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THE COMMENTARY TO THE DECISION OF THE SUPREME COURT OF 15 FEBRUARY 2012, II CRIMINAL CODE 193/2011 (OSNKW NO. 9-JURISPRUDENCE OF THE CRIMINAL AND THE MILITARY CHAMBER OF THE SUPREME COURT, ITEM 89)

Judgement II CC 193/2011:

The penal liability for the effect justifies such contribution, which significantly increases the risk of this effect. To accept the punitive nature of contributing to the effect, it is necessary to establish that the perpetrator - irrespective of other conditions of objective attribution - has significantly increased the risk of the effect of a type of offense, which would most often be inferred from a material violation of the prudential rule of dealing with the legal right under the given conditions.

The Supreme Court in case II Criminal Code 193/2011 considered the criminal liability of teachers organizing a Nativity play, who had given the pupils participating in the performance an order to use open fire, even though the students were dressed in flammable clothing. During the performance the students, changing the scripts themselves, lighted the candles earlier than it was planned, not on the stage, but among the audience, sitting in the eleventh row. They did this at the teacher's request and during the performance. It was then that one of the schoolgirl's costumes became inflamed, which in turn resulted in severe injuries to her body, qualified by the experts as a life-threatening illness. There was a total ban on the use of fire. The expert's opinion indicated that the candlesticks used in the presentation caused the deterioration of fire safety and caused the student's costume to ignite. The acquittal verdict was found to be legitimate.

The question then arises regarding the criteria for attributing the effect to those responsible for organizing the play and school management, i.e. serious injury, direct danger of loss of life or serious injury and fire hazard.

In the judgement, the Supreme Court considered the criteria for objectively attributing the effect, emphasizing that the subject matter of the evaluation should be the actual causal path leading to the effects of the offenses of Article 156 § 1, Article 160 § 2 and Article 164 § 2 the Criminal Code. The court also pointed out that the

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accused should be objectively aware of the significant increase in the risk of this causal event at the time of the behavior that triggered this episode. The basis for criminal liability for the effect can be only a contribution that significantly increases the risk of its occurrence. These arguments of the Supreme Court do not raise much doubt on the grounds of modern law of criminal law. It was more puzzling to conclude that due to the arbitrary change of the script by the students, the subject of the assessment could not have been a hypothetical causal nexus consistent with the script, but rather 'the organization of the play itself.'

The result of this judgement was the reopening of the discussion on penal liability for effect. This was connected with the statement by the Supreme Court that such responsibility justifies such a contribution which significantly increases the risk of the effect of a type of offense, which in turn should be based on a material breach of the rules of prudent conduct under the given conditions. Not every unlawful act deserves to be punishable, and the attribution of an unintended offense should be linked to the scope of the sanctioning norm for a particular offense, and not solely to the unlawfulness of the act or omission. Publications analysing this provision pointed out that the rationale of objectively attributing the effect was taken from another point of view, which was expressed by the emphasis placed on a significant increase in the risk of the effect of the perpetrator, which in turn should be deduced from the materiality of the breach of the rules of prudential conduct itself.

This "materiality" has in some sense become a platform for *ex ante* risk assessment. This depends in particular on the probability of occurrence of such an event and the possibility of objectively attributing the effect to the guarantor[1]. In an approving commentary Mikolaj Malecki shared the conviction of the Supreme Court that the probability of such an incident, against the background of established facts, was not high. This statement was expressed in the view that there was no serious failure to supervise the safety of students. The author shared the Court's argument that there was no update of the obligation to prevent the effect, since the organization of the play did not involve a significant risk of occurrence of the effects referred to in Article 156 or 160 the Criminal Code.

The Supreme Court assessing the facts of this particular case concluded that the actors of that play were adults or were about to reach the age of majority (17 years), which allowed them to know that they knew how to handle fire and have the necessary life experience. They can independently take steps that would prevent the occurrence of a dangerous situation. Although there was a violation of the fire regulations, this was not a sufficient condition for criminal liability (it should be borne in mind that the school strictly prohibited handling fire). The emphasis was placed on the breach of the rule of procedure in relation to particular facts.

[1] M. Małecki, *Glosa aprobująca do postanowienia SN z dnia 15 lutego 2012 r.,* GSP Decision 2013/3/89-106.

In this way, it was considered that the main cause of the effect was the disobedient (contrary to the script) behavior of the pupils in the guise of the angels. Originally, the students were supposed to light the candles on stage and only such events should be evaluated for actual risk. These students, as indicated above, had previously sat in the audience. According to the Supreme Court, with appropriate and predetermined proceedings, such risk was not high, which should be essential for assessing the criteria for objective attribution. This approach has also been criticized.

It has been pointed out that the consequence of this is the overly general approach to the liability of the accused and the Supreme Court focusing on objectively attributed criteria without taking into account the rules of responsibility for co-operating in the criminal stadial form. Indeed, in the discussed judiciary a lot of space was devoted to the responsibility of the "play organizers" for the effect caused by the behavior of a third party. The question therefore is whether only the predictability of a significant outcome determines criminal liability or whether the objective predictability resulting from the violation of the precautionary principle is sufficient to assume responsibility for the effect. This, in turn, is connected with defining the obligations of the guarantor, not only on the basis of Article 9 § 2 the Criminal Code, especially the attribution of the offense of omission to the offender, especially since some types of offenses, such as land, water or air disaster, include an effect that is not related to physical change in the external world. Going forward, one has to ask about the role of the rationale of an objective attribution of the predictability of a significant degree of probability of occurrence of a particular causal course.

In the realities of this particular case, there was no doubt that there had been a violation of the fire regulations, as confirmed by the unambiguous opinion of the expert. The requirement for responsible behavior with fire was not only for students dressed in flammable clothing, but also for the play's organizers and the particular teacher who wrote the script and was obliged to watch over its proper execution.

While it is possible to agree with the Supreme Court that the correct execution of the script (lanterns on the stage rather than the audience) was not associated with a high probability of a tragic outcome, the question may be raised whether, in the case of improper execution of the script, the risk of the occurrence of this tragic effect would indeed have increased? An analysis of the facts and a specific set of events allow us to conclude that the change of the script was an event that directly led to the result. The students lit the candles earlier than they were supposed to and not on the stage, but in the clam, in the audience, which numbered about 300 people. As evidenced by the description of the allegations being investigated by the Supreme Court, fire inflammation was, however, at the behest of one of the accused, who was the organizer of the Christmas play. There is no doubt that this command violated the precautionary principle, even though the girls did not follow this command and probably lit the candles too early, so before going out on stage. The principal

question to be asked is whether the guarantor (the teacher) has created an excessive risk of harm in the form of an infringement of a legitimate good, treated as a consequence of the failure to do activity to which the guarantor was obliged, and above all whether it is possible to consider his or her liability on the basis of Article 2 the Criminal Code as a referring person (see the judgement of the Supreme Court dated 9 May 2012, V Criminal Code KK 21/02, LEX No. 54393).

Another question concerns the fact when an offender can be attributed the effect of a third party as a result of the unlawful breach of the guarantor's obligation? Both these questions must be related to the accuracy of the charges presented to the defendants.

So far, it has been assumed that, in order to attribute an effect to the danger of a particular good, it is irrelevant whether the person obliged to act did not interfere with the immediate threat, or by failing to comply with the obligation increased the immediate threat that can not be attributed to the obligee (Supreme Court of 5 November 2002, IV KKN 347/99). From this point of view, the objective attribution of the effect of omission is based on the finding that if the obliged had taken the ordered action, the consequence would not have occurred[2]. Going forward, since the guarantor must conduct behavior that aims to prevent or reduce a significant risk of its occurrence, it is necessary to determine whether the teacher was required to supervise such a course of the scenario in such a way as to preclude the increase of the risk (SC did not make reasoning in this direction).

The answer to this question must be affirmative, especially when we look at this problem from the legal point of view of the guarantor. In the analyzed situation, the teacher was an entity with a special legal obligation. Here the legal norm imposed on him, as a person defined by certain characteristics, distinction due to the relationship to the good protected by the norm of law[3]. The teacher therefore belongs to the group of subjects that is addressed to such an obligation. This particular nature must also influence the assessment of the fulfillment of its obligation to act.

The teacher knew that, in school conditions, the use of fire at the Nativity play was a violation of the precautionary principles. Therefore, his duty was to minimize any danger – already "in the bud". The practical implementation of this obligation was to take all the actions that were associated with observing the script. Schoolgirls, in spite of this script, occupied places among other people, with a significant reduction in the movement in a lack of space, and by executing the command of lighting the candles, immediately created a state of immediate danger. Direct executors, departing from the script, behaved in a manner contrary to the previously issued command. However, there has also been a violation of the precautionary principle on the part of the teacher, which has been left in the causal nexus link to

[2] A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 2 k.k.*, Warsaw 2012, p. 92.
[3] Ibidem, p. 94.

the effect. The teacher possessed a specific "power over the situation". This was a dominant position in relation to the students, whose role consisted in command execution. It is difficult to imagine that such orders, even completely unjustified, in such a specific situational context as the ongoing performance may have been challenged by the addressees. The third person (the student) who lit the candle and consequently led to the occurrence of the effect was characterized by the limitation of the autonomous decision of the will, which resulted in increased responsibility for the occurrence of the so-promoter-guarantor[4]. Although there has been an inclusion of another subject (the student) in the chain of causes, the relationship of subordination between the two subjects greatly increases the effect attributed to the teacher at the normative level. Therefore, responsibility should be attached not only to the issue lighting the candle itself and the presumption that the order was to be executed in accordance with the script, but not the omission of certain reaction with the appropriate *ex ante* response, that is to say when it was necessary for the guarantor to be involved in causation.

It can be said that the 'devil is in the details'. Of course, it is difficult to require the teacher, in the dynamic course of events, to stand directly with each student who lit the candle, but where there is a risk of harm and a sense of danger (in this case, the participants were instructed to act according to the script), there should be not only basic but also specific actions aimed at eliminating the danger (the Supreme Court stated differently saying that the play organization itself was not related to the increased risk of effects of Article 156 § 2 and 160 § 1 the Criminal Code); It was enough to instruct students who were close to the age of majority.

The attribution of the offender's effect to the offender should be linked not to the causal effect of the offender, but above all to the fact that he/she has not interfered with the existing obligation. This omission must, of course, be unlawful and based solely on the normative association with the effect. This association must result from the creation or substantial enhancement of a legally unacceptable danger to a legitimate interest. The risk of negative effect is therefore "created" by the guarantor, but the mere fact that the mere omission to fulfill the obligation has occurred can not prejudge the attribution of the effect. This can be demonstrated by the fact that the hazard has actually materialized, and the guarantor may and should have reversed it, and the omitted action would have ruled out the effect[5].

Agnieszka Barczak-Oplustil also raised another problem concerning the rationale of objectively attributing an effect in the form of predictability of a given causal event. The requirement of substantial predictability as a general rationale of liability would

[4] A. Jezusek, *Glosa aprobująca z pewnymi zastrzeżeniami*, „Przegląd Sądowy" 2014, no. 3, p. 125 and following.

[5] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 2 k.k.*, Warsaw 2012, p. 38; J. Majewski, *Prawnokarne przypisanie skutku przy zaniechaniu,* Kraków 1997, p. 114.

have the effect of depreciating the importance of the prohibition itself. The standard of conduct provided for in such a ban (here the ban on the use of fire on the school premises) would be significantly impaired in practice[6]. In turn, T. Bojarski noted that it is not correct to give the essential meaning of "materiality" to the effect investigated itself and the materiality of the contribution should be related primarily to the scope of responsibility. Each contributing to the effect becomes a rationale of responsibility and it is sufficient to take into account the subjective limitation resulting from the principle of guilt[7]. According to the aforementioned, the materiality of the contribution may affect the scope of responsibility, rather than prejudge about it.

Such edition of charges determined the Supreme Court's decision, which had to focus on assessing the organization of the play and assessing the risk of a material increase in effect. It is reasonable to assume that another edition of charges, consisting in a general indication of lack of diligence in caring for students who refrain from taking action to eliminate the threat, would result in the accused being guilty.

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Summary: The commented sentence concerns the assessment of the responsibility for the result. The Supreme Court admitted that the proving of the casual nexus is necessary for the establishment of the perpetrator's crime's responsibility and the perpetrator's behavior should substantially improve the risk of its appearance.
According to the Supreme Court not every increase of risk is punishable. The author indicates also the fact, what the rules infringement of careful proceedings with the legal interest in specific conditions consist of. In the gloss there was spotlighted another possibility of the criminal responsibilities interpretation of the accused teachers, particularly their negligence as persons who were obliged to the special protection of the performance's participants (students) in a specific place (school) where the accident took place.

Keywords: result**,** responsibility, risk, casual nexus, obligation

[6] A. Barczak-Oplustil, *Glosa do postanowienia SN z dnia 15 lutego 2012 r.*, II Criminal Code 193/2011, CzPKiNP 2012/4/149-157.
[7] T. Bojarski (ed.), *Kodeks karny. Komentarz do art. 2 k.k.*, Warsaw 2013.

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 15.02.2012 R., II KK 193/2011 (OSNKW NR 9, POZ. 89)

Streszczenie: Komentowany wyrok zajmuje się oceną odpowiedzialności za skutek. Sąd Najwyższy uznał, że dla ustalenia odpowiedzialności sprawcy przestępstwa konieczne jest wykazanie związku przyczynowego, a zachowanie sprawcy powinno istotnie zwiększać ryzyko jego wystąpienia. Zdaniem SN nie każde zwiększenie ryzyka jest karalne. Autorka wskazuje także, na czym powinno polegać istotne naruszenie reguł ostrożnego postępowania z dobrem prawnym w danych warunkach. W glosie zwrócono jednak uwagę na możliwość innego ujęcia odpowiedzialności karnej oskarżonych nauczycielek, w szczególności na popełnione przez nie zaniedbania jako osób, które były zobowiązane do szczególnej opieki nad uczestnikami przedstawienia (uczniami), w miejscu o szczególnym charakterze, gdzie doszło do zdarzenia (szkoła).

Słowa kluczowe: skutek**,** odpowiedzialność**,** ryzyko**,** związek przyczynowy**,** obowiązek