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

*EN BANC*

**JUDGMENT**
in the name of the Republic of Estonia

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| **Case number** | 5-24-3 |
| **Date of judgment** | 19 December 2024 |
| **Judicial panel** | Chair Villu Kõve, members Velmar Brett, Oliver Kask, Hannes Kiris, Ants Kull, Kai Kullerkupp, Julia Laffranque, Saale Laos, Vahur-Peeter Liin, Heiki Loot, Kaupo Paal, Ivo Pilving, Paavo Randma, Kalev Saare, Juhan Sarv, Heili Sepp, Nele Siitam, Urmas Volens and Margit Vutt |
| **Case** | Review of the constitutionality of the sanction under § 141(2) clause 1 of the Penal Code |
| **Basis for proceedings** | Tartu Circuit Court of Appeal judgment of 11 April 2019 in administrative case No 1-23-2431 |
| **Participants in the proceedings** | Riigikogu<br>The accused XX<br>Counsel, attorney-at-law Tarmo Pilv<br>Prosecutor's Office<br>Victim, representative attorney-at-law Sirje Must<br>Chancellor of Justice<br>Minister of Justice and Digital Affairs<br>Government of the Republic |
| **Examination of the case** | Written procedure |

## OPERATIVE PART

**1. To decline to declare § 141(2) clause 1 of the Penal Code unconstitutional and invalid.**

**2. To replace the accused's name in the published judgment with an alphabetical character.**

## FACTS AND COURSE OF PROCEEDINGS

**1.** These proceedings were initiated by the Tartu Circuit Court of Appeal by its judgment of 29 April 2024 in criminal case No 1-23-2431 (the main case) on the basis of § 9(1) of the Constitutional Review Court Procedure Act (CRCPA).

### The facts of the main case

*Judgment of the District Court*

**2.** On 16 August 2023, Tartu District Court found XX guilty and sentenced him to six years and three months' imprisonment under § 141(2) clause 1 of the Penal Code. As the criminal matter was heard in abridged proceedings, the court reduced the imprisonment by one-third to four years and two months pursuant to § 238(2) of the Code of Criminal Procedure.

**3.** The court found XX guilty of lying down behind an alcohol-intoxicated 17-year-old guest sleeping on the sofa at a gathering at his residence after midnight on 17 April 2022, unhooking the victim's bra without asking for consent and pulling her trousers halfway down her legs. The accused then inserted at least one finger into the sleeping victim's vagina and rubbed his erect penis against the victim's genitals. The victim then woke up and realised what was happening. The victim punched the accused in the stomach with her fist in order to stop his actions against her will and left his apartment, resisting the latter's attempts to stop her. XX followed the victim into the street and tried to talk to her, but a random passer-by intervened, listened to the victim and demanded that the accused leave. The latter initially refused to do so and became threatening, but after the victim promised to call the police the accused walked away. Thus, the accused committed a criminal offence qualified under § 141(2) clause 1 of the Penal Code by intentionally having sexual intercourse with a person younger than eighteen years of age against her will, taking advantage of the victim's situation in which the victim was unable to comprehend the situation or to resist.

**4.** The District Court noted that no mitigating or aggravating circumstances existed in XX's case. When assessing the degree of the accused's guilt on the basis of the first sentence of § 56(1) of the Penal Code, the court took into account that the accused used his own finger, not his penis, for sexual intercourse with the victim. The sexual intercourse was not intense and lasted for a short time, the accused did not cause injuries or great distress to the victim (e.g. the victim did not need psychological counselling). Nor did XX use violence or contribute to the victim's helplessness. For this reason, the accused's act is less severe than the average act qualified under § 141(2) clause 1 of the Penal Code. XX has no prior criminal record. In view of all this, the accused must be given a sentence close to the minimum sanction. The court did not see any exceptional circumstances mentioned in § 61(1) of the Penal Code that would allow imposing a punishment below the minimum sanction. An act that corresponds to the elements of the statutory offence definition cannot be exceptional in the context of that definition. An act can be rendered exceptional by some circumstances characterising the case – the act must be exceptional in comparison to other similar acts, not in the context of the statutory offence definition.

*Judgment of the Circuit Court of Appeal*

**5.** On 29 April 2024, on the basis of an appeal by defence counsel, the Tartu Circuit Court of Appeal overturned the District Court judgment in respect of the sentence, declared the sanction under § 141(2) clause 1 of the Penal Code unconstitutional and sentenced the accused to three years' imprisonment, reducing it to two years on account of the abridged procedure.

**6.** The Circuit Court of Appeal found that the accused's act was proven and correctly qualified and rejected the appellant's application to acquit XX. At the same time, the court panel took the position that, considering the circumstances of the accused's act, six years and three months' imprisonment was an unreasonably harsh punishment and not compatible with the Constitution. The appellate court arguments were as follows.

**7.** The District Court correctly found that § 61 of the Penal Code, which allows imposing a punishment below the minimum laid down by law in view of exceptional circumstances, cannot be applied to XX. The actions of the accused did not last long nor were they intense, and the accused has no prior criminal record. However, these circumstances cannot be considered exceptional within the meaning of § 61(1) of the Penal Code. The act must be exceptional in comparison to other similar acts.

**8.** The sanction under § 141(2) clause 1 of the Penal Code violates the principle of guilt, the fundamental right to liberty and the principle of equality in lawmaking, and must therefore be declared unconstitutional and set aside.

**9.** The provision is in conflict with the requirement of proportionality arising from § 11 of the Constitution of the Republic of Estonia, constituting a disproportionate interference with the fundamental right to liberty laid down by § 20 of the Constitution. In addition, a conflict exists with the principle of the rule of law established in § 10 of the Constitution because, in the circumstances of the case under consideration, six years' imprisonment is contrary to the principle of guilt. According to this, the punishment must correspond to the degree of wrongfulness committed. The gravity of the accused's act is not comparable to other criminal offences for which the Penal Code prescribes at least six years' imprisonment. Such criminal offences are characterised either by particular cruelty (§ 97 PC), endangering many people (§ 95, §§ 110–112 PC) or a serious consequence, such as death (§§ 113, 96, $100^1$ PC). In the case of equally serious criminal offences such as robbery (§ 200 PC), human trafficking (§ 133 PC) or inducing a minor to use narcotic drugs (§ 187 PC), the minimum sanction corresponding to the qualified statutory offence definition is three years' imprisonment.

**10.** Although rape is a highly reprehensible criminal offence, this does not mean that all rapes are equal in gravity. The act by XX, i.e. inserting a finger into the victim's vagina, is not as grave as violent sexual intercourse. The sanction under § 141(2) clause 1 of the Penal Code is contrary to the principle of guilt as it prescribes a punishment of the same severity as for manslaughter. This provision also conflicts with the principle of equality of lawmaking.

**11.** A sentence imposed within the framework of a sanction under § 141(2) of the Penal Code cannot be suspended on the basis of §§ 73 or 74 of the Penal Code, because the duration of the minimum six-years' imprisonment exceeds the maximum duration of the probation period, which is five years. However, according to case-law, the probation period of a person released on probation must be longer than imprisonment.

**12.** When sentencing XX to three years' imprisonment, the Circuit Court of Appeal proceeded from the minimum sanction under § 141(1) of the Penal Code, taking into account the following:

- no mitigating or aggravating circumstances exist;

- the accused has no criminal or misdemeanour record;

- insertion of a finger into the vagina does not violate the right to sexual self-determination as intensely as the same activity using the penis;

- interference with the victim's sexual self-determination was not strong and did not cause her great distress;

- the victim was almost seventeen years and four months old at the time of the criminal offence, thus close to reaching the age of majority. In the case of an adult victim, the current law would have allowed the accused to be sentenced to one year's imprisonment.

**Referral of the case to the Court *en banc***

**13.** On 27 August 2024, the Supreme Court Constitutional Review Chamber referred the matter to the Supreme Court *en banc* on the basis of the first sentence of § 3(3) of the Constitutional Review Court Procedure Act (CRCPA), in order to avoid the risk of inconsistency arising between the practice of the chambers of the Supreme Court in interpreting § 61 of the Penal Code, which affects the relevance of the provision that was declared unconstitutional.

## OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

**Riigikogu**

**14.** The minimum sanction under § 141(2) of the Penal Code is in conformity with the Constitution.

**15.** This provision establishes a proportionate measure to protect the normal development of minors and their right to sexual self-determination. The legislator enjoys broad discretion in shaping punishments for offences. The degrees of punishment chosen by the legislator reflect penal policy decisions, which in turn are based on societal values. In finding that the criminal offence laid down in § 141(2) clause 1 of the Penal Code is not comparable in gravity to other criminal offences for which the Penal Code prescribes at least six years' imprisonment, the Circuit Court of Appeal relied on its own subjective assessment. The comparison by the Circuit Court of Appeal is also not relevant for the reason that the other statutory criminal offence definitions that it refers to are not characterised by an act committed against a minor.

**16.** Current law allows imposing a just punishment on every person for their act. In exceptional circumstances, a lighter punishment may be imposed than the minimum sanction and its application suspended, or a substitute punishment imposed. In such a legal situation, the court's ability to declare a sanction unconstitutional due to disproportionality is limited. This can only be considered if the sanction is manifestly disproportionate. However, this is presently not the case.

**17.** We cannot agree with the position of the Circuit Court of Appeal that it is not possible to apply § 61 of the Penal Code in the main case or to individualise the punishment on the basis of §§ 73 or 74 of the Penal Code. The purpose of § 61 of the Penal Code is to allow for flexible administration of justice so that the law does not define the exceptional circumstances referred to therein. Nor does the law establish a maximum limit for imprisonment, above which it is no longer possible to apply a suspended sentence.

**Defence counsel**

**18.** The sanction under § 141(2) clause 1 of the Penal Code is contrary to the Constitution.

**19.** Section 61(1) of the Penal Code cannot be a measure for bending rigid sentencing frames. The possibility of individualising a punishment must arise from the norm in the Special Part of the Code. The disposition of § 141(2) clause 1 of the Penal Code covers acts of very different gravity. For example, in practice, situations occur where young people who have consumed alcohol, whose declarations of intention may not be consistent or unambiguous, and who later no longer remember

what happened, end up in a sexual relationship. The sanction under § 141(2) clause 1 of the Penal Code sends a strong general preventive message, but inhibits achievement of other objectives of punishment. A lower minimum sentence would allow avoiding unfair punishments without limiting the possibility to impose a severe punishment for a serious criminal offence.

**Prosecutor's Office**

**20.** The Circuit Court of Appeal is right that the minimum sanction under § 141(2) clause 1 of the Penal Code does not always allow imposing a punishment corresponding to the degree of guilt.

**21.** The criminal offences described in § 141(2) clause 1 of the Penal Code are very different. The victim may be an infant or a person who will reach the age of majority in a few days. The damage that rape causes to the development of a minor depends on whether the victim is, for example, thirteen or seventeen years old. The present case is a telling example of a criminal offence that meets the characteristics of § 141(2) clause 1 of the Penal Code and whose circumstances are not exceptional, but rather where the person's guilt is small. Although the accused's act is reprehensible and the distress caused to the victim is not insignificant, the act in question cannot be equated with manslaughter or other very serious crimes. If the law allowed imposing a lighter sentence for XX's act, this would not be contrary to the principles applicable in Estonia and Europe.

**22.** When applying the sanction under § 141(2) clause 1 of the Penal Code, the courts are in difficulty in imposing just punishment, which may indicate that the sanction does not comply with the spirit of the Constitution. The maximum sanction under § 141(2) clause 1 of the Penal Code enables an appropriate response to the most serious criminal offences.

**The victim**

**23.** The application by the Circuit Court of Appeal is justified because the provision declared unconstitutional contains six acts of varying gravity. The law should be amended and the punishments differentiated.

**Chancellor of Justice**

**24.** The sanction under § 141(2) clause 1 of the Penal Code is compatible with the Constitution.

**25.** The degrees of punishment are based on societal values, whose expression lies with the legislature. The minimum sanction under § 141(2) clause 1 of the Penal Code is proportionate to sanctions for other similar offences (§ $141^1$(2) clause 1, § $143^2$(1) Penal Code). The Constitution does not prohibit equating the minimum punishment for sexual offences against children with the minimum sanction for manslaughter. In order to protect the legal order and fundamental rights, strict punishments for sexual offences committed against children are justified. Section 61 of the Penal Code enables imposing a just punishment. The law does not prescribe the nature of the exceptional circumstances referred to in that provision.

**Minister of Justice and Digital Affairs**

**26.** The minimum sanction under § 141(2) clause 1 of the Penal Code is in conformity with the Constitution.

**27.** When imposing the sanction in question, the legislature has taken into account the special need for protection of children. The consequences of raping a minor can affect the victim for the rest of

their life. This is the case even if, immediately after the act was committed, it seems to bystanders that everything is fine and the victim does not need, for example, psychological counselling. According to scientific research, it is not justified to classify rapes as minor or more serious based solely on the victim's post-traumatic reaction or lack thereof. In the case of sexual abuse experienced in childhood, the connection with the victim's physical health, sexual functioning, depression, post-traumatic stress disorder, suicide, self-esteem and academic achievement has been established. Childhood abuse affects a person's socio-economic coping, including increasing the risk of poverty, unemployment and homelessness. Based on the above, it is impossible to agree with the Circuit Court of Appeal that, in the circumstances of the case, interference with the right to sexual self-determination was not serious and did not cause the victim great distress.

**28.** The minimum sanction under § 141(2) clause 1of the Penal Code protects children's constitutional right to sexual self-determination, mental and physical health and development. At the same time, the minimum sanction in question shapes societal values, sending a clear message about how serious and reprehensible are sexual crimes against children. A comparison with the sanction under § 113(1) of the Penal Code is not relevant, as the latter is not a qualified statutory offence definition.

**29.** The courts found that § 61 of the Penal Code was not applicable in the main case. At the same time, the law does not prescribe the nature of the exceptional circumstances referred to in that provision. Declaring the sanction under § 141(2) clause 1 of the Penal Code unconstitutional on the basis of the facts of an individual case is not correct. Such a decision would affect all punishments imposed under § 141(2) clause 1 of the Penal Code because, according to case-law, the starting point for imposing a punishment is the average level of the sanction.

**30.** It is not possible to agree with the position established in case-law that imprisonment within the limits of the sanction under § 141(2) of the Penal Code cannot be suspended on the basis of §§ 73 or 74 of the Penal Code and that the sentence not reduced on the basis of § 238(2) of the Code of Criminal Procedure must be regarded as the sentence imposed.

## PROVISION DECLARED UNCONSTITUTIONAL

**31.** Section 141 of the Penal Code lays down the following:

"§ 141. Rape

(1) Sexual intercourse with a person against their will by using force or taking advantage of a situation in which the person is not capable of initiating resistance or comprehending the situation

[…]

(2) The same act:

1) if committed against a person of less than eighteen years of age;

[…]

is punishable by six to fifteen years' imprisonment."

## OPINION OF THE COURT *EN BANC*

**Relevance of the sanction under § 141(2) clause 1 of the Penal Code**

**32.** According to the first sentence of § 14(2) of the CRCPA, in proceedings for specific constitutional review initiated by a court of first or second instance, the Supreme Court may declare a legislative act or a provision thereof invalid or unconstitutional only if that act or provision is relevant to adjudicating the main case. A provision is deemed relevant if in the event of its unconstitutionality the court should decide differently than if it were constitutional (Supreme Court *en banc* judgment of 28 October 2002, 3-4-1-5-02, para. 15; 15 March 2022, 5-19-29/38, para. 49; 21 November 2023, 5-23-1/19, para. 45). In other words, the operative part of the decision in the main case must differ depending on whether the applicable norm is in conflict or in conformity with the Constitution, with the exception of certain procedural norms (Supreme Court Constitutional Review Chamber judgment of 7 September 2020, 5-20-5/10, para. 16). Since specific constitutional review mainly serves the interests of the participants in proceedings, in this frame the constitutionality of the relevant provision can be reviewed primarily on the basis of the facts established by the court that decided the main case, i.e. by assessing whether interference with the fundamental right at issue of a participant in the proceedings is proportionate (see also Supreme Court *en banc* judgment of 11 June 2019, 5-18-8/19, para. 57).

**33.** The Circuit Court of Appeal declared unconstitutional the sanction under § 141(2) clause 1 of the Penal Code that prescribes a punishment of six to fifteen years' imprisonment for the rape of a person younger than eighteen years of age (a minor). The appellate court declared the provision unconstitutional in order to sentence XX to three years' imprisonment for raping a minor, i.e. a punishment which, in the opinion of the court, is constitutional in the circumstances of the present case. Consequently, the sanction under § 141(2) clause 1 of the Penal Code is relevant if the Circuit Court of Appeal was unable to sentence XX to three years' imprisonment without declaring this provision unconstitutional, and to the extent that the provision in question prevented the imposition of such a sentence.

**34.** The prohibition on imposing a sentence of three years' imprisonment for rape of a minor does not arise from the maximum sanction under § 141(2) clause 1 of the Penal Code. Consequently, that part of the provision is not relevant in the present case.

**35.** The minimum sanction of the norm under the Special Part of the Penal Code can be relevant within the meaning of the first sentence of § 14(2) of the CRCPA only if no provision under the General Part of the Penal Code that provides a basis for imposing a sentence on the accused that is lighter than the minimum sanction is applicable in the main case, which would also be constitutional in the opinion of the court (see also cited 3-4-1-9-03, para. 13 and 5-20-5/10, para. 16). Inter alia, the relevance of the minimum sanction is precluded if § 61 of the Penal Code is applicable in the main case and the court can, on that basis, impose a sentence which it considers compatible with the requirements of the Constitution (see also cited 3-4-1-9-03, para. 15).

**36.** Section 61 of the Penal Code stipulates that, taking into account exceptional circumstances, a court or a body conducting extra-judicial proceedings may impose a punishment below the minimum prescribed by law (subsection (1)). If the minimum term of imprisonment laid down by the Special Part of the Penal Code is at least five years, the imprisonment imposed may not be less than one year (subsection (2)).

**37.** According to the explanatory memorandum to the draft Penal Code (119 SE – IX composition of the Riigikogu), the purpose of the provision referred to is to soften the rigidity of the minimum punishment in the sections of the Special Part of the Penal Code, giving the court an additional opportunity to impose a punishment below the minimum sanction prescribed in the Special Part in

cases that cannot be foreseen in the law (page 83; see also Supreme Court Criminal Chamber judgment of 17 June 2004, 3-1-1-29-04, para. 12).

**38.** In the opinion of the Court *en banc*, the purpose of § 61 of the Penal Code is to ensure that the punishment imposed for an offence is proportionate in each individual case and in conformity with the principles of human dignity and the rule of law (see, in the context of the levels of sanctions: Supreme Court Constitutional Review Chamber judgment of 23 September 2015, 3-4-1-13-15, para. 39). Within the meaning of § 61 of the Penal Code, all circumstances that are important from the point of view of § 56(1) of the Penal Code are exceptional (Supreme Court Criminal Chamber judgment of 12 October 2012, 3-1-1-76-12, p 7), which, individually or collectively, either *a)* significantly reduce the punishability of an act in question as compared to a typical act corresponding to the statutory offence definition, *b)* reduce the need for punishment to a particularly low level for general or special preventive reasons, or *c)* make the punishment within the limits of the sanction unbearably burdensome considering the identity of the offender. The exceptional nature of the circumstances may also result from the combined effect of these three factors. The exceptional circumstances referred to in § 61 of the Penal Code may be related to both the person of the perpetrator as well as to the offence (cited 3-4-1-9-03, para. 18), but also, for example, to the time that has passed since the offence (Supreme Court Criminal Chamber judgment of 12 February 2021, 1-20-1301/35, para. 18).

**39.** Presumably, circumstances which, in an individual case, may give rise to doubts as to the proportionality and constitutionality of the punishment imposed on the offender according to the minimum sanction are also exceptional within the meaning of § 61 of the Penal Code. Essentially, every statutory offence definition may also apply to some type of act in the case of which the punishment imposed even at the minimum level of the sanction is excessive. In order to ensure the proportionality of punishments and at the same time to avoid frequent challenges to the constitutionality of the minimum sanctions, the legislator has given the court the opportunity, by applying § 61 of the Penal Code, to take into account the details of the case which would otherwise require initiating specific constitutional review with regard to the minimum sanction.

**40.** However, the minimum penal law sanction may prove to be a relevant provision in the context of specific constitutional review proceedings. This is primarily the case in situations where a set of facts that are relevant from the point of view of § 56(1) of the Penal Code can be considered typical in the context of such types of offences and there is no possibility whatsoever to speak, for example, of any exceptional circumstances in connection with the act or the perpetrator.

**41.** In the present case in the main proceedings, the Circuit Court of Appeal assessed the possibility of applying § 61 of the Penal Code and, in agreement with the District Court, took the position that no circumstances had been established in the case of XX's act or person that could be considered exceptional within the meaning of that provision. The Court *en banc* sees no reason to question such a conclusion by the Circuit Court of Appeal in constitutional review proceedings. The Circuit Court of Appeal did not correct the District Court's unsuccessful reasoning that "a certain type of act that corresponds to the elements of the statutory offence definition cannot be exceptional in the context of that definition" and that "the act must be exceptional in comparison to other similar acts, not in the context of the statutory offence definition". Of course, an act for which a punishment below the minimum level is imposed must also correspond to the statutory offence definition, as otherwise it would not be punished. At the same time, it does not appear from the judgment of the Circuit Court of Appeal that the court, in setting aside § 61 of the Penal Code, was guided by the above-mentioned position or interpreted § 61 of the Penal Code clearly too narrowly for some other reason, thereby failing to verify the existence of possible exceptional circumstances (cf. cited 3-4-1-9-03, paras 16–20). Nor are the facts established by the judgment of the Circuit Court of Appeal, either taken

separately or as a whole, such that setting aside § 61 of the Penal Code in the main case would in itself indicate an incorrect interpretation of that provision.

**42.** For this reason, in the current constitutional review proceedings, the Court *en banc* proceeds from the premise that § 61 of the Penal Code does not apply in the circumstances of the main case. However, the Court *en banc* draws such a conclusion solely in the context of assessing the relevance of § 141(2) clause 1 of the Penal Code.

**43.** At the same time, the Court *en banc* also considers that, in the circumstances established by the Circuit Court of Appeal, no other provision of the Penal Code that would allow imposition of a punishment lighter than the minimum sanction (e.g. § 60 or § $60^1$ of the Penal Code) is applicable in the main case. Consequently, whether XX can be punished with three years' imprisonment imposed by the judgment of the Circuit Court of Appeal depends on the constitutionality of the minimum sanction under § 141(2) clause 1 of the Penal Code. The norm is therefore relevant.

## (II) Interference with fundamental rights resulting from the minimum sanction under § 141(2) clause 1 of the Penal Code, and its constitutionality

**44.** Neither the Circuit Court of Appeal nor any of the participants in the proceedings has questioned compliance of the minimum sanction under § 141(2) clause 1 of the Penal Code with the requirements of competence, procedure, form and legal clarity. The Court *en banc* also had no misgivings about the formal constitutionality of this provision.

**45.** The minimum sanction under § 141(2) clause 1 of the Penal Code prescribes six years' imprisonment as a minimum punishment for rape committed against a person under eighteen years of age.

**46.** Imprisonment primarily interferes with the fundamental right to physical liberty, i.e. liberty of the person, guaranteed by § 20(1) of the Constitution (Supreme Court *en banc* judgment of 10 April 2012, 3-1-2-2-11, paras 47–49, and Supreme Court Constitutional Review Chamber judgment of 6 November 2023, 5-23-35/15, para. 28). Section 20(2) clause 1 of the Constitution allows a person to be deprived of their liberty, i.e. for restriction of their right to physical liberty, in the cases and pursuant to a procedure provided by a law, inter alia to execute a judgment of conviction. Under § 11 of the Constitution, deprivation of liberty to execute a judgment of conviction must also be proportionate to the objective. Above all, this means the requirement that the custodial sentence to be enforced should conform with the principle of individual guilt arising from the principles of human dignity and the rule of law laid down by § 10 of the Constitution. Accordingly, a person may be punished for a specific act and no more than required by the gravity of the offence committed. (See also cited 3-4-1-13-15, paras 38–39.)

**47.** Under §§15(2) and 152 of the Constitution, courts are entitled and obliged to review the constitutionality of all laws, including penal sanctions. At the same time, the Court *en banc* maintains the position repeatedly expressed in Supreme Court case-law that judicial review of the substantive constitutionality – in particular proportionality – of punishments for offences is limited. That is, the legislator enjoys broad discretion in choosing the punishment corresponding to the statutory offence definition. The degrees of punishment are based on the values adopted by society, whose expression lies with the legislature. (See cited 3-4-1-9-03, para. 21, and Supreme Court *en banc* judgment of 12 June 2008, 3-1-1-37-07, para. 23.) It follows from the principle of separation of powers that courts cannot take the place of the legislator and start shaping the system of sanctions on the basis of abstract penal policy objectives (cited 3-4-1-13-15, para. 41).

**48.** Therefore, the punishment laid down by law complies with the requirement of proportionality arising from § 11 of the Constitution and conforms with the principles of human dignity and the rule of law if the Penal Code allows the court to impose a punishment on the offender that is not manifestly excessive or manifestly arbitrary in view of the degree of wrongfulness of the act and the objective of preventing commission of new criminal offences and protecting the legal order (see also Supreme Court *en banc* judgment of 27 June 2005, 3-4-1-2-05, para. 57 and cited 3-4-1-13-15, para. 39).

**49.** The threat of punishment arising from the first clause of § 141(2) of the Penal Code has a legitimate purpose. It protects a minor's right to physical integrity, sexual self-determination and normal development and, in that connection, their mental and physical health as well. These are extremely important legal rights, the effective protection of which – including through penal law – from attacks by third parties is a positive duty of the state. This duty arises for the state from the Constitution (in particular, § 19(1), § 20(1), § 27(4), § 28(1) and § 26(1) (first sentence) in conjunction with § 13(1) (first sentence) and § 14), the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, e.g., European Court of Human Rights (ECtHR) 12 November 2013, *Söderman v. Sweden* (5786/08), paras 78–85; 2 February 2021, *X and Others v. Bulgaria* (22457/16), Nos. 176–183 and 18.06.2024, *A.P. v Armenia* (58737/14), paras 103–109) as well as European Union law (Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011). The duty to establish effective, proportionate and dissuasive sanctions for sexual abuse of victims under the age of eighteen is also provided for in Articles 18 and 27 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

**50.** The Court *en banc* has no doubt that the minimum sanction under § 141(2) clause 1 of the Penal Code is an appropriate and necessary measure for protection of the legal rights mentioned in the previous paragraph (see, for more on the review of proportionality, e.g. Supreme Court *en banc* judgment of 17 March 2003, 3-1-3-10-02, para. 30). Neither the Circuit Court of Appeal nor any of the participants in the proceedings have claimed otherwise.

**51.** When assessing the narrow proportionality of the minimum sanction under § 141(2) clause 1 of the Penal Code, in addition to taking into account the legislator's broad margin of discretion, consideration must be given to the extent and severity of interference with fundamental rights, on the one hand, and the importance of the objective pursued by it, on the other.

**52.** Six years' imprisonment as the minimum penal sanction interferes very severely with the liberty of the person. Liberty of the person is one of the most important fundamental rights and freedoms guaranteed by the Constitution (Supreme Court *en banc* judgment of 21 June 2011, 3-4-1-16-10, para. 55), being also a prerequisite for the exercise of several other fundamental rights (see also Supreme Court *en banc* judgment of 13 November 2012, 3-1-1-45-12, para. 39). Imprisonment, which extensively restricts a person's physical liberty, is the most severe type of punishment established in the Estonian legal order (§ 56(2) Penal Code). Six years is a long term of imprisonment. Also valid is the argument of the Circuit Court of Appeal that, in line with the case-law, an offender cannot be released on probation from imprisonment imposed at the minimum level of sanction under § 141(2) of the Penal Code (cited 1-20-1301/35, para. 17), not even if the sentence is reduced in abridged proceedings (Supreme Court Criminal Chamber judgment of 14 June 2021, 1-19-7945/137, para. 31). Similarly, it is not possible to replace imprisonment corresponding to the minimum sanction under § 141(2) clause 1 of the Penal Code with community service, electronic monitoring or medical treatment (§§ 69–69(2) Penal Code). All this adds weight to interference with liberty of the person arising from the minimum sanction under § 141(2) clause 1 of the Penal Code. When assessing the proportionality of this interference, it is also not possible to take into account the fact that, in the case of abridged proceedings, the sentence is reduced by one-third. Application of § 238(2) of the Code of

Criminal Procedure does not depend on the degree of a person's guilt and it is merely procedural compensation to the accused for waiving some of their procedural rights (see for more detail Supreme Court Criminal Chamber judgment of 19 June 2019, 1-17-11930/45, para. 15). The constitutionality of imprisonment prescribed by the Penal Code for a particular act cannot depend on the type of proceedings in which such imprisonment is imposed or whether the accused has waived their procedural rights in exchange for a shorter sentence.

**53.** However, the minimum penal sanctions are not entirely rigid. As the Court *en banc* explained when verifying the relevance of the contested norm, § 61 of the Penal Code gives the body conducting proceedings the possibility to impose a punishment below the minimum sanction in atypical cases. Section 61 of the Penal Code does not preclude imposing a punishment lighter than the minimum sanction in the case of any statutory offence definitions. When imposing a punishment for an act qualified under § 141(2) clause 1 of the Penal Code, the court may, in the presence of exceptional circumstances, limit itself to imprisonment with a term starting from one year (§ 61(2) Penal Code). In the case of imprisonment shorter than five years, the case-law does not preclude its replacement or suspension. This, in turn, mitigates the intensity of interference with fundamental rights arising from the minimum sanction under § 141(2) clause 1 of the Penal Code.

**54.** In addition, the intensity of interference with the liberty of person associated with imprisonment imposed at the minimum level of sanction under § 141(2) clause 1 of the Penal Code is somewhat reduced by the possibility of release on parole laid down by § 76 of the Penal Code. The court may release an offender on parole from six years' imprisonment if the person has served four years of the sentence (§ 76(2) clause 2 Penal Code), or three years in the case of application of electronic monitoring (§ 76(2) clause 1 Penal Code). In the case of the minimum sentence of imprisonment under § 141(2) clause 1 of the Penal Code, imposed in abridged proceedings, these periods are two years and eight months, and two years, respectively (see also Supreme Court Criminal Chamber order of 9 November 2020, 1-15-10026/166, paras 12–13). However, bearing in mind that application of § 238(2) of the Code of Criminal Procedure is not related to the degree of guilt (see paragraph 52 above), the Court *en banc* will not take this circumstance into account with regard to the intensity of interference with the fundamental rights at issue.

**55.** As noted, the physical integrity of minors, their right to sexual self-determination, normal development, and health are particularly important legal rights which require effective protection under penal law (see paragraph 49 above). Sexual offences committed against children in particular are a social problem that justifies strict punishments in order to protect the legal order and the fundamental rights and freedoms of individuals (cited 3-4-1-13-15, para. 44). Excessively light punishments for sexual assault against a minor would also mean violation of the state's duty of protection (see e.g. ECtHR 20 February 2024, *M. G. v. Lithuania* (6406/21), paras 97 and 116).

**56.** In declaring the sanction under § 141(2) clause 1 of the Penal Code unconstitutional, the Circuit Court of Appeal relied mainly on the argument that the act imputable to XX was not comparable in gravity to several other criminal offences for which the Penal Code prescribes a minimum six years' imprisonment (§§ 95–97, $100^1$, 110–113 Penal Code) or a more lenient sanction. Above all, the Circuit Court of Appeal focused on comparing the sanction under § 141(2) clause 1 of the Penal Code with the sanction for manslaughter (§ 113(1) Penal Code), finding that nothing justifies the same minimum sanction for these two criminal offences, since manslaughter involves the intentional taking of another person's life.

**57.** The Court *en banc* notes, first of all, that in comparing the gravity of XX's act of rape with the acts described in the abstract in several other criminal offence definitions, the Circuit Court of Appeal

failed to take into account that these other criminal offences also include acts of very different degrees of wrongfulness.

**58.** Rape is the most serious form of sexual violence, because it violates a person's sexual freedom and bodily integrity in the most acute way (Supreme Court Criminal Chamber judgment of 25 January 2005, 3-1-1-95-04, para. 10). Unlike other acts of a sexual nature, sexual intercourse with a person against their will – whether committed by violence or by taking advantage of the victim's helplessness – presumably always significantly impairs the right to sexual self-determination (see also Supreme Court Criminal Chamber judgment of 9 November 2017, 1-16-5792/101, para. 15). In accordance with the above, the Supreme Court has also found that since rape is a compound criminal offence that violates not only the victim's right to sexual self-determination but also their physical and mental health, equalisation of punishments for rape of a minor and manslaughter is justified in view of the need to protect legal rights (cited 3-4-1-13-15, para. 50). In the opinion of the Court *en banc*, the circumstances of the present main case do not indicate any reason to change the above conclusion.

**59.** The substantive wrongfulness of manslaughter does not include the substantive wrongfulness of rape (cf. e.g. §§ 200(1) and § 199(1) and § 215(1) of the Penal Code or §§ 118(1) clause 2 and § 121(2) clause 1 of the Penal Code). Therefore, the comparative severity of the sanctions for manslaughter and rape is largely based on value judgments and criminal policy considerations. As noted above, the legislator enjoys a broad — though not unlimited — discretion in deciding on both of them. The Court *en banc* shares the opinion of the Chancellor of Justice that the Constitution does not in itself prohibit equating the minimum punishment for a sexual offence against children with the minimum sanction for manslaughter.

**60.** However, it cannot be argued that the legislator has equated punishments for murder and rape. Section 113(1) of the Penal Code lays down six to fifteen years' imprisonment for the manslaughter of an adult victim, while § 141(1) of the Penal Code prescribes one to six years' imprisonment for the rape of a similar victim. Also, the sanction for murder (§ 114 (1) Penal Code) under aggravating circumstances exceeds the sanctions for rape under aggravating circumstances (§ 141(2) and ($2^1$) Penal Code). The status of a victim as a minor, of which the offender is aware, increases the degree of culpability for the offence in the case of manslaughter (first sentence of § 56(1) of the Penal Code), and in the case of a victim who is younger than twelve years of age, this is always the case under § 58(3) of the Penal Code. However, the guilt of the rapist of a minor victim may not be assessed as greater due to the victim's age, as this is already a characteristic element of the statutory offence definition. Exceptions are cases where the victim is younger than twelve years of age (Supreme Court Criminal Chamber judgment of 18 June 2018, 1-17-7206/27, para. 27). Consequently, the killing of a minor victim is generally a more severely punishable criminal offence than the rape of a victim of the same age.

**61.** In the opinion of the Court *en banc*, the degree of wrongfulness of XX's act is not so small that imposition of six years' imprisonment for it should be considered manifestly excessive or arbitrary and thus disproportionate. In the case of a criminal offence qualified under § 141(2) clause 1 of the Penal Code, the perpetrator's guilt within the meaning of the first sentence of § 56(1) of the Penal Code is greater the younger the victim (see also Supreme Court Criminal Chamber judgment of 9 May 2014, 3-1-1-18-14, para. 10). Therefore, the fact that XX's victim was approaching the age of eighteen may reduce the accused's guilt compared to if he had committed the same act against a younger victim. Similarly, from the point of view of special prevention, the absence of prior convictions may speak in favour of the accused. When choosing the level of punishment within the frame of the sanction under § 141(2) clause 1 of the Penal Code, the court adjudicating the main case is justified and obliged to take into account these, as well as all other facts relevant from the perspective of § 56(1) of the Penal Code.

**62.** The Circuit Court of Appeal also noted that the sanction under § 141(2) clause 1 of the Penal Code violates the principle of equality of lawmaking. At the same time, it is not clear from the court judgment which comparable groups are treated unequally by the law and why such interference with the fundamental right to equality is contrary to the Constitution (on the finding of a violation of the fundamental right to equality, see, e.g. Supreme Court *en banc* judgment of 20 October 2020, 5-20-3/43, paras 93–94). In the circumstances of the main case, the Court *en banc* does not see a violation of the fundamental right to equality arising from the sanction under § 141(2) clause 1 of the Penal Code. The Supreme Court has previously taken the position that the Constitution does not prohibit the legislator from combining acts violating the same legal right with different degrees of gravity into one provision of the Special Part (one statutory offence definition), provided that the sanction for it allows the court to impose a (proportionate) punishment corresponding to the offender's guilt in each individual case. The range of punishments provided for in § 141(1) and (2) of the Penal Code generally enables differentiation of the punishment according to the gravity of the specific act and the offender's degree of guilt, and individualisation of the punishment on the basis of the duration of imprisonment close to the minimum, medium or maximum sanction. (See cited 3-4-1-13-15, para. 47.)

**63.** For the above reasons and in accordance with § 15(1)6) of the CRCPA, the Court *en banc* declines to declare the sanction under § 141(2) clause 1 of the Penal Code unconstitutional and invalid in the circumstances of the present case.

(signed digitally)