Constitutional judgment 3-4-1-2-02

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-2-02
Date of judgment	3 April 2002
Composition of chamber	Chairman Uno Lõhmus, members Tõnu Anton, Lea Kivi, Ants Kull, Jür Põld
Court case	Petition of the Tallinn Circuit Court to declare § 40(3) of Criminal Code partly invalid and § 65(1) of Penal Code unconstitutional.
Date of court session	30 January 2002
Persons participating at session	Chancellor of Justice Allar Jõks and representative of the Minister of Justice Jaanus Ots
Decision	**1. To declare § 40(3) of the Criminal Code partly invalid, omitting the words "unserved part of".** **2. To dismiss the request of the Tallinn Circuit Court to declare § 65(1) of Penal Code unconstitutional.**

FACTS AND COURSE OF PROCEEDINGS

1. By the judgment of the Tallinn City Court of 24 July 2001 Roland Vill was convicted of attempted concealed theft and he was punished by 4-months' imprisonment. The term of serving the sentence was considered to have started as of the date when he was taken into custody, that is on 15 May 2001. R. Vill served the sentence by 14 September 2001, when he was released from prison. On 15 September he was again taken into custody. By judgment of the Järva County Court of 24 October 2001 he was convicted of attempts of theft committed on 2 and 10 March of 2001 (i.e. before the first court session) and he was punished by 8-months' imprisonment. The term of serving the sentence was considered to have started as of the date when he was taken into custody, that is on 15 September 2001.

At the time when the criminal case of R. Vill was pending before the Järva County Court criminal cases against him were also being heard by the Tallinn City Court and the Harju County Court. Irrespective of awareness of the fact the Järva County Court did not join these three criminal matters into one proceeding.

2. R. Vill appealed against the judgment of the Järva County Court. He requested for the mitigation of the punishment, as he was of the opinion that one year of imprisonment imposed on him as a punishment for three attempts of theft was too onerous.

3. By the judgment of the Tallinn Circuit Court of 26 November 2001 the appeal was allowed. The final

punishment imposed on R. Vill for criminal offences ascertained by judgments of the Tallinn City Court and the Järva County Court was 10-months' imprisonment, of which the fully served sentence of 4 months' imprisonment imposed by judgment of the Tallinn City Court of 24 July 2001 was deducted. The final punishment to be served was 6 months' imprisonment and the beginning of the term of serving the sentence was considered to have started on 15 September 2001.

By the same judgment, upon imposing the punishment on R. Vill, the court did not apply § 40(3) of the Criminal Code because of the conflict thereof with § 12 of the Constitution. The court initiated constitutional review proceedings related to the part of § 40(3) of Criminal Code that prescribes for imposition of final punishment proceeding from the unserved part of the sentence imposed previously. The Tallinn Circuit Court requests that § 40(3) of the Criminal Code and § 65(1) of the Penal Code be declared to be in conflict with § 12 of the Constitution.

REASONING OF THE COURT AND PARTICIPANTS

Reasoning of the petitioner

4. The Tallinn Circuit Court reasons its petition as follows.

§ 40 of the Criminal Code prescribes imposition of punishment for the commission of several criminal offences. Application of subsections (1) and (3) of this § does not render it possible to treat persons accused at trial equally. A final punishment on a person on whom punishments are imposed for the commission of several criminal offences in one judgment, can be imposed by regarding the less severe punishment to be imposed by the imposition of the more onerous one, or by partly or wholly adding up the punishments (§ 40(1) of Criminal Code). But if a punishment is imposed on a person for the aggregate of crimes by two judgments (so called aggregate of crimes ascertained later), § 40(3) of Criminal Code is applicable. Pursuant to the wording of the provision the court shall add, fully or partly, the unserved part of a previously imposed punishment to the subsequently imposed punishment or shall regard the less severe punishment to be imposed by the imposition of the more onerous punishment. In reality the possibility to regard the less severe punishment to be imposed by the imposition of the more onerous punishment is excluded, because the court has to proceed not from the previously imposed punishment but from the unserved part thereof. In regard of persons who have already fully served the sentence imposed by a previous judgment it is only possible to add up the punishments imposed for the aggregate of crimes wholly (the possibility of regarding a served punishment as a part of the final punishment to be served is excluded).

The fact whether a punishment for several criminal offences is imposed on a person by one or several judgments does not necessarily depend on the person accused at trial. The fact that criminal offences committed by one and the same person are investigated and heard within the framework of different criminal cases is rather caused by the omissions of law enforcement authorities. Subsections (1) and (3) of § 40 of the Criminal Code are in conflict with each other and the unequal treatment of persons resulting from this conflict is unconstitutional.

In its judgment the circuit court also analyses the constitutionality of § 65(1) of the Penal Code, passed on 6 June 2001 but not yet in force. According to § 65(1) of the Penal Code, upon subsequent imposition of aggregate punishment, courts have to proceed from the unserved part of the punishment imposed by the previous judgment. On the motives described above this provision, too, is unconstitutional.

The circuit court argued that it would be expedient to examine the referred provisions of the Criminal Code and the Penal Code together within the constitutional review case, because the declaration of unconstitutionality of § 40(3) of the Criminal Code would also mean the declaration of unconstitutionality of § 65(1) of the Penal Code.

Reasoning of participants

5. The Legal Affairs Committee of the Riigikogu is of the opinion that § 40(3) of the Criminal Code and §

65(1) of the Penal Code are not in conflict with § 12 of the Constitution.

6. The Chancellor of Justice is of the opinion that upon imposition of punishment a court can not treat persons equally under subsections (1) and (3) of § 40 of the Criminal Code. If a judgment is made during the period when a person is serving his or her sentence, in the case of certain terms of punishment it would be impossible to add up the punishments, if the unserved part of the previously imposed punishment is smaller than the punishment imposed subsequently. If a judgment is made after the sentence is served, the partial adding up of punishments is not at all possible. § 40 (3) of the Criminal Code is in conflict with § 12 of the Constitution as far as it concerns the adding up of punishments when the sentence is being or has been served.

Also, it is impossible to treat equally persons whose punishments are added up under §§ 65(1) or 64(1) of the Penal Code. In the latter case it is possible to consider the less severe punishment as imposed by the imposition of the more onerous one. There is no such possibility under § 65(1) of the Penal Code and that is why the provision is in conflict with § 12(1) of the Constitution to the extent that it relates to partial adding up of punishments and excludes the possibility to regard a punishment as being imposed by the imposition of another.

The Chancellor of Justice points out that if, upon providing for unequal treatment, the legislator aimed at inducing a person at trial to confess all criminal offences committed by him or her, then it is in conflict with § 22(3) of the Constitution, pursuant to which no one shall be compelled to testify against himself or herself, or against those closest to him or her.

7. The Minister of Justice is of the opinion that § 40(3) of the Criminal Code and § 65(1) of the Penal Code are in conflict with § 13(2) of the Constitution, as the punishment to be imposed is made dependant on the activities of the state upon detection and prosecution of criminal offences. This amounts to the violation of prohibition on the state to act arbitrarily for the purposes of § 13(2) of the Constitution, which is manifested in a situation where the law makes it possible to unjustifiably treat persons differently, in several ways, depending on chance or discretion of the executive power.

The disputed law not applied

8. The Criminal Code (RT I 2001, 73, 452) reads as follows:

§ 40 Imposition of punishment for the commission of several crimes
(3) If, after the making of judgment, it is ascertained that the convicted person is guilty of another criminal offence specified in the special part of this Code, which he or she has committed before the judgment was made in the first case, the court shall add the unserved part of previously imposed punishment wholly or partly to the subsequently imposed punishment or shall consider the less severe punishment to be imposed by the imposition of the more onerous one.

9. The Penal Code (RT I 2001, 61, 364):

§ 65. Subsequent imposition of aggregate punishment
(1) If commission of another criminal offence by a convicted offender is ascertained after the making of the court judgment but before the sentence is served in full, the unserved part of the sentence imposed by the previous judgment shall be wholly or partially added to the punishment imposed by the new judgment, whereas the aggregate punishment shall exceed the unserved part of the punishment imposed by the previous court judgment. Except in the cases provided for in subsections (2) and (3) of this section, the maximum term of imprisonment imposed for a specified term as an aggregate punishment shall not exceed thirty years.

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

I.

10. This case relates to the principles of imposition of criminal punishments. According to the Criminal Code, when imposing a punishment, it shall be taken into consideration whether the accused at trial has committed one or several criminal offences. Naturally, if a person has committed several crimes, a separate punishment for each criminal offence must be imposed on him or her. Nevertheless, the punishments imposed on the convicted for the commission of several criminal offences can not be added up mechanically. This possibility is excluded by the rule provided in § 43 of the Criminal Code, which limits the overall term of a sentence. That is why special provisions regulate imposition of punishment for several criminal offences.

11. The special provisions regulating imposition of punishments take into consideration first and foremost whether the repeated criminal offences were committed prior to or subsequently to conviction of a criminal offence. If criminal offences had been committed before the conviction, this amounts to imposition of punishment for the aggregate of crimes, which is regulated by § 40 of the Criminal Code. But if a person commits a criminal offence subsequently to a judgment of conviction but before he or she has fully served the sentence, a punishment shall be imposed on him or her according to the rules provided in § 41 of the Criminal Code. In either case a single final punishment is imposed on the person.

12. § 40(1) of the Criminal Code determines the aggregate of criminal offences as a commission of two or more criminal offences specified in various sections of the Criminal Code by one and the same person, who has not previously been convicted of any of these criminal offences. Firstly, a court shall impose a punishment for each of the criminal offences and then a final punishment for the aggregate of criminal offences so that the criminal offences of the aggregate of crimes are re-qualified as more onerous punishments and are considered as imposed by more onerous punishment or are added up in full or partly.

13. The so called aggregate of crimes ascertained subsequently is a special type of aggregate crimes (§ 40(3) of Criminal Code). This occurs when after the making of the court judgment it is ascertained that the person is also guilty of another criminal offence, which he or she has committed before the making of the judgment concerning the former criminal offence. The other criminal offence may have been committed prior to or after the criminal offence of which the person had been convicted by the first court judgment. It is also possible that both criminal offences were committed simultaneously.

14. According to the wording of § 40 of the Criminal Code in force until 5 February 1996 a punishment for the subsequently ascertained aggregate of crimes was imposed on the same basis as in other cases of aggregate of crimes, irrespective of whether the convicted person had fully or partially served the sentence imposed by the first court judgment. According to the amendment of law in force since 5 February 1996 the served part of sentence imposed earlier shall not be taken into consideration when imposing a punishment for subsequently ascertained aggregate of crimes. Thus, the amendment of the Act prescribed for differences upon imposing punishments for subsequently ascertained aggregate of crimes as compared to other cases of aggregate crimes, which brought about unequal treatment of persons convicted of criminal offences.

15. In its judgment of 5 December 2001 in case no. 3-1-1-111-01 (RT III 2002, 1, 4) the Criminal Chamber of the Supreme Court pointed out that the courts have to guarantee a situation where "under criminal law the treatment of persons who had committed several crimes before the making of the first judgment is equal irrespective of whether for these criminal offences a punishment was imposed by one judgment (under § 40(1) of Criminal Code) or by several judgments (under § 40(3) of Criminal Code)." In order to achieve this result, "when imposing a final punishment, a court must, at least mentally, take into consideration the served part of the sentence imposed by the previous judgment, although this does not expressly proceed from § 40(3) of the Criminal Code". Thus, the Criminal Chamber suggested that the courts interpret § 40 of Criminal Code in a manner that would exclude unequal treatment of convicted persons. In its petition to the Supreme Court the circuit court, on the other hand, rises the issue of conformity of § 40(3) of the Criminal Code to § 12 of the Constitution.

II.

16. The Constitutional Review Chamber observes first of all that the first sentence of § 12(1) of the Constitution does not expressly refer to a subjective right. It only states that everyone is equal before the law. Nevertheless, these words embrace the right of a person not to be treated unequally. The wording of the first sentence expresses, above all, the equality upon application of law and means a requirement to implement valid laws in regard of every person impartially and uniformly. In the present case the right to equality upon application of law has not been disputed.

17. The Chamber shares the opinion that the first sentence of § 12(1) of the Constitution is to be interpreted as also meaning the equality in legislation. The equality in legislation requires, as a rule, that persons who are in similar situations must be treated equally by law. This principle expresses the idea of essential quality: those, who are equal have to be treated equally and those who are unequal must be treated unequally. But not any unequal treatment of equals amounts to the violation of the right to equality. The prohibition to treat equal persons unequally has been violated if two persons, groups of persons or situations are treated arbitrarily unequally. An unequal treatment can be regarded arbitrary if there is no reasonable cause therefor.

The Chamber admits that although the review of arbitrariness is extended to the legislator, the latter must be awarded a wide margin of appreciation. If there is a reasonable and appropriate cause, unequal treatment in legislation is justified.

18. The principle of equality requires that all persons who have not been convicted of the commission of a criminal offence must be treated in like manner irrespective of the fact whether the court hearing of criminal offences committed by the person takes place at one court session or at different times in different courts.

Next, the question of whether the legislator had a reasonable cause to treat the accused at trial differently has to be answered.

The Supreme Court observes that the legislator has not given any justifications as to the objectives of establishing such unequal treatment. A presumable objective might be making penal procedure more efficient - to induce the accused at trial to confess all the criminal offences committed by him or her to avoid more onerous punishment. According to § 22(3) of the Constitution no one shall be compelled to testify against himself or herself, or against those closest to him or her. Moreover, there are several other reasons why the criminal offences committed by one and the same person are investigated and heard within different criminal cases at different times in different courts. These reasons are not always related to the behaviour of the guilty, sometimes these stem from the activities or omissions of the state in criminal proceedings. This allegation is supported by the fact that in the case under discussion the Tallinn Circuit Court ascertained that irrespective of the possibility and necessity the three different criminal cases of R. Vill were not joined into one proceeding and the criminal offences committed by him were not heard jointly.

Considering the aforesaid the Chamber is of the opinion that there is no reasonable cause to treat such persons unequally and thus § 40(3) of the Criminal Code, to the extent that upon imposing the final punishment it allows only to take into consideration the unserved part of the sentence imposed by a previous court judgment, is in conflict with the first sentence of § 12(1) of the Constitution.

III.

19. Tallinn Circuit Court has also requested that § 65(1) of the Penal Code be declared unconstitutional to the extent that it coincides with the unconstitutional norm - § 40(3) of the Criminal Code. The Penal Code has not yet entered into force and it is not possible, within this case, to declare the provision unconstitutional and invalid. Nevertheless, the Constitutional Review Chamber considers it necessary to point out that analogously with the valid Criminal Code the Penal Code also treats differently persons to whom an aggregate punishment is imposed immediately and persons to whom an aggregate punishment is imposed later. Unequal treatment is also possible against persons who have served the sentence imposed by a previous court judgment or whose unserved punishment is not allowed to be considered to be imposed by

imposition of the most onerous one.
