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## constitutional-judgment-5-23-36

S U P R E M E C O U R T

CONSTITUTIONAL REVIEW CHAMBER

### COURT ORDER

Case number	5-23-36
Date of order	13 December 2023
Judicial panel	Chairman: Villu Kõve; members: Hannes Kiris, Julia Laffra and Urmas Volens
Case	An appeal by XX seeking a declaration of unconstitutionality of clause 3 of the Code of Criminal Procedure insofar as it does not allow the accused to contest a judgment of conviction of the circuit court through an appeal in cassation to the Supreme Court drawn by defense counsel in the capacity of appellant
Manner of examination	Written procedure

### OPERATIVE PART

**1. To decline to examine the appeal by XX.**

**2. To replace the appellant's name in the published decision with an alphabetical character.**

## **FACTS AND COURSE OF PROCEEDINGS**

**1.** By judgment of 3 June 2022 in criminal case No 1-21-1421, Harju County Court convicted XX (hereinafter also called 'the appellant') under § 235<sup>1</sup>, § 234<sup>2</sup>(1) and § 183(2) clause 2 of the Penal Code and sentenced them to eight years and six months' imprisonment.

**2.** By judgment of 25 October 2022, Tallinn Circuit Court of Appeal upheld the appellant's conviction and sentence.

**3.** On 23 November 2022, attorney-at-law Sven Sillar, in the capacity of XX's defence counsel, lodged an application with the Supreme Court signed by him and titled "Appeal in cassation by XX currently an inmate at Tallinn Prison", asking the appeal to be treated as an appeal in cassation by the accused submitted through an attorney or, alternatively, treat the application as a supplement to counsel's appeal in cassation. The application asserted that § 344(3) clause 3 of the Code of Criminal Procedure (CCrP) also entitles the accused, as a party to judicial proceedings, to lodge an appeal with the Supreme Court if they do so through an attorney. Counsel noted that he retyped the appellant's appeal and was intermediating the appeal in cassation to the Supreme Court.

**4.** On 24 November 2022, counsel submitted his appeal in cassation to the Supreme Court in criminal case No 1-21-1421.

**5.** By order of 28 February 2023, the Supreme Court Criminal Chamber accepted for proceedings the appeal in cassation submitted by counsel but declined to examine the appeal by XX because the appellant has no right to lodge an appeal in cassation with the Supreme Court.

**6.** On 16 June 2023, as a result of examination of the criminal case based on the appeal by counsel, the Supreme Court Criminal Chamber delivered a judgment, declining, inter alia, to examine the supplement to counsel's appeal in cassation. The Criminal Chamber explained that, under § 344(3) clause 3 of the CCrP, an accused has no right of appeal in cassation. Under § 344(3) of the CCrP, the right to lodge an appeal with the Supreme Court is enjoyed by the prosecutor's office (clause 1), defence counsel who is an attorney (clause 2), other parties to judicial proceedings through an attorney (clause 3). Other parties to judicial proceedings within the meaning of § 344(3) clause 3 of the CCrP should be understood as including a victim, a civil defendant, and a third party, but not the accused. Only an attorney or another person with legal knowledge who is the accused's defence counsel within the meaning of the CCrP has the right and duty to defend the accused's interests in criminal proceedings. Instead of or alongside defence counsel, the accused in criminal proceedings cannot be represented by an attorney who does not have the powers of defence counsel. Under §

17(1) of the CCrP, defence counsel in person is a party to judicial proceedings and participates in proceedings on their own behalf, while the accused can exercise the right of appeal in cassation only by instructing counsel who is an attorney to that effect, but not under § 344(3) clause 3 of the CCrP. Nor can an application titled an appeal in cassation by XX be treated as a supplement to an appeal in cassation by counsel. The application stating that it was drawn up by the accused and that counsel's role was only limited to retyping the document, signing it and sending it to the Supreme Court, does not constitute an appeal in cassation by counsel. Section 344(3) clause 2 of the CCrP presumes that an attorney in the capacity of counsel should – in the frame of provision of a legal service complying with the requirements of § 40(2) of the Bar Association Act and based on their legal knowledge – have examined all applications to be filed as part of an appeal in cassation and submitted them to the Supreme Court in their own name. The application appended to the appeal in cassation in the present case does not comply with this requirement (see Supreme Court Criminal Chamber judgment of 16 June 2023 in case No 1-21-1421 [1]/182, paras 55 and 56).

**7.** On 29 June 2023, counsel filed a supplement to the appeal in cassation and requested restoration of the deadline for its submission, stating, inter alia, that in lodging XX's appeal he "perhaps somewhat too adventurously tested the limits of an ambiguous law". Additionally, counsel noted: "This criminal case has shown that the legislator has ambiguously laid down exercise of the right of appeal in cassation by the accused as set out in § 344(3) clause 3 of the CCrP. Only by the judgment of 16 June 2023 did the Supreme Court's interpretation create an understanding that the provision in question does not actually apply to the accused – even though this is what is written in the norm in § 17 of the CCrP – since otherwise the provision of § 344(3) clause 2 of the CCrP would become void of substance. No such application practice for this norm existed before the above judgment."

**8.** By order of 30 June 2023, the Supreme Court Criminal Chamber denied counsel's applications to restore the deadline for submission of the supplement to the appeal in cassation and to resume the appeal proceedings before the Supreme Court, and declined to examine counsel's supplement of 29 June 2023 to the appeal in cassation.

**9.** On 14 July 2023, counsel lodged an appeal with the Supreme Court against the Supreme Court Criminal Chamber order of 30 June 2023, which the Supreme Court Criminal Chamber declined to examine by order of 10 August 2023.

**10.** On 2 August 2023, the appellant lodged an application with the Supreme Court titled an individual complaint for constitutional review, seeking a declaration of incompatibility of § 344(3) clause 3 of the CCrP with § 24(5) and § 13 of the Constitution insofar as it does not enable the accused to contest a judgment of conviction of the circuit court of appeal through an appeal in cassation to the Supreme Court drawn up and signed by counsel in the capacity of appellant. The appellant also requests an award of legal expenses incurred in connection with lodging the complaint, stating that the amount of the expenses is to be specified in the course of proceedings.

## **THE POSITION OF THE APPELLANT**

**11.** Since in the judgment in criminal case No 1-21-1421 the Supreme Court Criminal Chamber relied on § 344(3) clause 3 of the CCrP for the first time, neither the appellant nor their counsel was able to raise the issue of the constitutionality of this provision during the case proceedings. For this reason, the appellant may raise the issue of the constitutionality of the said provision through an individual complaint for constitutional review lodged with the Supreme Court Constitutional Review Chamber.

**12.** Under § 344(3) of the CCrP, in a criminal case the right to lodge an appeal in cassation with the Supreme Court is enjoyed by the prosecutor's office, defence counsel who is an attorney, and other parties to judicial proceedings through an attorney. In line with § 17 of the CCrP, the accused is also a party to judicial proceedings.

**13.** In the judgment in criminal case No 1-21-1421, the Supreme Court Criminal Chamber interpreted § 344(3) clause 3 of the CCrP so that the accused does not have the right to lodge an appeal in cassation through the intermediation of counsel in the capacity of appellant, but may do so separately from counsel. Thus, since delivery of that judgment the force of law (§ 2 clause 4 CCrP) has been given to the interpretation of the Supreme Court stating that the accused cannot make submissions signed by an attorney who is their counsel to contest the judgment of a circuit court of appeal. The said norm of the CCrP along with the interpretation given to it by the Court interferes with the accused's fundamental right under § 24(5) of the Constitution to appeal a judgment rendered in their case to a higher court in accordance with the procedure laid down by law.

**14.** In line with the letter and spirit of § 24(5) of the Constitution, a person must be guaranteed the right of appeal in order to challenge a judgment of conviction entered against them in a criminal case. From a legal-philosophical point of view, the legislator has no justification in restricting a right granted to an individual by the Constitution. Since the legislator had no right to disregard the provisions of the Constitution, it did not expressly exclude the accused's right of appeal under § 344(3) clause 3 of the CCrP, but stipulated the right of the accused as a party to proceedings to lodge an appeal in cassation through an attorney. In view of the logic of the CCrP, that attorney in criminal proceedings is to be understood as the accused's defence counsel. However, in case No 1-21-1421, the Supreme Court noted that the norm in question does not enable the accused to exercise the right under § 24(5) of the Constitution to independently lodge an appeal in cassation through an attorney in the capacity of counsel. Thus, in view of the interpretation given by the Supreme Court, § 344(3) clause 3 of the CCrP contravenes the Constitution.

**15.** The Supreme Court must also assess the compatibility of § 344(3) clause 3 of the CCrP with the constitutional principle of legal clarity. That provision expressly states that a party to proceedings who is not a prosecutor or defence counsel may lodge an appeal in cassation against a judgment of the circuit court of appeal through an attorney. A situation where, in accordance with the Constitution, substantive law confers on the accused the right to lodge an appeal in cassation against a judgment of the circuit court of appeal, but the interpretation of the Supreme Court excludes that right, is contrary to the requirement of legal clarity.

## CONTESTED PROVISION

**16.** Section 344(3) of the Code of Criminal Procedure:

“(3) The following enjoy the right to lodge an appeal in cassation:

- 1) the prosecutor’s office;
- 2) defence counsel who is an attorney;
- 3) other parties to judicial proceedings – through an attorney.”

## OPINION OF THE CHAMBER

**17.** The appellant has had recourse to the Supreme Court, seeking a declaration of unconstitutionality of § 344(3) clause 3 of the CCrP insofar as it does not enable the accused to contest a judgment of conviction of the circuit court of appeal through an appeal in cassation drawn up and signed by counsel in the capacity of appellant. This constitutes an individual complaint for constitutional review against a judicial procedural rule applied in respect of the appellant in criminal judicial proceedings. By relying on the contested provision, in criminal case No 1-21-1421 the Supreme Court Criminal Chamber declined to examine the appeal in cassation lodged by the appellant as the accused against the judgment of conviction of the circuit court of appeal.

**18.** In line with long-standing Supreme Court case-law, lodging an individual complaint is only permissible if the appellant’s subjective rights have been violated and they lack any other effective means to invoke the right of recourse to the courts to protect their rights ensured under the first sentence of § 15(1) of the Constitution. If the appellant has at their disposal another effective remedy to protect their fundamental rights, an individual complaint is inadmissible regardless of whether the appellant invoked it or not (Supreme Court case-law since the judgment of 17 March 2003 of the Court *en banc* in case No 3-1-3-10-02 [2], para. 17; most recently Supreme Court Constitutional Review Chamber order of 29 May 2023 No 5-23-15/4 [3], para. 4). The Supreme Court has also held that, regardless of whether a person had another effective remedy at their disposal, a complaint is only permissible if the alleged interference with a subjective right is significant (Supreme Court Constitutional Review Chamber judgment of 3 March 2015 in case No 3-4-1-60-14 [4], paras 18 and 19).

**19.** A person who finds that a norm in a legislative act violates their rights can apply for review of the constitutionality of the norm, first and foremost within the court case in which the norm needs to be applied (second sentence of § 15(1) of the Constitution). A person can challenge the constitutionality of a restriction on recourse to the court within the judicial proceedings in which the provision in dispute should be applied. The same conclusion should be reached in a situation where access to a court is hindered by the absence of a procedural rule, not by a restrictive rule (see Supreme Court Constitutional Review Chamber order of 3 March 2011 in case No 3-4-1-15-10 [5], para. 13; Supreme Court Constitutional Review Chamber order of

21 March 2022 No 5-22-11/4 [6], para. 13). The judicial panel deciding on the admissibility of a complaint, including an appeal for cassation, has an absolute obligation ex officio to check the constitutionality of all the applicable rules. Under § 15 and § 152 of the Constitution, when adjudicating a case every court must assess the constitutionality of applicable law (see e.g. Supreme Court Constitutional Review Chamber order of 27 January 2017 in case No 3-4-1-14-16 [7], para. 26; Supreme Court Constitutional Review Chamber order of 7 November 2022 No 5-22-7/4 [8], para. 30).

**20.** The appellant considers that § 344(3) clause 3 of the CCrP unconstitutionally interferes with their right of appeal ensured under § 24(5) of the Constitution, nor is the provision legally clear (incompatibility with § 13 of the Constitution). However, the appellant asserts that neither they nor their counsel could raise the issue of the constitutionality of the disputed provision in cassation proceedings, since the Supreme Court Criminal Chamber relied on § 344(3) clause 3 of the CCrP for the first time in the judgment in criminal case No 1-21-1421.

**21.** In the opinion of the Chamber, by submitting an individual complaint, the appellant is seeking an amendment of the final judgment delivered in criminal proceedings. The Constitutional Review Chamber is not a jurisdiction above the other Supreme Court chambers to which appeals can be lodged against decisions of the civil, criminal or administrative law chamber, which is why the Constitutional Review Chamber cannot assess the legality and constitutionality of a decision reached by another Supreme Court chamber (see the cited order No 5-22-7/4 [8], para.30).

**22.** The contested provision is not lacking legal clarity and, in the opinion of the Chamber, its application could not have been unforeseeable for the appellant or their counsel, since the Supreme Court has repeatedly expressed similar substantive views in the past. Paragraph 7 of the Supreme Court Criminal Chamber order of 17 February 2010 in case No 3-1-1-9-10 [9] states as follows: “Section 344(3) of the CCrP sets out the list of people entitled to lodge an appeal in cassation. Use of the right of appeal in cassation in the interests of the accused is regulated by § 344(3) clause 2 of the CCrP – in that case the attorney who is the person’s counsel lodges the appeal in cassation in their own name, so that the attorney is also responsible for its content and compliance with the requirements of the law. Section 344(3) clause 3 of the CCrP, to which reference is made in the interim appeal, regulates lodging an appeal in cassation in the interests of the persons mentioned in § 344(2) and (2<sup>1</sup>) of the CCrP (a victim, civil defendant, and a third party), and even in that case only the attorney representing that person may lodge the appeal in cassation. As the Supreme Court mostly resolves legal issues, the legislator has proceeded from the understanding that only a professional lawyer with a presumably thorough legal knowledge – either a prosecutor or an attorney – can apply to the Supreme Court with an appeal in cassation or an interim appeal. Only those persons can also defend their positions at an oral hearing in the Supreme Court” (see also Supreme Court Criminal Chamber order of 27 March 2006 in case No 3-1-1-26-06 [10]; order of 10 September 2007 in case No 3-1-1-35-07 [11], para. 1; judgment of 21 October 2011 in case No 3-1-1-74-11 [12], para. 10). The view that, under § 344(3) of the CCrP, the accused has the right to lodge an appeal in cassation only through counsel who is an attorney has also been expressed in the legal literature (Kriminaalmenetluse seadustik, kommenteeritud väljaanne, [Code of Criminal Procedure. Annotated Edition] Tallinn 2012, § 344, para. 13). Thus, XX and their counsel could raise the issue of the constitutionality of § 344(3) clause 3 of the CCrP in the appeal in cassation lodged with the Supreme Court.

**23.** In the criminal proceedings against the appellant, defence counsel lodged an appeal in cassation, which was accepted for proceedings and examined by the Criminal Chamber of the Supreme Court. Thus, the

appellant was able to exercise their right of appeal through an appeal in cassation filed by counsel.

**24.** As to whether the interference alleged in the complaint was significant, the Chamber notes the following. Under § 24(5) of the Constitution, in accordance with the procedure laid down by law, everyone is entitled to appeal a judgment rendered in their case to a higher court. The Chamber agrees with the appellant that § 344(3) clause 3 of the CCrP, which precludes the right of the accused to lodge an appeal in cassation with the Supreme Court, interferes with this fundamental right, but this does not mean that interference with the fundamental right contravenes the Constitution. It does not follow from the Constitution that a person must in any case be able to exercise the right of appeal by personally and directly submitting an appeal in cassation to the Supreme Court. The fundamental right laid down by § 24(5) of the Constitution is subject to a simple statutory reservation and the legislator is competent to restrict that right based on reasonable justifications (see e.g. Supreme Court *en banc* judgment of 12 April 2011 in case No 3-2-1-62-10 [13], para. 38).

**25.** Similarly to the exercise of the right of recourse to the courts (§ 15(1) Constitution), exercise of the right of appeal is not an end in itself but a means for ensuring protection of other rights without gaps and effectively through judicial proceedings (e.g. Supreme Court *en banc* judgment of 12 April 2016 in case No 3-3-1-35-15 [14], para. 25). The Criminal Chamber of the Supreme Court has explained that the legislator, in imposing a restriction on the accused's right of appeal, has proceeded from the understanding that the Supreme Court predominantly resolves legal issues, which is why only a professional lawyer with a presumably thorough legal knowledge – either a prosecutor or an attorney – can apply to the Supreme Court with an appeal in cassation. An attorney-at-law serving as counsel is the accused's representative in lodging an appeal in cassation, and exercises the accused's right under § 24(5) of the CCrP on the accused's behalf. In doing so, counsel must ascertain the views of the accused and draw up the appeal in cassation in line with the accused's interests and the requirements of the law (cited order in case No 3-1-1-9-10 [9], paras 7 and 9). The individual complaint does not allege that counsel has failed to fulfil those duties. Nor has it been argued that, as a result of the contested restriction on the right of appeal, the appellant's rights in the cassation proceedings were not sufficiently protected due to other reasons.

**26.** Since the appellant has failed to show what constituted significant interference with their fundamental rights in a situation where their counsel was able to lodge an appeal in cassation, and where XX and their counsel were able to raise the issue of the constitutionality of § 344(3) clause 3 of the CCrP in cassation proceedings, the Chamber declines to examine the individual complaint and returns it to the appellant. Since the complaint is not examined, examination of the application for reimbursement of procedural expenses, which is part of the complaint, is also declined.

(signed digitally)

**Dissenting opinion of Supreme Court Justices Villu Kõve and Urmas Volens to the order delivered in case No 5-23-36**

1. We concur with the reasoning of the order (in particular paras 22–26) to the effect that the contested regulatory provisions of the Code of Criminal Procedure (CCrP), which preclude the right of appeal in cassation by the accused against a circuit court of appeal judgment in respect of them, do not contravene the Constitution. However, we do not agree with the operative part of the resolution that declines to examine the complaint, instead of denying it.

2. We agree with the majority of the judicial panel, as well as with the interpretation of the Criminal Chamber of the Supreme Court, that § 344(3) of the CCrP does not allow the accused personally to lodge an appeal in cassation, but enables doing so only as a subject of independent proceedings launched by the accused's counsel (para. 22 of the order). For this reason, the Criminal Chamber in itself rightly declined to examine the appellant's appeal in cassation. The norm precluding lodging the complaint undeniably interferes with the accused's fundamental right of appeal under § 24(5) of the Constitution. In the application to the Constitutional Review Chamber, the appellant requested assessment of the constitutionality of their lack of standing.

3. In its order, the judicial panel essentially resolved the appellant's application, holding that the lack of standing was not unconstitutional. However, this amounts to a substantive assessment of the constitutionality of a legal norm, which, in our view, the Constitutional Review Chamber can only offer by a judgment on the merits but not by declining to examine the complaint.

4. In our opinion, previous case-law of the Supreme Court on the admissibility of lodging an individual complaint is ambiguous and even contradictory, and the present order further exacerbates this ambiguity. Specifically, in the judgment in case No 3-1-3-10-02 the Supreme Court *en banc* found that lodging an individual complaint is only permissible if the appellant's subjective rights have been violated and they lack any other effective means to invoke the right of recourse to the courts to protect their rights ensured under the first sentence of § 15(1) of the Constitution. As rightly noted in para. 18 of the order, this position has also been followed at least in general in subsequent long-standing Supreme Court case-law where the right to lodge an individual complaint has unfortunately always been denied. A clear exception was the Supreme Court order in constitutional review case No 3-4-1-60-14, in which the Court found, in paras 18 and 19, that regardless of whether a person had another effective remedy at their disposal, the complaint is only permissible if the alleged interference with a subjective right is significant (see para. 18 of the order). In our opinion, that interpretation deviates from the Supreme Court *en banc* judgment and, essentially, it is a completely new concept where the right to lodge an individual complaint was actually denied because the complaint had no prospect of success. The present order essentially relies on both interpretations in parallel, without distinguishing between them. Actually, it now remains unclear whether the appellant's complaint is left unexamined because they had another effective remedy at their disposal, as can be concluded from para. 19 of the order, or because, even though the appellant had standing, the complaint was seen as having no prospect of success since the majority of the judicial panel believes that the absence of the right to lodge a personal appeal in cassation is constitutional, as can be concluded from paras 22–26 of the order.

5. We are of the opinion that the appellant's complaint should have been resolved in substance. In general,

we support the Chamber's long-standing practice of a negative attitude to the admissibility of an individual complaint in our constitutional review arrangements, since in most cases a possibility of relying on the unconstitutionality of a norm relevant to adjudication of the case is indeed available at the latest when appealing against the court decision. However, exceptions to the rule exist, and these should be acknowledged. The exception, in our opinion, are the procedural rules of the Supreme Court itself, in particular the rules on jurisdiction to resolve complaints, for the review of whose constitutionality no regular appeal procedure exists if examination of the complaint was declined.

**6.** For us, the argument set forth in para. 19 of the order, which the Constitutional Review Chamber has used repeatedly in the past, is not convincing. That is, the argument that the constitutionality of lack of standing was probably also assessed by the relevant chamber of the Supreme Court which refused to hear the complaint, in this case the Criminal Chamber. First of all, no such assessment can be inferred from anything. Second, the Criminal Chamber could not have recognised standing without declaring its absence as unconstitutional. However, the Criminal Chamber has no competence to do so, and in case of doubt, the only option would have been to refer the whole matter to the Supreme Court *en banc*. Thus, in a specific constitutional review, assessment of the procedural rules of the Supreme Court by the Constitutional Review Chamber of the Supreme Court is essentially excluded, i.e. in fact, the Supreme Court chamber hearing an appeal in cassation has exclusive competence to assess the constitutionality of a procedural rule of the Supreme Court.

**7.** In our opinion, the current practice should have been changed. Although the Constitutional Review Chamber is not superior to other chambers of the Supreme Court as regards interpretation and application of norms, nevertheless only this chamber has the right to bindingly assess the constitutionality of norms. In essence, the other chambers can only express their opinion on this. Inevitably our relatively unique constitutional review system means that, in the Supreme Court, it is primarily the Constitutional Review Chamber and, in exceptional cases, also the Court *en banc*, that perform the functions of the constitutional court. At the moment, however, the opposite situation has developed with regard to the procedural rules of the Supreme Court, where the Constitutional Review Chamber has essentially been deprived of its constitutional powers. In a situation where the judicial panel adjudicating the appeal in cassation does not see or does not even consider the unconstitutionality of the applicable procedural rule, the appellant does not have at their disposal an effective procedure to protect their constitutional rights.

**8.** The interpretation of the majority of the panel that the complaint should be considered as essentially an attempt to challenge the final judgment reached in the criminal case, which cannot be done outside the cassation proceedings (para. 21 of the order), is incorrect. However, an individual complaint can only be directed at assessing the constitutionality of a norm or its absence, and the Constitutional Review Chamber cannot adjudicate an appeal against a judgment. In theory, satisfaction of the appellant's individual complaint could only have resulted in the appellant's right to apply for reversal of the order declining to examine the appeal in cassation by way of reopening the case (*teistmine*) and for the right to apply for a new examination of the appeal in cassation (§ 366 clause 6 CCrP). At the same time, the Criminal Chamber might, even in that case, decline to accept the appeal in cassation for proceedings on the basis of the so-called sovereign right to refuse to proceed (§ 349(3) CCrP).

(signed digitally)

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