



Acta Juris Stetinensis

2020, No. 2 (Vol. 30), 61–72
ISSN: 2083-4373 e-ISSN: 2545-3181
DOI: 10.18276/ais.2020.30-05



Justyna Matynia-Kłos

MA

University of Lodz, Poland

e-mail: justyna.matynia.klos@edu.uni.lodz.pl

ORCID ID: 0000-0001-9941-1894



Relation between the injured party being under the influence of alcohol and the liability of the perpetrator due to the crimes under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code

Abstract

The paper constitutes an attempt at presenting the views of legal scholars and commentators and the judicature on the possibility of attributing criminal liability under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code to the perpetrator in the case of alcohol consumption by the injured party. This issue is the basis of a crucial dogmatic problem, extremely up-to-date from the point of view of the study of criminal law, since the solution thereof determines the criminal liability of the alleged perpetrator.

Therefore, the analysed issue raises the question of the limits of impunity for violations in the sphere of sexual life of the injured party in comparison with the features and circumstances directly related to the victim. Thus, the paper attempts to answer the question whether actions belonging to so-called sexual offences should be predominantly assessed with the use of a literal interpretation or taking into account the formal-dogmatic interpretation.

Keywords: rape, sexual abuse, sexual offences

Introduction

The issue of consuming alcohol by injured parties with regard to the liability for committing a crime under Article 197 of the Criminal Code and Article 198 of the Polish Criminal Code is the basis for major discussions among legal commentators and in court decisions. It is related to the legislator's use of ambiguous, fuzzy concepts with a possibility of over-interpretation.

In the case of the crime of rape stipulated in Article 197 of the Polish Criminal Code, one of the alternative premises is subjecting the injured party to sexual intercourse or to perform/submit to other sexual act by deceit, which is an extremely broad concept that causes many interpretative difficulties. Issues regarding deceit are also subject to assessment with regard to intoxication of the injured party by the perpetrator. Whereas, with regard to the crime of sexual abuse under Article 198 of the Polish Criminal Code, one of the premises is the injured party's state of helplessness. The thus formulated attribute of the aforementioned type of crime poses a range of questions, among others, on the legal-criminal assessment of exploiting the fact of the injured party's intoxication in order to subject this person to sexual intercourse or to perform/submit to other sexual acts. This discussion is multi-threaded due to the multitude of opinions represented in this scope by criminal law representatives. Primarily, the up-to-dateness and importance of these issues outlined herein cannot be dismissed from the point of view of both a lawyer-practitioner and a lawyer-theorist.

Even at this stage, one could ask a controversial question challenging the purposefulness of studying the issue at hand. In fact, while analysing some ideas, especially those presented in the past, it may be concluded that a person consuming alcohol, irrespectively of whether such consumption is done on one's own initiative or the person is persuaded to do so by a companion who later commits a sexual act with such a person, is not put in a position of an injured party, and thus no crime is committed in this aspect by the alleged perpetrator.

It would seem that such a comment, completely groundless, could be justified by legal scholars and in court decisions taking into consideration some of the notes specified above. The rationality of such assessments would be predominantly advocated by considering as appropriate conclusions in the scope of Article 197 of the Criminal Code, which concentrate on accepting as appropriate the opinion on the impossibility of showing the attributes specified in the aforementioned provision in the case of intoxicating the *quasi*-injured party, an adult, who knows how his or her body reacts to an alcoholic drink. In such a case, any alcohol consumption at social meetings, at which sexual intercourse or other sexual act would be performed on

a person who has been previously deliberately persuaded by the perpetrator to consume alcohol and who was influenced by the *quasi*-perpetrator, would be left outside the interest of the judicature.

A similar conclusion should be drawn from the analysis of the contents of Article 198 of the Criminal Code in the context of committing a sexual act with a person who is unconscious as a result of previous alcohol consumption who, however, put himself or herself in this state independently and which was not related to pathological drinking or alcoholism.

Arguments supporting this presented opinion should be based on the interpretation of the contents of Article 1 § 2 of the Polish Criminal Code and Article 115 § 2 of the Polish Criminal Code. In light of the analysis of the invoked provisions, the aforementioned hypothetical facts of a case could not be subjected to legal-criminal assessment at all due to being acts of a low degree of damage to society, which excludes liability on the grounds of the principles expressed in the Polish Criminal Code. Therefore, the crime should have an attribute of damage to society at a degree higher than low, while the determination of the degree of damage to society is influenced by a series of factors indicated by the legislator in the contents of Article 115 § 2 of the Polish Criminal Code, such as, among others, the type and character of violated goods, the form of the intent and the type and degree of violated prudential rules. Attributes comprising the concept of the degree of damage to society stipulated in Article 115 § 2 of the Polish Criminal Code are divided into objective, which include, for instance, the type of the good violated by the act, and subjective, which include, among others, the issue of the assessment of the form of the intent and the perpetrator's motivation.¹ Additionally, it is necessary to indicate that the assessment of the degree of damage to society must be based on the analysis of all circumstances enumerated in Article 115 § 2 of the Polish Criminal Code.²

Therefore, it is necessary to ask the question whether, in the aforementioned cases, the degree of damage to society is higher than low due to the attitude and behaviour of the injured party. It is, in fact, a rule, which was confirmed by the Supreme Court in its judgment of 20 March 2019, that the aim of the institution described in Article 115 § 2 of the Polish Criminal Code is that the authorities enforcing the law are vested with tools to classify acts committed by perpetrators to insignificant and significant categories, which deserves to be analysed.³ Furthermore, it should be considered if, in the context of the aforementioned situation,

1 Budyn-Kulik, M., *Komentarz do art. 115 Kodeksu karnego*, in: Mozgawa, M. (ed.), *Kodeks karny. Komentarz*, Warszawa 2014, p. 283.

2 Resolution of the Supreme Court of 25 June 2019, I DO 21/19, LEX No. 2696823.

3 Judgment of the Supreme Court of 20 March 2019, VI KA 3/19, LEX No. 2643291.

attributes of the acts specified in Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code were shown.

Thus the formulated question was deliberate, as the author intended to raise the reader's scepticism. Whereas, the intention accompanying this concept was to emphasise the validity of interpreting the aforementioned provisions with a consideration of the injured party's interests and separating the injured party's attitude from the possibility of attributing commission of the discussed sexual offences to the perpetrator. Therefore, it is necessary to underline that this paper focuses on the position supporting a wide interpretation of the provisions of Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code in the spirit of providing victims with as broad legal-criminal protection against instances of sexual aggression as possible.

Alcohol vs. the crime of rape

In the scope of the crime classified by the legislator pursuant to Article 197 of the Criminal Code, discussion in the scope in question has its starting point at locating the issue of the victim's alcohol consumption to the prohibited act with reference to the set of statutory premises.

As has been indicated above, the issue of alcohol in the context of the injured party is related to one of the premises of the act under Article 197 of the Polish Criminal Code, i.e. deceit. In legal scholarship, deceit is classically stipulated as using the mistake made by the injured party by maintaining his or her conviction as to the validity of the circumstances causing such a mistake.⁴ J. Wojciechowska specifies the concept of deceit by linking deceit with the behaviours of a person who is misleading another person in order to lead the injured party to be unable to resist.⁵ Therefore, the mistake leads to excluding the injured party's decision-making ability or to the perpetrator influencing the victim to make a specific decision as a result of being misled, i.e. assurance regarding a state of reality which is not compliant with the truth.

In the context of this paper, it is crucial to underline that the issue of deceit is extremely complex, whereas the assessment of consuming alcohol by the victim and the impact thereof on the legal-criminal assessment of the perpetrator's act has been changing with time. In the period when the Criminal Code of 1969

4 Marek, A., *Kodeks karny. Komentarz*, Warszawa 2010, p. 450.

5 Wojciechowska, J. and Kunicka-Michalska, B., *Przestępstwa przeciwko wolności sumienia i wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Rozdziały XXIII, XXIV, XXV i XXVII Kodeksu karnego. Komentarz*, Warszawa 2001, p. 95.

was binding, both the judiciary and legal scholars and commentators had a rather coherent position on the discussed scope. It was believed that when an indecent assault was committed by the alleged perpetrator on an intoxicated victim, it did not constitute grounds for bringing prosecution against such a perpetrator. Such a thesis was supported with the arguments that focused on the statement that an adult who knows the character and effects of alcohol consumption should control it, especially while being aware of their body's reaction to this substance. In this context, it was irrelevant for representatives of science and judiciary whether the offender persuaded the injured party to consume alcohol, was indifferent in this scope or, while seeing the bad condition of the intoxicated person, did not advise against further consumption of alcoholic drinks. Such a position was expressed in 1974 by the Supreme Court in one of its rulings and which stipulated the clarity of the above statement for many years.⁶

The judgement of the Supreme Court of 1983, which allowed the possibility of prosecuting a perpetrator persuading a minor to consume alcohol in order to exclude his or her ability to make a conscious decision and then committing an indecent assault with such a person, constituted a certain breach in the discussed issue. However, this exception included only minors, who do not know the impact of alcohol on their bodies and who are not aware of the possibilities of excluding the decision-making ability due to alcohol consumption.⁷

Such a conception should be assessed, in the context of current social relations, as being univocally unfavourable, especially taking into consideration the legislator's pursuit of increasing the legal-criminal protection of victims of sexual offences.

Therefore, according to the currently binding conception, as a rule, the party injured with a sexual offence is not burdened in any manner with the liability for the occurrence thereof. Such a conclusion constitutes a starting point for accepting as proper a position according to which intoxicating an injured party in order to exclude his or her state of awareness and then, leading to performing a sexual intercourse or other sexual act constitutes a crime pursuant to Article 197 of the Criminal Code.⁸ However, what should also be considered, according to representatives of legal scholarship and according to court decisions, is the behaviour of the perpetrator who persuades the victim to consume alcohol in order for the injured party to break his/her moral principles in the sphere of sexual life does not consti-

6 Judgement of the Supreme Court of 26 September 1974, III KR 105/74, OSNKW 1974/12, item 229.

7 Judgement of the Supreme Court of 8 July 1983, IV KR 124/83, OSNKW 1984/1-2, item 13.

8 Mozgawa, M., *Komentarz do art. 197 kk*, in: Mozgawa, M. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2015, p. 538.

tute showing premises defined by the legislator in Article 197 of the Polish Criminal Code.⁹ Such a conclusion constitutes a natural consequence of assuming that in the case of the crime of rape, it is required for the perpetrator to have a direct specific intent strictly oriented to the aim of leading to sexual intercourse or performing/submitting by the victim to other sexual act.¹⁰ The issue in question leads the discussion to a new path where the attention to the insightful and critical and thus, devoid of unnecessary in this scope emotional character, subsumption of Article 197 of the Polish Criminal Code to the specific facts of a case, is reinforced.

Alcohol vs. sexual offence of exploiting helplessness

With reference to the issue of the sexual offence of exploiting helplessness, it is necessary to first shortly outline this issue in the context of Article 198 of the Polish Criminal Code, pursuant to which the aforementioned prohibited act has been penalised.

Above all, the act described at this point can be classified as one of the manners of committing by the perpetrator the crime classified under Article 198 of the Polish Criminal Code. This provision stipulates the liability of a person who exploits the helplessness, mental illness of the victim or his or her mental impairment in order to lead them to sexual intercourse or to perform/submit the injured party to other sexual acts in the situation when the victim is not able to recognise the significance of his or her acts or control his or her behaviours.

Therefore, with reference to this issue, it should be indicated that the person consuming alcohol, which resulted in excluding the ability to recognise the significance of his or her acts or control his or her behaviours, is characterised with helplessness. This state is, in fact, defined in court decisions as causing a disorder in the scope of understanding one's own acts by a helpless person irrespectively of the reason of such helplessness.¹¹ Moreover, it is underlined that helplessness can have attributes of permanent or temporary circumstances.¹² Thus, consuming alcohol by a person who, as result of his or her behaviour, becomes a person unable to recognise the significance of his or her acts or to control their behaviours and who is then sexually abused by a third party should be unconditionally recognised as showing

9 Hypś, S., *Komentarz do art. 197 kk*, in: Grześkowiak, A. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2019, pp. 1049–1050; Judgement of the Supreme Court of 26 September 1974, op. cit.

10 Judgement of the Supreme Court of 4 December 2018, II KK 114/18, LEX No. 2603598.

11 Judgement of the Supreme Court of 2 July 2002, IV KKN 266/00, LEX No. 54406.

12 Hypś, S., op. cit., p. 1057.

attributes of a prohibited act classified under Article 198 of the Criminal Code. The rationality of this position is also supported by judicature that, on the grounds of one of the issued court decisions, concluded that the criminal liability of the perpetrator of the act under Article 198 of the Polish Criminal Code is related to the circumstances strictly related to the injured party and his or her subjective features. In fact, these features prevent the victim from making a conscious decision in the sphere of the individual's sexual freedom at a specific moment.¹³ Nevertheless, there are discrepancies in this scope among legal commentators, which is problematic in the scope of the possibility to establish a uniform position.

For instance, in order to illustrate the above issue, the beliefs of M. Rodzynkiewicz regarding this matter should undoubtedly be indicated. The author explicitly questions the possibility of attributing criminal liability to the perpetrator due to committing a crime under Article 198 of the Polish Criminal Code in the case of alcohol consumption by the alleged victim in a situation when it is not related to e.g. alcoholism or other pathological conditions.¹⁴ Thus, the author promotes ideas constituting a breach in the general rule based on separating the reason of intoxication, i.e. helplessness to a level causing disruptions in the sphere of recognising by the injured party the significance of his or her behaviour and excluding the possibility of controlling it.¹⁵ It may, therefore, seem that the aforementioned author is in favour of the strict interpretation of the concept of "helplessness" and thus professes relating it solely to the injured party's helplessness caused by strictly physiological conditions, such as: paralysis, disability or a state of pathological alcohol or drug intoxication related to the victim's addiction. This position cannot be supported due to the literal interpretation of the provision of Article 198 of the Polish Criminal Code, which stipulates not only the helplessness, but primarily includes the formulated result of the helplessness, i.e. exclusion of the ability of making a conscious, free decision in the scope of sexual activity. Therefore, it should be indicated that the inability of formulating free and conscious consent or expressing verbal or non-verbal resistance does not occur in the case of physiological conditions related to, among others, disability, for instance, in the aforementioned forms. Thus, while summarising this part of deliberations, it should be stated that only

¹³ Decision of the Supreme Court of 20 April 2016, III KK 489/15, <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/III%20KK%20489-15.pdf> (accessed 27.02.2020).

¹⁴ Rodzynkiewicz, M., *Komentarz do art. 198 kk*, in: Zoll, A. et al. (eds.), *Kodeks karny. Część szczególna. Komentarz*, Zakamycze 2006, pp. 632–633.

¹⁵ See e.g. Konarska-Wrzosek, V., *Komentarz do art. 198 kk*, in: Konarska-Wrzosek, V. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2018, p. 952; Piórkowska-Flieger, J., *Komentarz do art. 198 kk*, in: Bojarski, T. et al. (eds.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 570.

meeting the aforementioned factors jointly can one be led to the statement that the perpetrator commits an act prohibited by the legislator pursuant to Article 198 of the Polish Criminal Code and not the crime of rape pursuant to Article 197 of the Polish Criminal Code.

Moreover, it seems that the above issue does not leave any misunderstandings on the grounds of the court decisions. Thus, the Supreme Court in one of its ruling rightly indicated that the attribute of helplessness is, in the context of Article 198 of the Polish Criminal Code, met if the injured party is in a condition excluding any ability of expressing [important and flawless – author’s note] will. Furthermore, the Supreme Court underlined that from the point of view of the analysed issue, only the fact that the circumstance of leading the victim to the state of helplessness occurred without the participation of the perpetrator, who “solely” exploits the existing circumstance of the victim’s state of helplessness due to alcohol consumption, is important.¹⁶

Acts under Article 197 of the Criminal Code and Article 198 of the Criminal Code vs. secondary victimisation

Additionally, in the discussed scope, the conviction prevailing in society regarding the even partial fault of the injured party due to the crime of rape committed against him or her should also be underlined. This phenomenon is called secondary victimisation on the grounds of victimology. This term refers to a set of behaviours of persons met by the victim of the crime and which come down to blaming the injured party and attributing to him or her contribution to the crime committed by the perpetrator. Thus, the injured party experiences negative results in a form of reliving the intense stress, fear and other psychosomatic reactions related to the specific event. It can also have an effect on the intensification of any post-traumatic stress disorder (PTSD).¹⁷ The sources of secondary victimisation include both, representatives of justice with whom the victim not often contacts first after the committed crime, as well as persons from the closest environment of the injured party: family or friends.¹⁸

¹⁶ Judgement of the Supreme Court of 25 November 2009, V KK 271/09, LEX No. 553764.

¹⁷ Łaskiewicz, K., *Powinności Policji wobec ofiary przestępstwa-zarys problem*, in: Mazowiecka, L. (ed.), *Wiktyimizacja wtórna. Geneza, istota i rola w przekształcaniu polityki traktowania ofiar przestępstw*, Warszawa 2012, p. 38.

¹⁸ Hryniewicz-Lach, E., *Ofiara w polskim prawie karnym. Interesy ofiary przestępstwa i karno-materiałne instrumenty służące ich zabezpieczeniu*, Warszawa 2017, pp. 82–83.

Therefore, considering the proper adoption of the conception of indirect liability of the victim for the crime of rape or the crime of sexual exploitation of helplessness in the case of consuming alcohol by the injured party is inadmissible due to the character of the aforementioned prohibited acts. Indeed, in victimology, there is a branch focusing on the impact injured parties have on the committed crimes. For example, one of the fathers of victimology, B. Mendelsohn, classified the types of victims and distinguished: completely innocent victims, victims less guilty than the perpetrator, victims equally guilty to the perpetrator, victims more guilty than the perpetrator, completely guilty victims.¹⁹ This conception constitutes a basis for other ideas in this scope, which have been developed by many representatives of victimology. Modifications of these conceptions consisted in, among others, describing victims as e.g. lewd, depressive or promiscuous.²⁰ Such epithets only reinforced the negative reception of victims of crimes *in generale*, while they are especially dangerous with reference to so-called sexual offences, since they allow for decreasing the liability of the actual perpetrator to the benefit of sharing it with the injured party. This, in turn, results in the stigmatisation and shame of the victim of sexual abuse of his or her sexual freedom and, in consequence, actual impunity of perpetrators, decreasing the number of reported crimes of this type or deepening traumas of victims and unconscious transfer thereof to the persons from the injured party's environment.

In the context of this issue, it should be indicated that the analysis of the impact of alcohol on the committed crime is often an element of victimological research. The research conducted by R.B. Felson and K.B. Burchfield proved a dependence between the injured party's alcohol consumption and a committed crime with the use of violence. In cases of such types of prohibited acts, the percentage of intoxicated victims was significantly higher than in the case of crimes committed without the use of violence.²¹ The contents of this type of formulated research can constitute a carrier of approval of the occurrence of a phenomenon of secondary victimisation with reference to sexual offences committed with the use of violence. Therefore, with reference to the issue of alcohol consumption by the party injured

19 Mendelsohn, B., *The origin of the doctrine of victimology*, in: Drapkin, I., et al. (eds.), *Victimology*, Toronto-London 1974, pp. 25–26.

20 Henting, H., *The criminal and his victim, studies in sociobiology of crime*, New Haven 1948, pp. 383–450; as quoted in: Chodorowska, A., *Ofiary zgwałcenia*, in: Chodorowska, A., *Przestępstwo zgwałcenia. Studium prawnokarne i kryminologiczne*, Olsztyn 2015, pp. 305–306.

21 Felson, R.B. and Burchfield, K.B., *Alcohol and the risk of physical and sexual assault victimization*, "Criminology" 2004, vol. 42, No. 4, p. 837, as quoted in: Bocheński, M., *Krytyczne spojrzenie na koncepcję przyczynienia się ofiary do zaistnienia przestępstwa zgwałcenia*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2010, Vol. 3, pp. 61–62.

as a result of crimes under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code, it is necessary to refer to the assessment formulated by J. Piórkowska-Flieger, who supported the interpretation increasing the protection of the injured party's rights against violations in the sphere of sexual life and who indicated the significance of each committed sexual offence irrespectively of the accompanying circumstances.²² Such circumstances include, among others: clothes worn by the injured party, the place of the event or the fact of consuming alcohol by the victim due to the persuasion of the perpetrator or without external impulse. A thus defined position is characterised with up-to-dateness, taking into account contemporary social conditions and increasing the feeling of urgency of changes in the sphere of human awareness in the scope of the lack of negative assessment concerning injured parties. M. Bocheński also supports this position and, noticing the interdependence between committing a sexual offence by the perpetrator and the injured party's alcohol consumption that sometimes occurs, challenges the passing of definite judgements in this regard.²³

Conclusion

Sexual offences constitute a specific type of prohibited acts due to their deep understory of extremely explicit social repercussions. Public opinion loudly and univocally passes judgments aimed at persons injured with sexual offences, burdening them with co-liability and often sole liability for the committed crime. Thus, it would be right to univocally assume that interpretation of provisions regarding crimes stipulated in Chapter XXV of the Polish Criminal Code, due to the aforementioned context, should especially cover a purposeful interpretation which allows for reinforcing the protection of injured parties and developing desirable social attitudes. It should be indicated that thus applied interpretative rules constitute not only performance of the justice function and protection function of the criminal law, but they also constitute implementation of a criminal policy aimed at minimising commission of sexual offences.²⁴ It is also important for commentators and judicature to maintain discipline in the scope of the interpretation of the aforementioned provisions due to the fact of their apparent thematic overlap. Many times, the differences between analysed types of prohibited acts are extremely delicate; however, proper assessment thereof allows one to conduct a reliable sub-

²² Piórkowska-Flieger, J., op. cit., p. 570.

²³ Bocheński, M., op. cit., pp. 62–63.

²⁴ Gardocki, L., *Prawo karne*, Warszawa 2019, p. 7.

sumption process of the specific facts of a case to the relevant provision of the Polish Criminal Code which influences the effectiveness of the criminal law. Additionally, to conclude, it is worth referring to the words of M. Filar, who noticed some room in sexual offences for legislative abuse related to providing an overly emotional tone to the legislation in this scope, especially the postulate of a rational approach to developing regulations in this scope, without detriment to the protection of the individual's rights in the scope of the freedom to decide on his or her sexual life and with a consideration of the rights of other persons.²⁵

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²⁵ Filar, M., *Współczesne kultury penalne*, in: Filar, M. and Utrat-Milecki, J. (eds.), *Kulturowe uwarunkowania polityki kryminalnej*, Warszawa 2014, pp. 47–48.

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CITATION

Matynia-Kłos, J., *Relation between the injured party being under the influence of alcohol and the liability of the perpetrator due to the crimes under Article 197 of the Polish Criminal Code and Article 198 of the Polish Criminal Code*, "Acta Iuris Stetinensis" 2020, No. 2 (Vol. 30), 61–72, DOI: 10.18276/ais.2020.30-05.