on the basis of § 5(3) of the Code of Criminal Procedure (hereinafter "the CCP") V. Zaitsev had no right to dispute the termination of the criminal proceeding on the ground that the limitation period had expired, because he was not a suspect in the criminal proceedings.

3. On 25 April 2002 V. Zaitsev submitted a complaint to the Public Prosecutor's Office, in which he requested that the order of the preliminary investigator of 12 July 2001 be amended as to the grounds of the termination of the criminal proceeding. On 2 May 2002 the public prosecutor dismissed the complaint, arguing that termination of the criminal proceeding on the basis of §§ 5(1)3) and 168(1)1) of the CCP was legal and justified.

4. On 3 June 2002 V. Zaitsev submitted an action to the Tallinn Administrative Court, requesting that the order on termination of the criminal proceeding be annulled as to the grounds of the order. The complainant was of the opinion that the criminal proceeding should have been terminated on the basis of § 168(1)2) of the CCP. By its judgment of 8 July 2002 the Tallinn Administrative Court declared unconstitutional and did not apply the phrase "if the guilt of the accused in the commission of the criminal offence is not proven" of § 168(1)2) of the Code of Criminal Procedure, because of the conflict thereof with § 22(1) of the Constitution.

JUSTIFICATIONS OF THE COURT AND PARTICIPANTS

5. The Tallinn Administrative Court was of the opinion that the complainant wanted the administrative court to oblige the respondent to remove from the documents of the criminal proceeding the statements, according to which the guilt of the complainant in the commission of the criminal offence is proven.

The Tallinn Administrative Court analysed § 168(1)2) of the CCP and found that the provision was in conflict with the presumption of innocence established in § 22(1) of the Constitution, because the guilt can be proved only by a court judgment, whereas § 168(1)2) of the CCP refers to making pertinent decisions during the pretrial investigation of a criminal matter. § 186(1) of the CCP offers a preliminary investigator the grounds for termination of a criminal proceeding if the guilt of the accused in the commission of the criminal offence is not proven and the collection of additional evidence is impossible. The court found that the provision actually means that a criminal proceeding shall not be terminated if the guilt of the accused in the commission of the criminal offence is proven. Such understanding violates the principle of the presumption of innocence established in § 22(1) of the Constitution, making it a duty of a pretrial investigator to decide, before the court makes a judgment, if a person is guilty in the criminal matter or not.

6. The Chancellor of Justice was of the opinion that § 168(1)2) of the CCP was not relevant for the disposal of the case. Proceeding from § 15(1) of the Constitution a court may declare legislation act unconstitutional and not apply it only if the legislation is decisive for the disposal of the case. A criminal proceeding is terminated on the ground that the limitation period has expired on the basis of § 5(1)3) of the CCP. Other grounds for the termination can not be evoked simultaneously, although upon the resumption of a criminal proceeding on the basis of § 5(3) of the CCP the application thereof in a later stage of the proceeding is not excluded. A criminal proceeding is terminated by an order in which it is justified why the proceeding was terminated specifically on the ground chosen. If the ground for termination of the proceeding is disputed and application of some other ground is requested, it is necessary to justify why the other grounds were not applied. This in itself does not render pertinent provisions relevant.

Secondly, the Chancellor of Justice was of the opinion that § 168(1)2) of the CCP was not in conflict with the principle of presumption of innocence established in § 22(1) of the Constitution. The Chancellor of Justice is of the opinion that the Tallinn Administrative Court has rendered incorrect meaning to § 168(1)2) of the CCP. This provision speaks of a situation wherein the preliminary investigator or the prosecutor finds that enough evidence has been collected to suspect a person in the commission of the criminal offence and there is no reason to terminate the criminal proceeding of the basis of clauses 1) or 2) of § 5(1) of the CCP. The activities of a preliminary investigator and a prosecutor during the ascertainment of the facts of a criminal matter does not violate the presumption of innocence.

7. The Legal Affairs Committee of the Riigikogu is of the opinion that within criminal proceedings the preliminary investigators and prosecutors have the right to decide whether the guilt of person is proved or not. At the same time, the opinion of the preliminary investigator or the prosecutor can not serve as the

ground for regarding this person, outside the frames of the concrete criminal matter, as guilty in the commission of the criminal offence. That is why § 168(1)2) of the CCP is not in conflict with § 22(1) of the Constitution.

8. The Minister of Justice did not support the opinion of the Tallinn Administrative Court. The Minister of Justice pointed out that termination of a criminal proceeding on the ground that the limitation period has expired, is one of the central examples of the application of the principle of rule of law, based on the need to protect an individual - also in the future - against accusations by state bodies. That is why the referred provision is not in conflict with the Constitution, because it means no restriction of rights of the person in regard of whom the referred ground is applied. On the contrary, a person is liberated from the situation wherein the authorities suspect him or her in the commission of a criminal offence. Also, the person is liberated from moral disdain of the society. The function of pretrial investigation is not to prove the guilt of a person but to create an evidential ground for such judgment in court.

9. The Chief Public Prosecutor is of the opinion that § 168(1)2) of the CCP is not in conflict with § 22(1) of the Constitution, because § 168(1)2) of the CCP does not give rise to the conclusion that a person is presumed guilty of a criminal offence until a conviction by a court against him or her enters into force.

10. V. Zaitsev was of the opinion that the Tallinn Administrative Court had wrongly interpreted the principle of presumption of innocence. V. Zaitsev is of the opinion that the presumption of innocence does not express the personal opinion of the official who conducts preliminary investigation, but it reflects the objective legal status of the suspect in different stages of a proceeding in a criminal matter. The reason why his constitutional rights are violated is not the unconstitutionality of the norms of the CCP, but the activities of concrete officials. The result of the failure of the officials to observe norms is the filing of a civil action against V. Zaitsev.

DISPUTED LEGISLATION

11. The Tallinn Administrative Court disputed the constitutionality of § 168(1)2) of the Code of Criminal Procedure (ENSV ÜT 1961, 1, 4 and Appendix; last amendment RT I 2002, 82, 480).

§ 168(1) 2) of the Code of Criminal Procedure establishes the following:

"§ 168. Termination of criminal proceedings

(1) The criminal proceedings shall be terminated if:

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2) if the guilt of the accused in the commission of the criminal offence is not proven, and the collection of additional evidence is impossible."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

12. The Tallinn Administrative Court did not apply and disputed, by way of constitutional review, § 168(1)2) of the CCP , arguing that the provision is in conflict with the presumption of innocence established in § 22(1) of the Constitution.

13. Pursuant to § 15 of the Constitution and § 9(1) of the Constitutional Review Court Procedure Act a court shall declare a legal act unconstitutional and shall not apply it if the court, upon adjudicating a case, comes to the conclusion that the applicable Act or other legislation is in conflict with the Constitution. Thus, within the framework of concrete norm control, the constitutional review court reviews the constitutionality of only applicable, i.e. relevant Acts. The court has to ascertain the constitutionality only when, upon adjudication of a case, a doubt arises as to the constitutionality of a relevant norm. Not all legal norms that participants in the proceeding refer to during the court proceeding may prove to be relevant. Upon assessing the relevance,

the court has to proceed from whether pertinent norm is applicable in the case or not. The disputed provision must be of decisive importance for the disposal of the case (judgment of the Supreme Court *en banc*of 22 December 2000, RT III 2001, 1, 1, paragraph 10). Legislation is of a decisive importance when in the case of unconstitutionality of the legislation a court should render a judgment different from that in the case of constitutionality of the legislation (see judgment of the Supreme Court *en banc* of 28 October 2002, RT III 2002, 28, 308, paragraph 15).

14. That is why, upon examining the petition of the court which did not apply the Act, the Supreme Court shall first of all check whether § 168(1)2) of the CCP was relevant for the disposal of the case. The constitutional review court is entitled to control whether the court which submitted a petition has, upon adjudicating a dispute, applied a provision which is of decisive importance for the disposal of the case. Such control is justified and necessary, because pursuant to § 14(2) of the Constitutional Review Court Procedure Act the Supreme Court can declare unconstitutional or invalid only relevant provisions. Nevertheless, it cannot be assessed within the constitutional review procedure, whether the court which initiated constitutional review proceedings has correctly adjudicated the dispute (see judgment of the Supreme Court *en banc* of 28 October 2002, RT III 2002, 28, 308, paragraph 15).

15. It appears from the materials of the administrative matter that preliminary investigator had terminated the criminal proceeding concerning the activities of V. Zaitsev on the ground that the limitation period had expired. V. Zaitsev disputed the termination of the criminal proceeding on this ground, and applied for the resumption of the proceeding in the criminal matter according to general procedure. Although, on the basis of the complaint of V. Zaitsev, the prosecutor revoked the preliminary investigator's order and resumed the proceeding of the criminal matter, the senior prosecutor in his turn revoked the order on resumption of the criminal proceeding. The senior prosecutor was of the opinion that V. Zaitsev had no right to dispute the termination of the proceeding in the criminal matter, because he had not been declared a suspect. In his complaint to the prosecutor and later, in the administrative court, V. Zaitsev amended his earlier application and requested that the criminal proceeding be terminated on the basis of the grounds referred to in § 168(1)2) because his guilt in the commission of the criminal offence was not proven, and the collection of additional evidence was impossible.

16. The Chamber points out that § 22(1) of the Constitution is applicable not only to those persons who are declared suspects in a criminal proceeding, but also to persons who are treated as suspects in a criminal proceeding. Public prosecutor had commenced a criminal proceeding on the basis of the elements of the criminal offence defined in § 133 of the Criminal Code, which clearly indicates suspicion of the criminal offence. Furthermore, in his letter to V. Zaitsev the Chief Public Prosecutor claimed that his guilt in the commission of the criminal offence was proven. Thus, the Prosecutor's office not only suspected that V. Zaitsev had committed the criminal offence but also considered his guilt proven and that is why he had to be regarded as a suspect.

17. The administrative court failed to pay attention to the fact that the criminal procedure commenced against V. Zaitsev was terminated because of the limitation period was expired, on the basis of § 5(1)3) of the CCP. § 168(1)2) of the CCP, which the court examined, serves as a basis for termination of a criminal proceeding if the guilt of the accused in the commission of the criminal offence is not proven, and the collection of additional evidence is impossible. Termination of a criminal proceeding because of the expiration of limitation period means that the behaviour of a person may have had necessary elements of a criminal offence, but the law does not allow to continue the proceeding and to punish the person. If a person so wishes, the proceeding in the criminal matter must be resumed under § 5(3) of the CCP. If it appears during the pretrial proceeding in a criminal matter that no criminal act has taken place or the act has no necessary elements of a criminal offence or the person is not guilty, the proceeding shall be terminated on the grounds which indicate at the lack of guilt. But if the proceeding continues in the court, at the request of the accused, the court shall decide, whether the person is guilty of the criminal offence he or she is indicted for. Such guarantee, established by law, gives a person who denies his or her guilt the possibility to protect his or her right, established in § 22(1) of the Constitution, not to be presumed guilty of a criminal offence until a conviction by a court against him or her enters into force.

18. An administrative court is not competent to decide on what grounds a criminal proceeding is to be terminated. Termination of a criminal proceeding is within the competence of preliminary investigators and prosecutors, if there exist facts referred to in clauses 1) or 2) of § 168(1) of the CCP. An administrative court can only control the lawfulness of the procedural acts of preliminary investigators and prosecutors, if these infringe upon the fundamental rights and freedoms of a person (see ruling of the Supreme Court *en banc* of 22 December 2000, RT III 2001, 2, 14, paragraph 24).

19. The administrative court was competent to control whether the prosecutor was entitled to terminate the proceeding because of the expiry of the limitation period, when the suspect applied for the resumption of the proceeding. Provisions relevant in this respect are §§ 5(3) and 168(1)1) of the CCP.

20. For the above reasons the Constitutional Review Chamber of the Supreme Court is of the opinion that § 168(1)1) of the CCP, declared unconstitutional by the administrative court, is not relevant; that is why the petition of Tallinn Administrative Court is dismissed.
