REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING CRIMINAL PROCEDURE LAW FOR 2018

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CRIMINAL PROCEDURE CODE

1. OBVIOUS EDITORIAL ERROR (ARTICLE 105 § 1 CPC)

In accordance with Article 105 § 1 of the Criminal Procedure Code (CPC), obvious editorial and calculation errors, and dates determined wrongly by mistake in a judgment or order or in justifications of those acts may be corrected at any time. As far as this provision is concerned, the Supreme Court judgments showed differences concerning the interpretation whether the discrepancy between a number determining a penalty or another measure which is transcribed in digits and in words is an obvious editorial error.

It was assumed that including two different amounts of a penalty (transcribed in digits and in words) in a sentence in fact causes that it is not possible to determine in what amount the penalty was actually imposed, which means that this way of specifying a penalty is not only in conflict with the content of Article 413 § 2(2) CPC, which stipulates that a judgment must be formulated in an understandable and unambiguous way, but also causes an internal contradiction in the sentence that prevents its execution, and this constitutes absolute grounds for an appeal in accordance with Article 439 § 1(7) CPC.[1] The Supreme Court recognised that pursuant

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[1] The Supreme Court judgments: of 21 October 2008, IV KK 316/08, LEX No. 469190; of 18 March 2010, III KK 25/10, OSNwSK 2010, item 569; of 11 April 2013, II KK 217/12, LEX No. 1298096; of 3 June 2015, III KK 79/15, OSNKW 2015, No. 10, item 87; of 22 October 2015, III KK 235/15, LEX No. 1820401; of 27 January 2016, V KK 413/15, LEX No. 1963397; of 19 January 2016, V KK 389/15, LEX No. 1959501; of 23 May 2017, III KK 186/17, LEX No. 2298279;

to Article 105 § 1 CPC, it is not admissible to amend a judgment when a court did not determine the type of a penalty, although there is no discrepancy between the description of its amount transcribed in digits and in words.[2] The Court indicated that: 'Article 105 § 1 CPC allows for the amendment to editorial or calculation errors in the form of a decision only in the case they do not concern the substantive content of a judgment and are obvious, i.e. they are apparent in the given context at first sight. An error can be made in the court symbol, number of files, number of an article in a legal act or a given name.'[3] The correction of editorial or calculation errors in a judgment is inadmissible only when their technical-editorial nature is not obvious and the correction of the error would actually lead to real interference into the substantive content of the judgment.[4] It is inadmissible to correct editorial errors concerning the substantive parts of a judgment, including those that interfere into a judgment with respect to a penalty by changing or adding the description of the type and amount of a penalty.[5]

The Supreme Court also adopted a different stance stating that: 'One cannot share the opinion that the inclusion of two different descriptions of the amount of a penalty makes it impossible to determine in what amount the penalty was actually imposed, which results in an internal contradiction that prevents the execution of a sentence. What is important are the circumstances of a given case which are always unique', and at the same time the Court approved of the correction made in its own judgment issued in appellate proceedings by substituting '100 (one hundred) daily rates' for '100 (two hundred) daily rates'.[6] The Court also admitted the correction of the date of an act commission in accordance with Article 105 § 1 CPC.[7] It assumed that: 'If the court of first instance had determined the type of punishment (deprivation of liberty) and its amount (8 – eight), and the only correction of the judgment had been the inclusion of the word "months" added as its clarification, as there are no doubts that the penalty imposed must have been determined in months and not years because an act under Article 288 § 1 CC committed by the accused carries a penalty of up to five years. Thus, an obvious editorial error was corrected, which is admissible pursuant to the provision of Article 105 § 1 CPC.'[8]

Z. Pachowicz, [in:] *Kodeks postępowania karnego. Komentarz*, J. Skorupka (ed.), Warszawa 2020, p. 290.

2 The Supreme Court judgment of 7 April 2010, IV KK 444/09, OSNwSK 2010, No. 1, item 663.

3 The Supreme Court ruling of 22 August 1970, III KZ 76/70, OSNKW 1970, No. 11, item 149.

4 The Supreme Court ruling of 17 September 2008, II KK 60/08, LEX No. 458853; the Supreme Court judgment of 3 June 2015, III KK 79/15, OSNKW 2015, No. 10, item 87; Z. Pachowicz, [in:] *Kodeks*, *supra* n. 1, p. 290.

5 The Supreme Court ruling of 22 August 1970, III KZ 76/70, OSNKW 1970, No. 11, item 149; the Supreme Court judgments: of 23 November 2005, IV KK 390/05, LEX No. 164378; of 21 October 2008, IV KK 316/08, LEX No. 469190; of 7 April 2010, IV KK 444/09, LEX No. 843704; of 4 December 2018, II KK 115/18, LEX No. 2623719; of 1 February 2018, II KK 300/17, LEX No. 2454222; of 13 December 2017, II KK 341/17, LEX No. 2408313; the ruling od the Court of Appeal in Kraków of 13 March 2018, II AKz 110/18, LEX No. 2609990.

6 The Supreme Court ruling of 29 November 2017, IV KK 391/17, LEX No. 2454225.

7 The Supreme Court ruling of 28 January 2009, II KK 206/08, LEX No. 486193.

8 The Supreme Court judgment of 4 October 2016, V KK 85/16, LEX No. 2151451.

Adjudicating on the issue, in the resolution of seven judges of 28 June 2018, I KZP 2/18,[9] the Supreme Court approved of the latter opinion and stated that:

> **Under the process of correction of an obvious editorial error (Article 105 § 1 CPC), the default that consists in a different formulation of a penalty amount (in digits and in words) prescribed in a sentence or another penal response measure may be eliminated. An editorial error may be recognised as an obvious one if, after a court analyses the content of a sentence and takes into account the legal classification of the given offence, grounds for conviction and the penalty amount, it is established that only one of the formulations of the penalty (another penal response measure) reflects the amount of penalty (another penal response measure) that could have been imposed based on the provisions of law referred to therein.**

It is a right opinion mainly for practical reasons and is not subject to unnecessary formalism. Justifying it, the Supreme Court referred to its former opinion that correction made in accordance with Article 105 CPC may concern every 'element' of a judgment or an order regardless of its procedural significance and substantive nature. However, it cannot lead to the change of the substantive content of the judgment or the order or their justification because such changes to their content can only be introduced as a result of hearing an appeal or under the process laid down in Article 420 CPC.[10]

The linguistic interpretation of the phrase 'obvious editorial error' also supports the Supreme Court's stance. An 'error', within its linguistic meaning, means: 'recognition, an opinion that is in conflict with real circumstances, inappropriate behaviour or move; a mistake, inaccuracy'; 'making of a mistake, a mistake, inaccuracy'; 'a mistake, usually a minor one'.[11] In this context, an error is a discrepancy between the actual, being in agreement with the real circumstances, state of things and the state adopted by a court in a judgment or ruling. An error is an unintended judgment that is in conflict with real circumstances, which does not result from purposeful action.[12] 'Editorial' means 'relating to text edition'; 'one that is connected with the process of transcribing'.[13] An error results from technical recording of some

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[9] OSNKW 2018, No. 8, item 54.

[10] Resolution of seven judges of the Supreme Court of 28 March 2012, I KZP 24/11, OSNKW 2012, No. 4, item 35 with a gloss of approval by D. Drajewicz, LEX/el. 2012 and similar comments by R.A. Stefański, *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie postępowania karnego za 2012 r.*, Ius Novum 2, 2013, pp. 181–186; the Supreme Court ruling of 4 January 2017, II KK 274/16, LEX No. 2203512; the Supreme Court ruling of 16 December 2009, IV KK 347/09, OSNwSK 2009, item 2572; the ruling of the Court of Appeal in Białystok of 20 January 2011, II AKz 13/11, LEX No. 1134039 with a critical gloss by B. Gadecki, GSP-Prz. Orz. 2011, No. 3, pp. 137–144; M. Kurowski, [in:] *Kodeks postępowania karnego. Komentarz*, D. Świecki (ed.), Vol. I, Warszawa 2013, p. 418; H. Paluszkiewicz, [in:] *Kodeks postępowania karnego. Komentarz*, K. Dudka (ed.), Warszawa 2018, p. 262.

[11] *Słownik języka polskiego*, M. Szymczak (ed.), Vol. 2, Warszawa 1982, p. 799; *Uniwersalny słownik języka polskiego*, S. Dubisz (ed.), Vol. 3, Warszawa 2003, p. 222; *Nowy słownik języka polskiego*, E. Sobol (ed.), Warszawa 2003, p. 599; *Inny słownik języka polskiego*, M. Bańko (ed.), Vol. I, Warszawa 2000, p. 1164.

[12] A. Lach, *Glosa do postanowienia SN z 27.02.2008 r., IV KO 21/08*, LEX 2008.

[13] *Uniwersalny słownik*, *supra* n. 11, p. 469, *Nowy słownik*, *supra* n. 11, p. 664; *Inny słownik języka polskiego*, M. Bańko (ed.), Vol. II, Warszawa 2000, p. 77.

facts in a different form, and not the process of drawing conclusions.[14] The essence of obviousness of an editorial error covers objectively recognised circumstances that take place in the course of action that unambiguously, with no effort of undertaking any interpretational steps, indicates that an error and not a purposeful activity occurred.[15] In case of doubts whether the given content of a judgment results from an error or an intended action, obviousness cannot be taken into account. At the same time, an error must be purely technical in nature, must result from carelessness or a hurry in which an author of a judgment is, including the process of copying some elements of another judgment that is recognised as a pattern in some types of cases with the use of the electronic system but without appropriate proofreading.[16]

The judicature rightly indicates that:

– 'An obvious editorial error the correction of which is admissible in accordance with Article 105 § 1 CPC consists in erroneous spelling of particular words composing a document content; thus, it is technical in nature, not resulting from the process of drawing conclusions. It constitutes unintended opinion that is not in conformity with real circumstances and that is not a result of purposeful action.'[17]
– 'An error that is subject to amendment pursuant to the provision discussed must, however, in the light of the circumstances of a given case, not raise any doubts, and be a certain, unquestionable, i.e. obvious, error concerning both the aspect of nature that is only an editorial or calculation and only technical one and the aspect of an unchallenged court's error.'[18]

In the above-mentioned resolution, the Supreme Court rightly pointed out that a different transcript of the penalty imposed in a sentence in digits and words is absolutely not a purposeful description, and thus it is an error and undoubtedly it is editorial in nature because a sentence is developed in writing (Article 412 CPC). However, the substantive content of a judgment or order cannot be changed or supplemented. The existence or the lack of conditions for amendment to the content of a sentence with a discrepancy between an amount transcribed in digits and words depends only on the content of a sentence alone and not other procedural documents, including the justification of a sentence. This is a sentence developed in writing (Article 412 CPC) that contains adjudication on punishment (Article 413 § 2(2) CPC); thus, it is carried out immediately after a discussion and voting in the form of recording a penalty imposed in writing. In the Supreme Court's right opinion, an editorial error concerning a penalty transcribed differently in digits and in words is obvious in nature when it can be determined without an analysis of the justification of a sentence or any other documents collected during a trial. The assessment is only based on an analysis of the content of a sentence, the classification of an offence attributed to the accused, which results in the level of penal response,

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[14] M. Kurowski, [in:] *Kodeks*, 2013, *supra* n. 10, p. 419.

[15] H. Paluszkiewicz, [in:] *Kodeks*, 2018, *supra* n. 10, p. 261.

[16] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz. Artykuły 1–467*, Vol. I, Warszawa 2014, p. 428.

[17] The Supreme Court ruling of 31 July 2018, II KK 431/17, LEX No. 2530664.

[18] The Supreme Court judgment of 24 April 2018, V KK 379/17, LEX No. 2490933.

grounds for conviction and a penalty amount. At the same time, it should be taken into account whether the provisions aggravating punishment (Article 64 § 1 and § 2 CC, Article 65 CC, Article 91 § 1 CC) or those mitigating it (Article 60 § 6 CC and Article 37a and b CC) have been applied or not.

The requirement of correcting such an error only during appellate or cassation proceedings would be an unnecessary waste of time and generate additional costs.

2. SCOPE OF SURVEILLANCE (ARTICLE 168B CPC)

Article 168b CPC authorises a prosecutor to take a decision on the use of evidence obtained in the course of surveillance concerning an offence prosecuted *ex officio* or a fiscal offence in criminal proceedings concerning an offence other than the one that is subject to a surveillance order, i.e. going beyond the objective scope, or concerning an offence prosecuted *ex officio* or a fiscal offence committed by a person other than the one that is subject to a surveillance order, i.e. going beyond the subjective scope. In the light of this regulation a problem occurred whether the phrase 'an offence prosecuted *ex officio* or a fiscal offence other than the one that is subject to a surveillance order' covers all offences prosecuted *ex officio* or fiscal offences or only the offences classified in Article 19 para. 1 of the Act of 6 April 1990 on the Police.[19] The problem is not unanimously solved in the doctrine, where there are opinions that a prosecutor's authorisation covers:

(1) only offences prosecuted *ex officio* and fiscal offences that can be subject to surveillance based on special provisions;[20]
(2) not only offences and fiscal offences that can be subject to surveillance based on special provisions; it is emphasised, however, that it raises considerable doubts whether this view is in conformity with the Constitution of the Republic of Poland.[21]

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[19] Dz.U. 2020, item 360, as amended.

[20] Z. Niemczyk, *Nowy kształt kontroli operacyjnej po zmianach ustawy o Policji i Kodeksu postępowania karnego*, Kwartalnik Krajowej Szkoły Sędziów i Prokuratorów 2, 2017, p. 2224; J. Skorupka, *Prokonstytucyjna wykładnia przepisów prawa dowodowego w procesie karnym*, [in:] *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, T. Grzegorczyk, R. Olszewski (eds), Warszawa 2017, p. 363; D. Gruszecka, [in:] *Kodeks*, J. Skorupka (ed.), 2020, *supra* n. 1, p. 368.

[21] T. Grzegorczyk, *Kodeksowe legalizowanie w procesie karnym, przez nowelizację z dnia 11 marca 2016 r., dowodów uzyskanych za pomocą przestępstwa lub z naruszeniem przepisów postępowania poza granicami zgody, udzielonej przez sąd na wkroczenie w sferę konstytucyjnie chronionych praw i wolności*, [in:] *Proces karny w dobie przemian. Zagadnienia ogólne*, S. Steinborn, K. Woźniewski (eds), Gdańsk 2018, pp. 333–337; S. Brzozowski, *Wykorzystywanie dowodów uzyskanych w toku kontroli operacyjnej w kontekście art. 168b Kodeksu postępowania karnego*, Palestra 6, 2016, pp. 23–25; S. Hoc, J. Kudła, *Zgoda następcza z art. 168b Kodeksu postępowania karnego. Komentarz praktyczny*, LEX/el. 2016, theses 9 and 10; P. Daniluk, *Instytucja tzw. zgody następczej po nowelizacji z 11 marca 2016 r. w świetle standardów konstytucyjnych i konwencyjnych*, Studia Prawnicze 3, 2017, pp. 93–99; B. Sitkiewicz, *Wykorzystanie dowodów uzyskanych w ramach kontroli operacyjnej oraz podsłuchu procesowego*, [in:] *Postępowanie karne po nowelizacji z dnia 11 marca 2016 r.*, A. Lach (ed.), Warszawa 2017, pp. 117–119; K. Burdziak, *Dowody uzyskane w toku kontroli operacyjnej*, [in:] *Dynamika zmian w prawie*, M. Nawrocki, M. Rylski (eds), Warszawa 2017, pp. 54–60; P. Wiliński, *Konstytucyjny standard*

In the resolution of seven judges of 28 June 2018, I KZP 4/18,[22] the Supreme Court stated that:

> **The phrase 'an offence prosecuted *ex officio* or a fiscal offence other than the one that is subject to a surveillance order' used in Article 168b CPC covers only those offences in relation to which a court can give consent to rule surveillance, including those referred to in Article 19 para. 1 of the Act of 6 April 1990 on the Police (Dz.U. 2017, item 2067, consolidated text, as amended).**

The opinion is right,[23] although it encountered criticism.[24] Justifying its stance, the Court assumed that the interpretation of Article 168b CPC must be in conformity with the Constitution of the Republic of Poland and international legal norms. Thus, the Court started the interpretation stating that the provision is not independent in nature because it concerns non-procedural control that is regulated in special provisions, inter alia, Article 19 of the Act on the Police, and is admissible in relation to offences listed in this provision. The Supreme Court is right to argue that it would be in conflict with fundamental principles of logical interpretation to assume that there are statutory restrictions on obtaining primary consent to surveillance, and in the case of the secondary surveillance, there are no restrictions of this type. With the use of reasoning based on the *argumentum a minori ad maius* principle, the Court rightly indicates that the scope of secondary surveillance cannot be broader than the scope of primary surveillance. If, in order to obtain consent to surveillance, a motion to apply it must concern offences referred to in the catalogue laid down in Article 19 para. 1 of the Act on the Police and broader surveillance is prohibited, the same catalogue should be applied to surveillance conducted in the background of this consent.

The statement made by the Supreme Court that if Poland is to be a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland), the prosecution bodies cannot have at their disposal instruments in the form of almost unlimited scope of surveillance being beyond judicial supervision deserves absolute approval.

It is significant that the Court made reference to the statement of the Constitutional Tribunal that: 'as concerns the grounds for ruling the application of surveillance, in order to be able to speak about the maintenance of the constitutional standard, the legislator should define a closed and possibly narrow catalogue of serious offences justifying this type of interference into the status of an individual,'[25] which covers

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legalności dowodu w procesie karnym, [in:] *Proces karny w dobie przemian. Zagadnienia ogólne*, S. Steinborn, K. Woźniewski (eds), Gdańsk 2018, pp. 131–314.

[22] OSNKW 2018, No. 8, item 53.

[23] C. Kulesza, [in:] *Kodeks*, K. Dudka (ed.), 2018, *supra* n. 10, p. 349; D. Czerwińska, *Problematyka zgody następczej na wykorzystanie tzw. przypadkowych znalezisk po 15.04.2016 r.*, Przegląd Sądowy 4, 2019, pp. 84–85.

[24] See glosses on this resolution by J. Skorupka, OSP 2019, No. 1, pp. 72–80; B. Gadecki, OSP 2019, No. 1, pp. 80–86; K.T. Boratyńska, P. Czarnecki, M. Królikowski, A. Lach, [in:] *Kodeks postępowania karnego. Komentarz*, A. Sakowicz (ed.), Warszawa 2020, p. 517.

[25] The Constitutional Tribunal judgment of 30 July 2014, K 23/11, OTK ZU 2014, No. 7A, item 80.

both primary and subsequent surveillance. Interference into human freedoms, the human right to privacy, cannot be unlimited, and in the context of Article 168b CPC, the catalogue of serious offences justifying the application of surveillance is the restriction. The judicature rightly assumes that:

> The catalogue laid down in Article 19 para. 1 of the Act on the Police should be developed based on strict compliance with the principle of proportionality and respect for an individual's privacy. If the legislator, who is rational, having in mind the above-mentioned issues, decided to narrow the scope of prohibited acts that could be subject to police surveillance, there are no arguments (except the purpose-related ones) for freely extending this catalogue and including other offences therein. And this means that only evidence obtained in accordance with Article 19 of the Act on the Police concerning offences laid down in the catalogue under para. 1 can be used in a court proceedings.[26]

The Supreme Court's statement that a prosecutor's decision concerning the use of evidence obtained from surveillance in criminal proceedings is effective only in the investigation phase is controversial. The Court stated as follows:

> the opinion that indicates that a prosecutor could arbitrarily decide on the use of evidence obtained from secondary surveillance in the course of the whole criminal proceedings, thus also in the court proceedings, is unacceptable. There are no doubts that the prosecutor must take a decision concerning the use of material obtained as a result of surveillance: whether it can be used in a trial and presented to a court with an indictment or not. The prosecutor's decision in the area refers to the final directive of Article 168b CPC. On the other hand, it must be regarded as obvious that at the stage of judicial proceedings, only the court may take a decision on admitting evidence, not the prosecutor. This results from the elementary rule governing this stage of criminal proceedings expressed in Article 368 CPC […] Thus, as a rule, the statement closing Article 168b CPC: 'a prosecutor takes a decision concerning the use of evidence in criminal proceedings' is technical in nature and does not bear any new entitlements for the prosecutor. It is due to the fact that the prosecutor possessing material obtained in the course of surveillance must assess its procedural usefulness. As a result of this assessment, adequate evidentiary motions will be added to an indictment or the material will be recognised as procedurally useless (due to its low evidentiary value or a defective way of obtaining it), which should result in its destruction.[27]

It is assumed in the legal doctrine that the competence that a prosecutor is awarded under Article 168b CPC is expressed in the possibility of getting acquainted with information obtained in an unlawful way and then deciding on its use for the purpose of carrying out other evidence-related activities.[28]

It might seem that a court may dismiss the evidence due to its unlawful nature.[29] It can be argued that binding a court by this decision would lead to the infringement of a court's jurisdictional independence, because in accordance with Article 8 CPC,

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[26] Judgment of the Court of Appeal in Poznań of 7 July 2017, II AKa 63/17, LEX No. 2402504.

[27] See also the judgment of the Court of Appeal in Warsaw of 13 June 2016, II AKa 133/16, LEX No. 2171252; D. Czerwińska, *supra* n. 23, pp. 83–84.

[28] J. Skorupka, *Glosa do uchwały 7 sędziów SN z dnia 28 czerwca 2018 r., I KZP 4/18*, OSP 2019, No. 1, p. 77.

[29] Thus, D. Czerwińska, *supra* n. 23, p. 85.

a criminal court independently adjudicates on factual or legal issues and is not bound by an adjudication of another court or body (§ 1), and it is only bound by valid and final court judgments that develop law or legal relations (§ 2). It is hard to recognise a prosecutor's decision on the use of evidence obtained in the course of surveillance and tapping or other forms of information in criminal proceedings as the latter.[30] It is indicated that a court is not bound by a prosecutor's decision and may refuse to admit evidence presented by the prosecutor.[31] It is believed that in the case a motion to admit evidence derived from information obtained from surveillance and tapping beyond statutory limits is lodged with an indictment, a court president should refer the case to a session to be admitted or a court should take such a decision at a preparatory session before a trial (Article 349).[32] It is stated that the adoption of the prosecutor's authoritative competence to arbitrarily impose evidentiary grounds for adjudication would lead to annihilation of procedural justice as well as would negate the guarantee function of criminal procedure norms. The reasons behind purpose-related and functional interpretation lead to a conclusion that deriving the prosecutor's authoritative competence binding the court to admit material obtained from surveillance from the content of Article 168b CPC would lead to inacceptable conclusions from the axiological point of view.[33]

The arguments are not convincing because the issue concerns admission of evidence, and a prosecutor is competent to do that in preparatory proceedings. Such prosecutor's decision causes that this evidence is presented at a trial and the court is not authorised to refuse to admit it because, in accordance with Article 170 § 1 CPC, it can only dismiss an evidence-related motion. At the same time, including evidence in an indictment, the prosecutor does not request that it be admitted but, *verba legis*, that 'it be heard at a trial' (Article 333 § 1(2) CPC). The word 'hear' means 'examine',[34] which makes it necessary to assume that the court must hear evidence and not decide whether to admit it or not.[35]

Thus, the court is bound by the prosecutor's decision to hear such evidence in criminal proceedings but assesses it independently and may refuse to take it into account as grounds for establishment of facts and adjudication due to unconstitutionality of Article 168b CPC, which allows the prosecutor to use the evidence, although it has been obtained with infringement of the provisions regulating the scope of surveillance and tapping or information transfer.[36] All public authorities, including law enforcement and justice administration bodies, in

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30 R.A. Stefański, *Węzłowe problemy kontroli i utrwalania rozmów telefonicznych*, [in:] *Kontrola korespondencji*, B. Opaliński, M. Rogalski (eds), Warszawa 2018, p. 64.

31 D. Gruszecka, *supra* n. 20, p. 367.

32 K.T. Boratyńska et al., [in:] *Kodeks*, A. Sakowicz (ed.), 2020, *supra* n. 24, p. 645; D. Gruszecka, *supra* n. 20, p. 369.

33 D. Szumiło-Kulczycka, *Dalsze wykorzystywanie materiałów z kontroli operacyjnej (uwagi na tle art. 168b k.p.k.)*, Państwo i Prawo 10, 2018, p. 111.

34 *Praktyczny słownik współczesnej polszczyzny*, H. Zgółkowa (ed.), Vol. 33, Poznań 2001, p. 429.

35 R.A. Stefański, *Pozycja prokuratora w zreformowanej procedurze karnej a standardy rzetelnego procesu*, [in:] *Ewolucja polskiego wymiaru sprawiedliwości w latach 2013–2018 w świetle standardów rzetelnego procesu*, C. Kulesza, A. Sakowicz (eds), Białystok 2019, p. 76.

36 R.A. Stefański, 2018, *supra* n. 30, p. 67.

accordance with Article 7 of the Constitution of the Republic of Poland, must act within the limits of law. The activities taken by those bodies are determined by law, which should lay down the grounds for them and their limits. The requirement of grounds for public authorities' actions is strictly connected with the necessity to undertake action within the limits of law. Going beyond those limits is classified as an action with no legal grounds, thus the action beyond the limits determined by law.[37] All activities performed in criminal proceedings should be based on the provisions of law and conducted within the limits laid down in law.[38]

The use of unlawful evidence infringes the principle of a fair trial. The judicature rightly emphasises that:

> the right to a fair trial has such an important position in the catalogue of the rights of the accused that it cannot be sacrificed for the efficiency in the prosecution of crimes. Public interest cannot justify the use of evidence obtained in an unlawful way. Using it without the evaluation whether the action is moral (when law enforcement bodies infringe the law in order to obtain evidence for another person's breach of law) makes the proceedings unfair, especially as the admission of this evidence would be decisive for adjudication on the guilt of the accused.[39]

In fact the European Court of Human Rights stated that, while Article 6 ECHR guarantees the right to a fair trial, it does not lay down any rules concerning the admissibility of evidence; that is why, the issue is subject to national law and it is not the Court's competence to adjudicate on the rules whether particular types of evidence, e.g. evidence obtained unlawfully, can be admitted or not. This competence concerns the issue whether proceedings as a whole, including the method of obtaining evidence, have been reliable and just.[40]

A prosecutor does not maintain his competence in court proceedings; this relates to a situation when the problem occurs in the proceedings. Due to the fact that the court hosts the proceedings and the prosecutor is only a party to it, there is no rational justification for granting him this right. The prosecutor may lodge a motion to admit evidence from the material obtained during surveillance and the court may dismiss this motion in accordance with Article 170 § 1(1) CPC if it decides that

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[37] T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2003, p. 231; the Constitutional Tribunal judgments: of 14 June 2000, P 3/00, OTK 2000, No. 5, item 138; of 20 October 1986, P 2/86, OTK 1986, No. 6; of 19 October 1993, K 14/92, OTK 1993, No. 35; of 15 March 1995, K 1/95, OTK 1995, No. 7; of 15 July1996, U 3/96, OTK 1996, No. 4, item 31.

[38] P. Kardas, *Problem granic legalności czynności uczestników postępowania karnego i konsekwencji ich przekroczenia*, [in:] *Granice procesu karnego. Legalność działań uczestników postępowania*, D. Gruszecka, J. Skorupka (eds), Warszawa 2015, p. 14; R.A. Stefański, *Stosunek sądu do dowodów nielegalnych*, [in:] *Postępowanie przed sądem I instancji w znowelizowanym procesie karnym*, D. Kala, I. Zgoliński (eds), Warszawa 2018, pp. 45–58.

[39] The Supreme Court rulings: of 19 March 2014, II KK 265/13, OSNKW 2014, No. 9, item 71; of 14 January 2004, IV KK 200/03, LEX No. 162404; of 30 November 2010, III KK 152/10, OSNKW 2011, No. 1, item 8; judgment of the Court of Appeal in Katowice of 11 October 2012, II AKa 368/12, LEX No. 135640.

[40] The ECtHR judgments: of 12 July 1988 in *Schenk v. Switzerland*, application no. 10862/84, LEX No. 81067; of 12 May 2000 in *Khan v. the United Kingdom*, application no. 35394/97, LEX No. 76868; L. Garlicki, *Aktualne orzecznictwo Europejskiego Trybunału Praw Człowieka*, [in:] *Orzecznictwo sądowe w sprawach karnych. Aspekty europejskie i unijne*, L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (eds), Warszawa 2008, p. 26.

hearing this evidence is unconstitutional and inadmissible.[41] The opinion that the court is obliged to take this evidence into account because statute allows it should not be approved of.[42]

3. COMPLAINT ABOUT REPEATED DECISIONS ON REFUSAL TO INSTIGATE PREPARATORY PROCEEDINGS OR ON THEIR DISCONTINUATION (ARTICLE 330 § 2 CPC)

The Supreme Court, in its ruling of 29 November 2018, I KZP 12/18,[43] explained that:

> **Repeated decisions refusing to instigate preparatory proceedings or on their discontinuation issued by a proceeding body pursuant to Article 330 § 2 CPC are not decisions closing the way to obtaining a judgment referred to in Article 459 § 1 CPC because they do not create a procedural situation that results in an absolute decision that the sentence will not be issued. The content of Article 55 § 1 CPC and Article 330 § 2 CPC in relation to the rights of the aggrieved constitutes a statutory exception to the rule concerning the right to appeal against the decision on the refusal to instigate preparatory proceedings or on their discontinuation laid down in Article 306 § 1 or § 1a CPC in conjunction with Article 459 § 2 CPC.**

At the time of its issue the stand was right, however, it became out-of-date due to the amendment to Article 330 § 2 CPC made by the Act of 19 July 2019 amending the Act: Code of Criminal Procedure and some other acts,[44] which allowed an appeal against a repeated decision to a superior prosecutor in accordance with Article 330 § 2 CPC.

4. SPECIFIC LEGAL QUESTIONS (ARTICLE 441 § 1 CPC)

The Supreme Court expressed accurate opinions on specific legal questions. They are as follows:

– Effective submission of a request to the Supreme Court for answering a legal question in accordance with Article 441 § 1 CPC requires that three conditions occur jointly. The question must be asked about: (a) a 'legal' issue, i.e. a serious interpretational problem such as one concerning a provision (provisions) interpreted in a different way in case law or a provision that is erroneously edited or unclearly formulated making different interpretations possible; (b) an issue that needs a 'fundamental interpretation of statute', i.e. concerning a situation where a norm makes a different interpretation possible, which has a negative impact on the functioning of law in practice; (c) an issue that

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41 R.A. Stefański, [in:] *Kodeks postępowania karnego. Komentarz*, R.A. Stefański, S. Zabłocki (eds), Vol. II, Warszawa 2019, p. 84.

42 J. Machlańska, *Procesowe wykorzystanie podsłuchu w nowelizacji kodeksu postępowania karnego oraz niektórych innych ustaw z 11 marca 2016 r. w świetle prawa do obrony*, Studia Iuridica Lublinensia 4, 2016, p. 135.

43 OSNKW 2019, No. 2, item 8.

44 Dz.U. 2019, item 1694.

occurs 'in connection with hearing an appeal', i.e. is connected with a particular case so that an appeal cannot be adjudicated on until the legal issue is resolved. However, a legal issue cannot concern the way of adjudicating of a particular case, the application of regulations, confirmation or negation of a particular interpretational opinion presented by an appellate court and issues connected with fact finding.[45]

- An appellate court's submission of a legal question is effective when all the conditions laid down in the provision are fulfilled. Thus, it must be a 'legal issue' requiring 'fundamental interpretation of statute' that occurs when 'an appellate measure is heard'. It should be reminded that the institution of resolutions of the Supreme Court adopted pursuant to this provision in connection with legal questions asked by an appellate court constitutes an exception to the general rule of independent adjudication by a competent court hearing a particular case, which is laid down in Article 8 § 1 CPC. Thus, under procedural statute, the scope of those resolutions is limited to basic issues requiring interpretation of statute. The Supreme Court's stance is consistent with regard to the requirement that legal questions should be asked only in case a legal issue occurs when an appeal is heard, i.e. when a serious interpretational problem occurs in connection with a provision that is diversely interpreted or a provision that is defectively or unclearly formulated. On the other hand, a court of second instance is obliged to provide detailed justification of doubts it has and why it believes they are serious or why the explanation of the issue requires fundamental interpretation of statute.[46]
- Asking a legal question, an appellate court is obliged not only to formulate the question in a precise way, but also prove in the justification of its decision why there is a need for the Supreme Court's fundamental interpretation of a particular provision in a given case. However, if a court fails to fully meet the requirements, inappropriate fulfilment of the requirement does not exclude a possibility of adopting a relevant resolution by the Supreme Court when the presented issue clearly seems to be real, important and requiring fundamental interpretation of statute.[47]
- Asking a legal question as an exception to the rule of jurisdictional independence of a criminal court must be preceded by an attempt to eliminate interpretational doubts via operative interpretation. The subject matter of the legal question cannot concern issues connected with the establishment of facts, the evaluation of evidence or the possibility of applying a particular norm to the established actual state. The mode laid down in Article 441 CPC does not serve the need for confirming by the Supreme Court that an appellate court's interpretation is appropriate.[48]

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[45] The Supreme Court rulings: of 25 October 2018, I KZP 9/18, OSNKW 2018, No. 12, item 76; of 28 June 2018, I KZP 1/18, OSNKW 2018, No. 8, item 56; of 25 October 2018, I KZP 11/18, OSNKW 2018, No. 12, item 77; of 28 March 2018, I KZP 16/17, OSNKW 2018, No. 7, item 47.

[46] The Supreme Court ruling of 28 March 2018, I KZP 15/17, OSNKW 2018, No. 6, item 43.

[47] The Supreme Court resolution of 19 December 2018, I KZP 13/18, OSNKW 2019, No. 1, item 1.

[48] The Supreme Court ruling of 25 January 2018, I KZP 10/17, OSNKW 2018, No. 3, item 24.

5. ABSTRACT LEGAL QUESTIONS (ARTICLE 83 § 1 ACT OF 8 DECEMBER ON THE SUPREME COURT)

The so-called abstract legal questions are specified in Article 60 § 1 of the Act of 8 December 2017 on the Supreme Court[49]. They are a means of judicial supervision aimed at standardisation of case law, including the Supreme Court case law, and the subject matter of a resolution adopted in this mode is the explanation of the provisions of law the interpretation, not application, of which has led to discrepancies in case law.[50]

In the resolution of seven judges of 20 September 2018, I KZP 7/18,[51] the Supreme rightly held that:

> **In accordance with established opinions that are still up-to-date, regardless of the fact that a new Act on the Supreme Court was passed, the basic grounds for a motion referred to in Article 83 § 1 of the Act of 8 December 2017 on the Supreme Court do not consist in discrepancies in case law, especially a discrepancy resulting from a different application of law, but a discrepancy in the interpretation of law. The problem of discrepancies in the interpretation of law is not resolved in this mode in connection with a specific case, but *in abstracto*, and is to serve ensuring standardisation of case law. That is why, it is assumed that the uniform interpretation of particular legal measures adopted by courts prevents the use of this instrument.**

The opinion in the resolution of seven judges of the Supreme Court of 28 June 2018, I KZP 3/18,[52] should be assessed in the same way. It indicates that:

> **Legal provisions are not explained in this mode in connection with a particular case, but *in abstracto*, and this aims to ensure uniformity of case law (Article 83 § 1 of the Act on the Supreme Court, unlike the regulation that was in force before, indicates that directly) because the Supreme Court provides interpretation in this mode when discrepancies in case law occur.**

The opinion is right and is presented in the doctrine.[53]

6. POSSIBILITY OF QUASHING AN ACQUITTAL OR DISCONTINUATION OF CRIMINAL PROCEEDINGS AND REFERRING A CASE FOR REHEARING BASED ON THE *NE PEIUS* RULE LAID DOWN IN ARTICLE 454 § 1 CPC

In accordance with Article 454 § 1 CPC, an appellate court cannot convict the accused who was acquitted by a court of first instance or when the first instance proceedings against him was discontinued and, in accordance with Article 427 § 2 CPC, an

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[49] Dz.U. 2019, item 825, as amended.

[50] The Supreme Court ruling of 25 February 2005, I KZP 33/04, LEX No. 142537; the Supreme Court resolutions: of 17 December 2008, I KZP 27/08, OSNKW 2009, No. 1, item 1; of 28 March 2012, I KZP 24/11, OSNKW 2012, No. 4, item 35; of 29 October 2012, I KZP 15/12, OSNKW 2012, No. 11, item 111; R.A. Stefański, *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych*, Kraków 2001, p. 145.

[51] OSNKW 2018, No. 11, item 72.

[52] OSNKW 2018, No. 8, item 55.

[53] S. Włodyka, *Przesłanki dopuszczalności pytań prawnych do Sądu Najwyższego*, Nowe Prawo 2, 1971, pp. 183–185; R.A. Stefański, 2001, *supra* n. 50, pp. 145–146.

appellate court quashes a judgment and refers a case for rehearing, inter alia, in the case laid down in Article 454 CPC.

As far as those provisions are concerned, the Supreme Court was asked the following question:

> Does the requirement laid down in Article 437 § 2 CPC in conjunction with Article 454 § 1 CPC concerning quashing of the first-instance court's decision on acquittal and referring a case to it for rehearing have to be fulfilled just when an appellate court recognises an infringement of evidence-hearing procedure that allows for recognition of acquittal, discontinuation or conditional discontinuation of proceedings as defective and opens a possibility of sentencing or only when, after this default is eliminated by supplementing the evidence--hearing proceedings, the appellate court states that there are grounds for conviction?

The grounds for this question consisted in discrepancies in the interpretation that can be found in the Supreme Court case law. The Court held that:

(1) Quashing a judgment and referring a case to the first-instance court for rehearing due to the *ne peius* rule laid down in Article 454 § 1 CPC (Article 437 § 2 second sentence CPC) is possible only when, after an appellate court eliminates recognised default referred to in Article 438 paras 1–3 CPC, e.g. by supplementing evidence-hearing proceedings in the course of appellate proceedings or evaluating evidence in these proceedings in accordance with Article 7 CPC, there are grounds for conviction.[54] A court of second instance, within the appellate proceeding model adopted, is obliged to supplement evidence in the course of appellate supervision conducted and to do it regardless of the type sentence that is subject to supervision. Only after performing this activity, the issue of the scope of the appellate court's adjudication on default recognised as relative grounds for an appeal can be discussed (Article 438 CPC). In case of acquittal or conditional discontinuation of proceedings, when there are grounds for conviction, the appellate court's judgment may only concern cassation (Article 454 § 1 CPC). On the other hand, when conviction is appealed against, the appellate court issues an amending judgment (argument under Article 437 § 2 second sentence *in fine* CPC).[55]

(2) In a situation when an appellate court notices that there were no grounds for an acquittal because some errors were made and it recognises that it is necessary to supplement the trial, it is neither justified nor purposeful to conduct its own evidence hearing within appellate proceedings. If these proceedings led to a conviction and, due to Article 454 CPC, the court would have to issue a cassation judgment, thus, the whole extended appellate proceedings would make no sense. On the other hand, there would be no grounds for conducting them in order to ensure the parties that the acquittal was right.[56]

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[54] The Supreme Court judgments: of 27 July 2017, IV KS 2/17, OSNKW 2018, No. 5, item 35; of 10 August 2017, III KS 5/17, LEX No. 2340594; of 20 September 2017, V KS 5/17, LEX No. 2389622.

[55] The Supreme Court judgments: of 14 March 2018, IV KS 4/18, OSNKW 2018, No. 7, item 51; of 23 August 2018, V KS 16/18, LEX No. 2538860; of 12 July 2017, III KS 4/17, LEX No. 2341782.

[56] The Supreme Court rulings: of 15 November 2017, IV KS 3/17, unpublished; of 21 November 2017, III KS 8/17, LEX No. 2428758; of 21 March 2018, III KS 2/18, unpublished;

In the resolution of seven judges of 20 September 2018, I KZP 10/18,[57] the Supreme Court approved of the former opinion and stated that:

> **The possibility of quashing an acquittal, discontinuance or conditional discontinuance of criminal proceedings and referring a case for rehearing due to the *ne peius* rule laid down in Article 454 § 1 CPC (Article 437 § 2 second sentence CPC) takes place only when an appellate court, as a result of eliminating default constituting one of the grounds for an appeal laid down in Article 438 paras 1–3 CPC (i.e., for instance, after supplementing an evidence-hearing, properly evaluating evidence, and establishing facts) recognises that there are grounds for a conviction, which faces an obstacle in the form of a ban laid down in Article 454 § 1 CPC. Just a possibility of issuing such a judgment alone in the course of proceedings before a court of first instance is insufficient to assume the occurrence of the *ne peius* rule laid down in Article 454 § 1 CPC.**[58]

It is a right opinion and it was thoroughly and deeply justified. Justifying it, the Court first of all referred to the stand of the Supreme Court that:

> In the case of the *ne peius* rule under Article 454 § 1 CPC, complaint-related supervision covers the evaluation of appropriate application of this provision from the point of view of compliance with the regulation stipulating that an appellate court 'cannot convict the accused'. It is required that the court prove that if the default had not been recognised, there could have been a conviction, but the issue of a sentence is inadmissible in the appellate instance due to a ban on such adjudication. Only then the sentence subject to appeal can be quashed and the case referred to a court of first instance for rehearing.[59]

The Court also drew attention to the fact that Article 427 § 2 CPC indicates that quashing a sentence appealed against and referring a case for rehearing is an exception, and the substantive adjudication by an appellate court is a rule and leads to the conclusion of this stage of criminal proceedings. According to the Supreme Court, it is not an appellate court's failure to recognise default and its impact on the content of the judgment appealed against, but only the type of judgment that could be issued in appellate proceedings that is an obstacle in the substantive adjudication by this court in case of the *ne peius* rule (Article 454 § 1 CPC). Only the need to convict the accused who was acquitted by the first-instance court, or against whom criminal proceedings were discontinued, constitutes grounds for cassation. The necessity of convicting the accused causes the update of the ban laid down in Article 454 § 1 CPC and an appellate court cannot change the judgment and convict the accused; it can only quash the judgment and refer the case to the first-

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of 11 April 2018, IV KS 7/18, LEX No. 2499850; of 16 May 2018, V KS 7/18, LEX No. 2500563; of 16 May 2018, V KS 9/18, LEX No. 2500565.

[57] OSNKW 2018, No. 11, item 73.

[58] The thesis also considers conditional discontinuation of proceedings but it is outdated because the Act of 19 July 2019 amending the Act: Criminal Code Procedure and some other acts (Dz.U. 2019, item 1694) deleted a phrase 'conditional discontinuation' from Article 454 § 1 CPC.

[59] The resolution of seven judges of the Supreme Court of 25 January 2018, I KZP 13/17, OSNKW 2018, No. 3, item 23.

instance court for rehearing (Article 437 § 2 second sentence CPC). Just a statement that the appeal is justified and the acquittal or discontinuation of proceedings that are appealed against is erroneous is insufficient to quash the judgment appealed against. If Article 454 § 1 CPC only excludes the possibility of convicting the accused, the Supreme Court continues, in such cases the appellate court should conduct proceedings until the conditions occur to issue a judgment upholding the first-instance court judgment or discontinuing proceedings, or on cassation in case of recognition of grounds for conviction.

7. SCOPE OF THE SUPREME COURT'S SUPERVISION AFTER A COMPLAINT ABOUT AN APPELLATE COURT'S JUDGMENT QUASHING FIRST-INSTANCE COURT'S JUDGEMNT AND REFERRING A CASE FOR REHEARING (ARTICLE 539A § 1 AND § 3 CPC)

In accordance with Article 539a CPC, parties have the right to complain to the Supreme Court about an appellate court's judgment quashing the first-instance court's judgment and referring a case for rehearing (§ 1); the complaint can be lodged only in case of infringement of Article 437 CPC or because of default laid down in Article 439 § 1 CPC. The regulation raises doubts concerning the scope of the Supreme Court's supervision after such a complaint is lodged, i.e. whether it covers the analysis of the default established by the appellate court but different from that laid down in Article 539a § 3 CPC, provided that it results in the infringement of Article 437 § 2 CPC within the scope of grounds for quashing the first-instance court judgment determined in this provision, or whether the scope of this supervision is limited to examination if the default recognised by the appellate court constitutes grounds for cassation.

The Supreme Court did not adopt a uniform stance on this issue. It stated that the Supreme Court:

(1) is not authorised to examine whether charges listed in the appeal are right and if the default recognised by an appellate court actually occurred, but only checks whether in the light of the default recognised it was necessary to quash the first--instance court judgment;[60]
(2) can examine grounds for admitting appeal charges if they resulted in the infringement of Article 437 § 2 CPC within the scope of the grounds for quashing the first-instance court judgment and referring the case for rehearing laid down in this provision.[61]

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[60] The Supreme Court ruling of 9 December 2016, IV KS 4/16, LEX No. 2165595; the Supreme Court ruling of 10 February 2017, IV KS 6/16, LEX No. 2204960; the Supreme Court judgment of 30 March 2017, V KS 1/17, LEX No. 2258065; the Supreme Court ruling of 5 April 2017, III KS 1/17, unpublished.

[61] The Supreme Court judgments: of 19 July 2017, V KS 7/17, LEX No. 2340622; of 12 September 2017, III KS 6/17, unpublished.

Explaining the issue in the resolution of seven judges of 25 January 2018, I KZP 13/17,[62] the Supreme Court approved of the latter of the above-mentioned opinions and rightly assumed that:

> **The scope of the Supreme Court's supervision after a complaint is filed about an appellate court's judgment referred to in Article 539a § 1 CPC is limited to the examination whether the default recognised by an appellate court constitutes grounds for cassation.**

In its justification the Court emphasised that the linguistic interpretation of Article 539a § 3 CPC leads to a conclusion that the reasons for a complaint listed in the provision in the form of the infringement of Article 437 CPC or the default laid down in Article 439 § 1 CPC have a different scope of reference to an appellate court judgment. In the case of Article 437 CPC, the term 'infringement' means inappropriate application of the provision. It takes place when it concerns a cassation judgment, although grounds for that have not occurred.

The default under Article 439 § 1 CPC referred to in Article 539a § 3 *in fine* concerns a judgment of an appellate court.[63] Its occurrence causes quashing of the judgment and referring the case for rehearing.

Article 437 § 2 CPC makes reference to Article 439 § 1 CPC, which means that such default concerns a judgment of the first-instance court subject to supervision conducted by a higher-instance court. The Supreme Court rightly excluded from its scope default laid down in Article 439 § 1(8) and (9) CPC because, due to its occurrence, an appellate court quashes a judgment appealed against and discontinues proceedings; thus, this type of judgment is not subject to complaint. Appellate control of default that belongs to the category of absolute grounds for an appeal pursuant to Article 439 § 1 CPC does not apply to the issue concerning substantive hearing of a case. As a result, the complaint-related control is limited to examination whether such default has really occurred. The Court rightly emphasised that, regardless of the grounds for cassation, complaint-related control cannot be limited to examination whether an appellate court has formally determined admissible grounds for quashing a judgment and referring a case for rehearing, but whether there have been such grounds in the real circumstances of a given case.

According to the Supreme Court, in the case a complaint brings a charge of infringement of Article 437 § 2 second sentence CPC in conjunction with Article 439 § 1 CPC, the complaint-related control requires assessment whether the default constituting absolute grounds for an appeal has really occurred, which means direct examination of the appropriateness of the first-instance court's judgment. The control of grounds for quashing a judgment connected with the default laid down in Article 438 CPC cannot, however, consist in the examination of grounds for their recognition by an appellate court, and it should be limited to whether cassation is admissible because of that. Otherwise, it would also have to cover supervision of the recognition of the essence of a case. Such a scope of the complaint-related control would be in conflict with the linguistic and systemic interpretation of the provisions on complaints.

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62 OSNKW 2018, No. 3, item 23.

63 The Supreme Court ruling of 26 May 2020, I KZP 14/19, OSNKW 2020, No. 6, item 18.

The opinion expressed in the resolution was repeated in successive case law. The Supreme Court held that:

> In proceedings initiated by a complaint about a judgment issued by an appellate court, the Supreme Court cannot assess whether there have been substantive grounds laid down in Article 454 CPC for an amending judgment, because in accordance with the provision of Article 539a § 1 CPC, it has no competence to assess evidence presented in a case; hearing a case within this scope is the competence of common courts. Interference of the Supreme Court into this scope of adjudication would be the violation of their competence to hear a case.[64]

In literature, the opinion is assessed as too general and its application may lead to inability to quash cassation judgments that are obviously defective.[65]

8. ISSUE OF A CUMULATIVE SENTENCE OF AN APPELLATE COURT (ARTICLE 568A § 2 CPC)

The issue of a cumulative sentence has caused a problem concerning the possibility of adjudicating a cumulative penalty by an appellate court for the first time or within the scope different from the one adjudicated by the first-instance court. The Supreme Court expressed the opinion that:

(1) 'In a case concerning the issue of a cumulative sentence conducted in accordance with Article 568a § 1(2) CPC, due to the necessity of guaranteeing the accused the constitutional right to appeal against a judgment of the first-instance court and implementing the right to a fair trial before an appellate court, as a rule, the possibility of issuing a judgment on a cumulative penalty by the second-instance court is excluded in a procedural situation in which the court of first instance has not adjudicated a cumulative penalty covering penalties imposed for particular offences determined in valid sentences. The right to a trial would not be infringed only if the appellate court adjudicated a cumulative penalty with the application of full absorption.'[66]

(2) Adjudicating within the above-determined scope is admissible.[67]

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[64] The Supreme Court rulings: of 8 August 2019, II KS 12/19, LEX No. 2749717; of 6 June 2019, II KS 8/19, LEX No. 2683385; of 22 May 2019, III KS 17/19, LEX No. 2671143; the Supreme Court judgment of 21 May 2019, III KS 12/19, LEX No. 2671545; the Supreme Court ruling of 23 January 2019, III KS 34/18, OSNKW 2019, No. 3, item 17; the Supreme Court judgment of 14 November 2018, IV KS 19/18, LEX No. 2585985. Thus, for the opinion presented in the doctrine, see: S. Steinborn, *Skarga na wyrok kasatoryjny sądu odwoławczego na tle systemu środków zaskarżenia w polskim procesie karnym*, [in:] *Verba volant*, T. Grzegorczyk, R. Olszewski (eds), *supra* n. 20, pp. 425–426; D. Świecki, [in:] *Kodeks*, J. Skorupka (ed.), 2020, *supra* n. 1, p. 1387; A. Sakowicz, [in:] *Kodeks*, A. Sakowicz (ed.), 2020, *supra* n. 24, pp. 1366–1367.

[65] J. Matras, [in:] *Kodeks*, K. Dudka (ed.), 2018, *supra* n. 10, p. 1236.

[66] The Supreme Court judgment of 11 April 2017, III KK 420/16, OSNKW 2017, No. 8, item 48; judgment of the Court of Appeal in Gdańsk of 13 July 2017, II AKa 186/17, LEX No. 2372257; judgment of the Court of Appeal in Gdańsk of 13 July 2017, II AKa 194/17, LEX No. 2372258; judgment of the Court of Appeal in Gdańsk of 4 October 2017, II AKa 298/17, LEX No. 2415312.

[67] The Supreme Court judgments: of 15 November 2017, IV KS 5/17, OSP 2018, No. 7–8, item74; of 30 March 2017, V KS 1/17, LEX No. 2258065.

In the resolution of seven judges of 28 June 2018, I KZP 3/18,[68] the Supreme Court explained that:

> **(1) In a case concerning the issue of a cumulative sentence, an appellate court can adjudicate a cumulative penalty for the first time when a court of first instance has issued a cumulative sentence appealed against adjudicating the penalty based on particular convictions and discontinuing proceedings in accordance with Article 572 CPC within the remaining scope. (2) Adjudication of a cumulative penalty is also not excluded based on convictions that have not been grounds for a cumulative penalty ruled by a court of first instance.**

The opinion deserves approval and arguments for that included in an ample justification are convincing. The Supreme Court highlighted that, in fact, this concerns a possibility of adjudicating on the matter by an appellate court, in particular the possibility of adjudicating on the case concerning a cumulative sentence for the first time or adjudicating it in the scope different from that adjudicated by a court of first instance in the context of the principle of two-instance court proceedings, perception of the right to a trial, as well as limitations to the scope of cassation; and the understanding of two-instance proceedings in the Polish criminal procedure is of key importance for the solution of this problem. The Court assumed that two-instance proceedings should be perceived formally in these proceedings, i.e. as guaranteeing a party a possibility of appeal against the first-instance court's judgment closing proceedings and leading to a higher-instance court's control of the appropriateness of the judgment.[69] The guarantee laid down in Article 176 para. 1 of the Constitution of the Republic of Poland, in accordance with which court proceedings must be at least two-instance ones, does not mean that every adjudication contained in an appellate court judgment which includes an element

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[68] OSNKW 2018, No. 8, item 55.

[69] The Constitutional Tribunal judgment of 11 March 2003, SK 8/02, OTK-A 2003, No. 3, item 20; the Constitutional Tribunal ruling of 11 June 2008, SK 48/07, OTK-A 2008, No. 5, item 93; the Constitutional Tribunal judgment of 13 July 2009, SK 46/08, OTK-A 2009, No. 7, item 109; the Supreme Court ruling of 28 June 2006, V KK 491/05, OSNKW 2006, No. 9, item 84; resolution of seven judges of the Supreme Court of 23 March 2011, I KZP 28/10, OSNKW 2011, No. 4, item 30; the Supreme Court ruling of 22 December 2010, II KK 288/10, LEX No. 686679; W. Hermeliński, B. Nita, *Orzekanie reformatoryjne w procesie karnym na podstawie nowych ustaleń faktycznych*, Państwo i Prawo 4, 2009, pp. 68–69; R. Kmiecik, *Glosa do postanowienia SN z dnia 26 marca 2008 r., V KK 389/07*, OSP 2009, No. 1, item 9; M. Fingas, *Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym*, Warszawa 2016, pp. 89–92; D. Świecki, *Bezpośredniość czy pośredniość w polskim procesie karnym*, Warszawa 2013, pp. 274–275; M. Andrzejewska, *Reguły ne peius w myśli Profesora Mariana Cieślaka – kontynuacja czy zmierzch idei?*, [in:] *Profesor Marian Cieślak – osoba, dzieło, kontynuacje*, W. Cieślak (ed.), Warszawa 2013, p. 587; P. Wiliński, *Dwuinstancyjność postępowania karnego w świetle Konstytucji*, [in:] *Funkcje procesu karnego. Księga Jubileuszowa Profesora Janusza Tylmana*, T. Grzegorczyk (ed.), Warszawa 2011, pp. 565–580; P. Hofmański, S. Zabłocki, *Dowodzenie w postępowaniu apelacyjnym i kasacyjnym – kwestie modelowe*, [in:] *Funkcje*, *ibid*., p. 473. Differently, P. Pojnar, *Prawo sądu odwoławczego do własnych ustaleń faktycznych a zasada kontroli procesu – rozważania de lege lata i de lege ferenda*, [in:] *Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci Profesora Stanisława Waltosia*, J. Czapska, A. Gaberle, A. Światłowski, A. Zoll (eds), Warszawa 2000, p. 712; M. Jeż-Ludwichowska, M. Klubińska, *Zasada bezpośredniości w postępowaniu odwoławczym w świetle nowelizacji k.p.k. z 27 września 2013 r*., [in:] *Środki zaskarżenia po nowelizacji kodeksu postępowania karnego*, A. Lach (ed.), Toruń 2015, p. 30.

of novelty in comparison with a judgment that is appealed against must open the way to higher-instance control. The Supreme Court convincingly proved that:

- regarding the issue of a cumulative sentence, the principle of two-instance court proceedings as well as the right to appeal against a judgment issued by the first-instance court do not constitute an obstacle to an appellate court's adjudicating a cumulative penalty for the first time or in the scope different from the one adjudicated by the first-instance court;
- a judgment issued by an appellate court for the first time in a case concerning the issue of a cumulative sentence, and the adjudicating it in the scope different from the one adjudicated by the first-instance court in particular, does not infringe the right to a fair trial to an inadmissible extent;
- in the case of discontinuation of proceedings concerning the issue of a cumulative sentence by a court of first instance in accordance with Article 572 CPC, the *ne peius* rule laid down in Article 454 § 1 CPC, which bans conviction of the accused by an appellate court when a court of first instance discontinues proceedings against him, is not in conflict with adjudication of a cumulative penalty by the appellate court.

PENAL ENFORCEMENT CODE

9. FEE FOR A MOTION TO APPEND AN ENFORCEMENT CLAUSE IN PENAL ENFORCEMENT PROCEEDINGS (ARTICLE 25 § 1 PEC)

A court or a court enforcement officer, in accordance with Article 107 § 1 CPC, on request of an entitled person, appends an enforcement clause to a judgment that is subject to execution. Judgments imposing an obligation to redress the wrong or compensate the harm suffered, as well as damages ruled in favour of the aggrieved are recognised as judgments concerning financial claims if they can be executed in accordance with the provisions of the Code of Civil Procedure (Article 107 § 2 CPC). The execution of civil claims adjudicated, a fine imposed, a pecuniary allowance, and court dues is conducted in accordance with the provisions of the Code of Civil Procedure, provided that the Penalty Enforcement Code (PEC) does not stipulate otherwise (Article 25 § 1 PEC). On the other hand, the provisions of Articles 776–795 of the Code of Civil Procedure are applicable to enforcement titles (Article 26 PEC).

In the context of those provisions, the Supreme Court was requested to resolve a legal issue:

> Is the content of Article 71(3) of the Act of 28 July 2005 on court costs in civil cases (Dz.U. 2018, item 300), in the face of the recognition of a blank nature of Article 794[1] of the Code of Civil Procedure, applicable by reference laid down in Articles 25 and 26 PEC to execution proceedings in criminal cases in situations when there is a request to append an enforcement clause made by a person other than the one indicated in the enforcement title to whom the right was transferred after the title occurred or, due to the lack of relevant regulation in the Act of 23 June 1973 on fees in criminal cases (Dz.U. 1973, No. 27, item 152), does a criminal court in execution proceedings not charge any other additional

fees for a motion to append an enforcement clause filed by a person other than that indicated in the enforcement title, to whom the entitlement was transferred after a title occurred apart from the one laid down in Article 19 para. 1 of the statute?

In the ruling of 25 October 2018, I KZP 11/18,[70] the Supreme Court explained that:

In the course of preparatory proceedings, in accordance with Article 71(3) of the Act of 28 July 2005 on court costs in civil cases (Dz.U. 2018, item 300), a criminal court can charge a fee for a motion to append an enforcement clause filed by a person other than the one indicated in the enforcement title to whom the entitlement was transferred after the title occurred.

Justifying this opinion, the Court emphasised that Article 26 PEC, referring to the application of the provisions of Articles 776–795 of the Code of Civil Procedure, indicated that all regulations included in those provisions are in force when procedural activities concerning enforcement titles issued in criminal proceedings are performed. It highlighted that an enforcement clause appended to an enforcement title is an institution of civil procedure, and the procedure of appending it is laid down in Articles 776–795 of the Code of Civil Procedure.[71] The problem of costs of proceedings concerning appending an enforcement clause is laid down in Article 794^1 § 1 and § 2 of the Code of Civil Procedure and stipulates that the ruling to append an enforcement clause in the part in which a creditor has been awarded the refund of the costs of proceedings is subject to execution with no need to append an enforcement clause thereto; and in case an enforcement clause is appended in accordance with Article 783 § 3 or § 3^1, the decision on awarding the creditor a refund of the costs of a proceedings is placed in an enforcement clause.

The provisions regulate the ruling of the proceeding costs refund but do not determine what should be classified as those costs and what the principles of their determining and adjudicating are. In the light of that the Supreme Court decided that the regulation is not exhaustive[72] and rightly referred to Article 13 § 2 of the Code of Civil Procedure, according to which the provisions on a trial are applied by analogy to other types of proceedings regulated in this code, unless special provisions stipulate otherwise. Due to the fact that Articles 776–795 of the Code of Civil Procedure do not lay down a different regulation in this respect, in accordance with Article 13 § 2 of the Code of Civil Procedure, inter alia Article 98 § 1 of the Code which concerns costs necessary for purposeful claiming rights and purposeful defence, and Article 98 § 3 of the Code which classifies the costs incurred by a party represented by a lawyer, his remuneration and costs connected with fees

[70] OSNKW 2018, No. 12, item 77.

[71] Resolution of seven judges of the Supreme Court of 20 December 2007, I KZP 35/07, OSNKW 2008, No. 1, item 1.

[72] A. Zieliński, *Orzekanie o kosztach postępowania cywilnego. Komentarz praktyczny z orzecznictwem*, Warszawa 2017, p. 172.

for a motion to append an enforcement clause as necessary costs of proceedings, are applicable by analogy in the clause-related proceedings.[73]

In accordance with Article 71(3) of the Act of 28 July 2005 on court costs in civil cases,[74] a fee for appending an enforcement clause against or in favour of a person other than the one indicated in an enforcement title to whom the entitlement or obligation was transferred after an enforcement title occurred or in the course of a case before a title was issued accounts for PLN 50. According to the Supreme Court, the fact that the statute concerns court costs in civil cases (Article 1) is not an obstacle to apply this statute in criminal proceedings because it concerns civil cases not only within the substantive meaning, i.e. cases resulting from relationships within the scope of civil, family and guardianship law and labour law (Article 1 of the Code of Civil Procedure), but also in the formal meaning, i.e. other cases which by force of a special provision of the statute have been referred for hearing in civil proceedings to a common court.[75] Provisions on civil court proceedings are applied as a supplementary means, e.g. in penalty enforcement proceedings to execute a fine imposed, a pecuniary allowance and court dues (Article 25 § 1 PEC).[76]

PETTY OFFENCES PROCEDURE CODE

10. ADMISSIBILITTY OF A COMPLAINT ABOUT A RULING ON REFUSAL TO ADMIT A MOTION TO DEVELOP IN WRITING AND SERVE AN APPELLATE COURT JUDGMENT JUSTIFICATION ISSUED IN PROCEEDINGS IN PETTY OFFENCE-RELATED CASES (ARTICLE 109 § 1 POPC)

In accordance with Article 81 § 1 of the Petty Offences Procedure Code (POPC), Article 422 CPC is applicable by analogy in proceedings concerning petty offences, which means that a party may file a motion to develop in writing and deliver the justification of a sentence within the final deadline of seven days from the date of the sentence announcement. Reference is made to the whole provision, which indicates that Article 422 § 3 CPC is also applicable in these proceedings and as a result: 'The president of a court shall refuse to admit a motion filed by an unauthorised person, after the deadline or if there are circumstances referred to in Article 120 § 2 CPC, and the ruling may be complained about.'

If the course of a trial is recorded with audio or audio and video recording equipment, the justification of a sentence may be *ex officio* presented only orally,

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[73] *Ibid.*, pp. 172–173.

[74] Dz.U. 2020, item 755, as amended.

[75] P. Feliga, *Ustawa o kosztach sądowych w sprawach cywilnych. Komentarz*, Warszawa 2015, p. 19; A. Górski, L. Walentynowicz, *Koszty sądowe w sprawach cywilnych. Ustawa i orzekanie*, Warszawa 2007, pp. 11–12.

[76] J. Gudowski, [in:] P. Grzegorczyk, J. Gudowski, M. Jędrzejewska, K. Weitz, *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze*, T. Ereciński (ed.), Vol. I, Warszawa 2016, pp. 57–58.

directly after the announcement of a sentence, and a party, within the final deadline of seven days from the date of the sentence announcement, may file a motion to develop in writing and deliver the transcript of the sentence justification presented orally. For the accused being in custody or one who has no counsel and was absent when a sentence was announced or its justification presented orally, the term starts running from the date when the sentence is delivered to him. The president of a court refuses to admit a motion filed by a person who is not entitled to file a complaint (Article 82 § 6 and § 7 POPC). In the Petty Offences Procedure Code, there is no provision regulating a motion to develop in writing and deliver a sentence justification within appellate proceedings, nor one that refers to the Criminal Procedure Code. As a result, a problem occurred whether the ruling on the refusal of a motion to develop in writing and deliver the justification of a sentence of an appellate court issued in cases concerning petty offences is subject to complaint. The judicature does not unanimously resolve the problem and there are two contradictory stands established.

According to one of them, such a ruling cannot be appealed against,[77] which results from the fact that Article 107 POPC does not stipulate such a complaint, and Article 109 § 2 POPC does not contain reference to Article 422 § 3 CPC and refers to Article 426 § 1 CPC which stipulates that a complaint *ex officio* is inadmissible.[78] Moreover, the regulation under Article 107 and Article 109 § 2 POPC prove that the legislator entirely regulated the issue of developing an appellate court's judgment justification and did not envisage reference to Article 457 CPC, which would constitute grounds for appealing against a ruling on refusal to admit a motion to develop a sentence justification.

According to the other opinion, a complaint about such a ruling is admissible and is subject to hearing before another equivalent bench of an appellate court.[79] This results from the reference made in Article 109 § 1 POPC to the application of the provisions on proceedings before an appellate court by analogy, which via Article 82 § 1 POPC stipulates full application of Article 422 § 3 CPC, thus also its last sentence concerning the entitlement to a complaint about such a ruling, in appellate proceedings in cases of petty offences. As far as the body competent to hear a complaint is concerned, it is indicated that there is a legal loophole that should be eliminated by analogy to Article 14 § 1(2) POPC, providing for the same-level instance to hear complaints about rulings and decisions not closing the way to

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[77] The Supreme Court rulings: of 30 August 2006, III KZ 44/06, LEX No. 196979; of 7 February 2013, III KZ 92/12, LEX No. 1277772; of 14 December 2016, III KZ 80/16, OSNKW 2017, No. 4, item 22; ruling of the Court of Appeal in Gdańsk of 18 October 2016, II AKz 698/16, KSAG 2017, No. 1, pp. 179–183. Thus: P. Gensikowski, *Postępowanie w sprawach o wykroczenia. Komentarz*, Warszawa 2017, p. 420; K. Dąbkiewicz, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Warszawa 2017, p. 442; P. Rogoziński, [in:] *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, A. Sakowicz (ed.), Warszawa 2020, p. 611; D. Świecki, *Metodyka pracy sędziego w sprawach o wykroczenia*, Warszawa 2012, p. 239.

[78] The Supreme Court ruling of 30 August 2006, III KZ 44/06, LEX No. 196979.

[79] The Supreme Court ruling of 23 August 2017, III KZ 38/17, LEX No. 2349403; the ruling of the Court of Appeal in Kraków of 25 February 2016, II AKz 54/16, KZS 2016, No. 3, item 48.

issue a sentence, which means that another equivalent bench of an appellate court is competent to hear a complaint in question.

In the resolution of seven judges of 25 January 2018, I KZP 12/17,[80] the Supreme Court approved of the former opinion and rightly held that:

> **There is no right to complain about a ruling on refusal to admit a motion to develop in writing and deliver an appellate court's judgment justification in cases concerning petty offences.**

Justifying this stance, the Court indicated that appellate proceedings in cases of petty offences are regulated in Articles 103–108 POPC, which directly cover appellate proceedings in petty offences and explicitly regulate some of their elements. Determining that an issue examined is entirely regulated in those provisions excludes the use of provisions beyond Part X of the Petty Offences Procedure Code. Article 109 stipulates application of the POPC provisions concerning first-instance proceedings (§ 1) and the enumerated CPC provisions (§ 2) by analogy. According to the Supreme Court, in appellate proceedings concerning petty offence cases, Article 422 CPC is applicable, which via Article 82 § 1 POPC refers to Article 109 § 1 POPC. Application of Article 422 § 3 CPC by analogy means that the president of a court issues a ruling refusing to admit a motion to develop a sentence filed by a person who is not entitled, after the deadline or if there are circumstances referred to in Article 120 § 2 CPC. This constitutes a logical and necessary supplementation of the directive laid down in Article 107 § 2 POPC, while the possibility of filing a complaint about this ruling laid down in the second sentence of Article 422 § 3 CPC does not have this nature.

ACT OF 27 SEPTEMBER 2013 AMENDING THE ACT: CRIMINAL PROCEDURE CODE AND SOME OTHER ACTS

11. TRANSITIONAL REGULATIONS CONCERNING AMENDMENTS TO PROVISIONS ON A COURT BENCH COMPOSITION

Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts[81] is an transitional (intertemporal) provision regulating the competence of courts, the court benches' composition in case of their change as a result of the entry into force of new provisions and assumes that until the conclusion of proceedings before a given instance court, a court that has been competent so far or a court's same bench adjudicates.

The content of the provision is clear and should not raise doubts. Nevertheless, the Supreme Court was asked to resolve a legal issue whether the rule articulated in this provision is general in nature, i.e. causes the establishment of the whole group of rules concerning a court bench composition in relation to court proceedings in

[80] OSNKW 2018, No. 3, item 22.
[81] Dz.U. 2013, item 1247, as amended.

progress at the moment when the Act entered into force, or concerns only those situations when a court bench composition determined by the former provisions adjudicates in given proceedings.

In its ruling of 28 March 2018, I KZP 16/17,[82] the Supreme Court expressed the right stand that:

> **Article 30 of the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts (Dz.U. item 1247, as amended), striving to ensure efficiency and economy of proceedings by stabilising cases in progress exceptionally stipulates 'continuation' of proceedings before a court competent so far without the risk of consequences resulting from Article 439 § 1(2) CPC. However, it is not possible to conclude that such consequences will not result in the conduct of proceedings before an inappropriately composed bench in accordance with the provisions that were in force before 1 July 2015 because such default was validated by the provisions that are in force at present.**

In its justification, the Court emphasised that the Supreme Court had already explained that the phrase 'a court's same bench' used in Article 30 of the statute meant a court bench determined by the provisions that were in force at the moment when proceedings started before the given instance court.[83] Moreover, the Court highlighted that the content of Article 30 unambiguously prejudges petrification of 'a court bench competent so far'; on the other hand, in relation to 'a court's same bench', there is no term 'competent' but there are no doubts that it concerns an adjudicating bench composed based on the provisions in force so far. The term 'a court's same bench' means a court determined by the provisions that were in force at the moment when the proceedings started before a given instance court. This provision indicates that if on the day when a statute enters into force a case is at a certain stage of proceedings, then, until these proceedings are concluded before a given instance, a court bench composed earlier adjudicates. However, the phrase 'a court's same bench' used in this provision should be related not to its bench that has already heard a case in the given instance, but a bench competent in accordance with the provisions that have been in force so far.[84] It concerns a court bench determined by the provisions that are in force at the moment when proceedings are started before a given instance.[85] The moment of starting proceedings before a court of first instance is the time when an indictment or its surrogate is lodged with

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[82] OSNKW 2018, No. 7, item 47.

[83] The Supreme Court ruling of 10 January 2017, II KK 183/16, LEX No. 2261738; the Supreme Court ruling of 6 February 2017, V KK 395/16, LEX No. 2255444; the Supreme Court judgment of 1 June 2017, IV KK 2/17, LEX No. 2300167; the Supreme Court ruling of 29 June 2016, II KK 180/16, LEX No. 2062819; the Supreme Court judgment of 18 October 2016, III KK 151/16, LEX No. 2142560; the Supreme Court ruling of 29 November 2016, I KZP 9/16, OSNKW 2016, No. 12, item 85, with a gloss of approval by V. Niemiec, GSP-Prz.Orz. 2017, No. 2, pp. 112–120, and similar comments by R.A. Stefański, *Review of Resolutions of the Supreme Court Criminal Chamber Concerning Criminal Procedure Law for 2016*, Ius Novum 1, 2018, pp. 127–160, and a critical one by W. Jasiński, *Petrification of a Court Bench Composition in the Transitional Provisions: Comments in the Light of the Supreme Court Ruling of 29 November 2016, I KZP 9/16*, Ius Novum 3, 2017, pp. 20–35.

[84] The Supreme Court judgment of 18 October 2016, III KK 151/16, LEX No. 2142560.

[85] The Supreme Court judgment of 1 June 2017, IV KK 2/17, LEX No. 2300167.

a court instigating judicial proceedings. And the moment of starting proceedings before a court of second instance is the time when this court receives the case files together with an appeal.[86]

ACT OF 20 JUNE 1997: LAW ON ROAD TRAFFIC

12. BODY AUTHORISED TO REPRESENT AN ORGANISATIONAL UNIT THAT DOES NOT HAVE A LEGAL PERSON STATUS (ARTICLE 78 PARA. 5 LRT)

An owner or holder of a vehicle, in accordance with Article 78 para. 4 of the Act of 20 June 1997: Law on road traffic,[87] requested by an authorised body, is obliged to indicate a person to whom he gave his vehicle and let drive it in a particular period, unless the vehicle has been used against his will and without his knowledge by an unknown person, which he could not prevent. In the case the owner or a holder of a vehicle is (1) a legal person, (2) an organisational unit that does not have a legal person status that is given legal capacity by other provisions, (3) a local government unit, (4) an enterprise in formation, (5) an entity in liquidation, (6) an entrepreneur that is not a natural person, and (7) a foreign organisational unit, a person obliged to provide this information is one designated by the body authorised to represent this entity, and in case such a person is not designated, these are persons that are members of this body in accordance with the request and the method of representation adopted by the entity (Article 78 para. 5 LRT).

In practice, a doubt was raised who is obliged to provide the information in a general partnership in which each of the partners can represent it, in accordance with Article 29 § 1 of the Code of Commercial Partnerships and Companies (hereinafter Companies Code).

In the ruling of 28 June 2018, I KZP 1/18,[88] the Supreme Court held that:

> **Within the meaning of Article 78 para. 5 of the Act of 20 June 1997: Law on road traffic (Dz.U. 2017, item 1260, as amended), partners are authorised to represent a general partnership as an organisational unit that does not have a legal person status to which other provisions give legal capacity to represent it, unless the right to represent a general partnership is limited in accordance with Article 30 § 1 of the Companies Code. Thus, in accordance with Article 78 para. 5 LRT, every partner of a general partnership authorised to represent it is obliged, on an authorised body's request, to provide information referred to in Article 78 para. 4 LRT, and in case of failure to fulfil this obligation, they may be liable under Article 96 § 3 of the Petty Offences Code.**

The opinion deserves approval and has a strong foundation in Article 29 § 1 of the Companies Code, in accordance with which every partner has the right to

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[86] The Supreme Court ruling of 23 September 2016, III KK 41/16, OSNKW 2016, No. 12, item 81.

[87] Dz.U. 2020, item 110, as amended; hereinafter LRT.

[88] OSNKW 2018, No. 8, item 56.

represent a partnership. Justifying this stance, the Supreme Court emphasised that in the case of a general partnership, the scope of the right to represent is broadly determined in the Companies Code because pursuant to Article 29 § 2 of the Companies Code, the right to represent a partnership is applicable to all court and non-court related activities in which a partnership is involved. Thus, it concerns all possible activities that a partnership can perform. Therefore, representation concerns taking part in any legal relations within civil law, administrative law, labour law and any other branches of law, and can consist in, e.g. making declarations before the authorities, public administration bodies and social organisations, and appearing before adjudicating bodies.[89]

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[89] A. Kidyba, *Handlowe spółki osobowe*, Vol. I, Kraków 2005, pp. 157–158.

poza granicami zgody, udzielonej przez sąd na wkroczenie w sferę konstytucyjnie chronionych praw i wolności, [in:] *Proces karny w dobie przemian. Zagadnienia ogólne*, S. Steinborn, K. Woźniewski (eds), Gdańsk 2018.

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REVIEW OF RESOLUTIONS OF THE SUPREME COURT CRIMINAL CHAMBER CONCERNING CRIMINAL PROCEDURE LAW FOR 2018

Summary

The article presents an analysis of the judgments of the Supreme Court Criminal Chamber passed in 2018 as a result of resolving legal issues that require fundamental interpretation of statute (Article 441 § 1 CPC), raising serious doubts concerning the interpretation of the

provisions of law (Article 82 § 1 of the Act on the Supreme Court) or causing discrepancies in case law concerning the interpretation of the provisions of law that are grounds for adjudication (Article 83 § 1 of the Act on the Supreme Court) within criminal procedure law. Resolving the legal issues referred to it, the Supreme Court held that: the correction of an obvious editorial error consisting in the different transcription of a penalty amount in words and digits is admissible (Article 105 § 1 CPC); a prosecutor may take a decision to use evidence in criminal proceedings that was obtained as a result of surveillance ordered on an authorised body's request in relation to another offence prosecuted *ex officio* or a fiscal offence other than the offence covered by the surveillance order, but only when ordering surveillance is admissible in relation to this offence (Article 168b CPC); a repeated decision on the refusal to instigate preparatory proceedings or on their termination was not subject to an appeal pursuant to the legal circumstances at that time (Article 330 § 2 CPC); the acquittal or discontinuation of criminal proceedings and referring a case for rehearing is possible based on the *ne peius* rule (Article 454 § 1 CPC); an adjudicating court that hears a complaint about quashing a judgment of the first-instance court and referring a case for rehearing is limited to examining whether the default recognised by an appellate court constitutes grounds for cassation (Article 539a § 1 and § 3 CPC); an appellate court may issue a cumulative sentence for the first time or rule it in an amount different from the one imposed by a court of first instance (Article 568a § 2 CPC); a fee is charged for a motion in penalty enforcement proceedings to append an enforcement clause filed by a person other than the one indicated in an enforcement title to whom the entitlement was transferred after the title occurred (Article 25 § 1 PEC); a complaint about a ruling on refusal to admit a motion to develop in writing and deliver an appellate court's sentence justification issued in cases concerning petty offences is inadmissible (Article 109 § 1 POPC); proceedings before a given instance court's same bench are continued in case the provisions on a court bench are amended (Article 30 of the Act of 27 September 2013); every partner of a general partnership is obliged to provide an authorised body with information who was entitled to drive or use their vehicle in a particular period (Article 78 para. 5 LRT). In addition, the Court explained the requirements that must be met in order to ask the Supreme Court legal questions on issues that need fundamental interpretation (Article 441 § 1 CPC) and cause discrepancies in case law concerning the interpretation of the provisions that are grounds for adjudication (Article 83 § 1 of the Act on the Supreme Court).

Keywords: abstract legal question, enforcement clause, surveillance, refusal to instigate preparatory proceedings, editorial error, proceedings in petty offence cases, legal question, Supreme Court, court bench composition, general partnership, quashing of a sentence, discontinuation of preparatory proceedings, cumulative sentence, complaint

PRZEGLĄD UCHWAŁ IZBY KARNEJ SĄDU NAJWYŻSZEGO W ZAKRESIE PRAWA KARNEGO PROCESOWEGO ZA 2018 ROK

Streszczenie

Przedmiotem artykułu jest analiza orzeczeń Izby Karnej Sądu Najwyższego, podjętych w 2018 r. w ramach rozstrzygania zagadnień prawnych wymagających zasadniczej wykładni ustawy (art. 441 § 1 k.p.k.), budzących poważne wątpliwości co do wykładni przepisów prawa (art. 82 § 1 u. o SN) lub wywołujących w orzecznictwie sądów rozbieżności w wykładni przepisów prawa, będących podstawą ich orzekania (art. 83 § 1 u. o SN), w zakresie prawa karnego procesowego. Rozstrzygając przedstawione mu zagadnienia, Sąd Najwyższy opo-

wiedział się za: dopuszczalnością sprostowania jako oczywistej omyłki pisarskiej określenia w sposób odmienny cyfrowo i słownie wymiaru kary (art. 105 § 1 k.p.k.); możliwością podejmowania przez prokuratora decyzji w przedmiocie wykorzystania dowodu w postępowaniu karnym, uzyskanego w wyniku kontroli operacyjnej zarządzonej na wniosek uprawnionego organu w stosunku do innego przestępstwa ściganego z urzędu lub przestępstwa skarbowego innego niż przestępstwo objęte zarządzeniem kontroli operacyjnej, ale tylko wtedy gdy do tego innego przestępstwa jest dopuszczalne zarządzenia takiej kontroli (art. 168b k.p.k.); niezaskarżeniem w ówczesnym stanie prawnym ponownego postanowienia o odmowie wszczęcia postępowania przygotowawczego lub o jego umorzeniu (art. 330 § 2 k.p.k.); możliwością uchylenia wyroku uniewinniającego lub umarzającego postępowanie karne i przekazanie sprawy do ponownego rozpoznania, związaną z regułą *ne peius* (art. 454 § 1 k.p.k.); ograniczeniem sądu rozpoznającego skargę na wyrok o uchyleniu wyroku sądu pierwszej instancji i przekazaniu sprawy do ponownego rozpoznania do zbadania, czy stwierdzone przez sąd odwoławczy uchybienie daje podstawę do wydania orzeczenia kasatoryjnego (art. 539a § 1 i 3 k.p.k.); dopuszczalnością wydania przez sąd odwoławczy wyroku łącznego raz pierwszy kary łącznej albo orzeczenia jej w innym zakresie niż orzekł sąd pierwszej instancji (art. 568a § 2 k.p.k.); pobraniem w postępowaniu karnym wykonawczym opłaty od wniosku o nadanie klauzuli wykonalności, złożonego przez osobę inną niż wskazana w tytule egzekucyjnym, na którą przeszły uprawnienia po powstaniu tytułu (art. 25 § 1 k.k.w.); niedopuszczalnością zażalenia na zarządzenie o odmowie przyjęcia wniosku o sporządzenie na piśmie i doręczenie uzasadnienia wyroku sądu odwoławczego, wydanego w postępowaniu w sprawach o wykroczenia (art. 109 § 1 k.p.w.); kontynuowaniem postępowania w danej instancji w składzie dotychczasowym w razie jego zmian w wyniku nowelizacji przepisów o składzie sądu (art. 30 ustawy z dnia 27 września 2013 r.); tym, że każdy wspólnik spółki jawnej jest obowiązany jest udzielić uprawnionemu organowi informacji, komu powierzył pojazd do kierowania lub używania w oznaczonym czasie (art. 78 ust. 5 p.r.d.). Ponadto organ ten wyjaśnił przesłanki przedstawiania Sądowi Najwyższemu zagadnień prawnych wymagających zasadniczej wykładni (art. 441 § 1 k.p.k.) oraz wywołujących w orzecznictwie sądów rozbieżności w wykładni przepisów prawa będących podstawą ich orzekania (art. 83 § 1 u. o SN).

Słowa kluczowe: abstrakcyjne pytanie prawne, klauzula wykonalności, kontrola operacyjna, odmowa wszczęcia postępowania przygotowawczego, omyłka pisarska, postępowanie w sprawach o wykroczenia, pytanie prawne, Sąd Najwyższy, skład sądu, spółka jawna, uchylenie wyroku, umorzenie postępowania przygotowawczego, wyrok łączny, zażalenie

COMENTARIO DE ACUERDOS DE LA SALA DE LO PENAL DEL TRIBUNAL SUPREMO RELATIVOS AL DERECHO PENAL PROCESAL EN EL 2018

Resumen

El artículo analiza las resoluciones de la Sala de lo Penal de Tribunal Supremo adoptadas en 2018 en virtud de cuestiones prejudiciales que requieran la interpretación esencial de la ley (art. 244 de código de proceso penal), que susciten dudas importantes en cuanto a la interpretación de la ley (art. 82 § 1 de la ley del Tribunal Supremo) o bien que produzcan discrepancias en la jurisprudencia sobre la interpretación de la ley que sirva como fundamento de resolución (art. 82 § 2 de la ley del Tribunal Supremo), relativas a derecho penal procesal. A la hora de resolver dichas cuestiones, el Tribunal Supremo ha estimado que: es posible rectificar como error obvio la determinación diferente de la pena en cifra y en letra (art. 105

§ 1 de código de procedimiento penal); es posible adaptar por el fiscal la decisión de utilizar la prueba en el proceso penal que fue recaudada como resultado de control de operación encomendada por el órgano competente en relación con otro delito perseguido de oficio o delito fiscal otro que delito sujeto al control de operación pero sólo cuando sea susceptible de tal control (art. 168b de código de proceso penal); no se puede impugnar el auto reiterado de denegación de apertura de investigación o sobre su sobreseimiento (art. 330 § 2 de código de proceso penal); es posible revocar la sentencia absolutoria o que sobresea el proceso penal y trasladar el caso para su conocimiento de nuevo en relación con la regla *ne peius* (art. 454 § 1 de código de proceso penal); el Tribunal que conozca el recurso contra la sentencia que revoque la sentencia de Tribunal de Primera Instancia y traslade la causa para su conocimiento queda limitado a comprobar si la falta constatada por el tribunal de apelación constituye fundamento para dictar la sentencia casatoria (art. 539a § 1 y 3 de código de proceso penal); es admisible que el tribunal de apelación dicte la sentencia conjunta por primera vez condenando a la pena conjunta o bien imponerla de otra forma que lo hizo el Tribunal de Primera Instancia (art. 568a § 2 de código de proceso penal); es posible cobrar en el proceso penal de ejecución la tasa por presentar la solicitud de otorgamiento de cláusula de ejecución presentada por otra persona que mencionada en el título ejecutivo, a la cual los derechos fueron cedidos después de otorgamiento de título (art. 25 § 1 de código penal de ejecución); es inadmisible presentar el recurso de queja contra la providencia que deniega admitir la solicitud de elaborar por escrito y entregar fundamentos de la sentencia de tribunal de apelación dictada en juicio de faltas (art. 109 § 1 de código de proceso de faltas); se puede continuar proceso en la composición de Tribunal hasta ahora en caso su composición cambie dado la reforma de normativa que regule la composición de Tribunales (art. 30 de la ley de 27 de septiembre de 2013), cada socio de la sociedad colectiva queda obligado a facilitar la información al órgano competente, a quién ha dado el vehículo para su uso (art. 78 ap. 5 de la ley derecho de tráfico vial). Además, dicho órgano jurisdiccional ha esclarecido los requisitos para presentar cuestiones legales ante el Tribunal Supremo que requieran la interpretación esencial (art. 441 § 1 de código de proceso penal) y que susciten dudas importantes en cuanto a la interpretación de la ley (art. 82 § 1 de la ley del Tribunal Supremo).

Palabras claves: cuestión legal en abstracto, cláusula de ejecución, control de operación, denegación a incoar el proceso de investigación, error obvio, juicio de faltas, cuestión prejudicial, Tribunal Supremo, composición de Tribunal, sociedad colectiva, revocación de sentencia, sobreseimiento de fase de instrucción, sentencia conjunta, recurso de queja

ОБЗОР ПОСТАНОВЛЕНИЙ УГОЛОВНОЙ ПАЛАТЫ ВЕРХОВНОГО СУДА В ОБЛАСТИ УГОЛОВНО-ПРОЦЕССУАЛЬНОГО ПРАВА ЗА 2018 ГОД

Аннотация

Статья посвящена анализу решений Уголовной палаты Верховного суда, принятых в 2018 году при разрешении юридических вопросов в области уголовно-процессуального права, которые требуют фундаментального толкования закона (ст. 244 УПК), вызывают значительные сомнения относительно толкования норм законодательства (ст. 82 § 1 Закона «О Верховном суде») либо приводят в судебной практике к расхождениям в толковании положений законодательства, являющихся основанием для принятия судебных решений (ст. 83 § 1 Закона «О Верховном суде»). В ходе принятия решений по рассматриваемым делам Верховный суд: признал допустимость исправления как очевидной опечатки несовпадения определяемой меры наказания в цифровом

и словесном выражении (ст. 105 § 1 УПК); подтвердил, что прокурор может принять решение об использовании в уголовном производстве доказательств, полученных по результатом оперативной проверки, проведенной по ходатайству уполномоченного органа в связи с иным преступлением, преследуемым в публичном порядке, либо налоговым преступлением иным, чем преступление, по которому издан приказ о проведении оперативной проверки, но только в том случае, если для такого иного преступления предусмотрена возможность проведения оперативной проверки (ст. 168b УПК); подтвердил невозможность, по состоянию законодательства на соответствующий момент, обжалования повторного решения об отказе в проведении предварительного расследования или о его прекращении (ст. 330 § 2 УПК); высказался в пользу возможности отмены оправдательного приговора или решения о прекращения уголовного дела с возвращением дела на повторное рассмотрение в соответствии с правилом *ne peius* (ст. 454 § 1 УПК); высказался в пользу того, чтобы суд, рассматривающий жалобу на решение об отмене приговора суда первой инстанции и передаче дела на повторное рассмотрение, ограничился выяснением, дает ли правовой дефект, выявленный судом второй инстанции, основание для вынесения кассационного решения (ст. 539a § 1 и § 3 УПК); признал допустимость назначения судом второй инстанции при рассмотрении апелляции на совокупный приговор первого совокупного наказания либо назначения совокупного наказания на основании приговоров, которые не являлись основанием для назначения совокупного наказания судом первой инстанции (ст. 568a § 2 УПК); высказался в пользу взимания в рамках уголовно-исполнительного производства пошлины за подачу ходатайства о вынесении решения о принудительном исполнении, поданного лицом иным, чем указанное в исполнительном листе, если данное лицо приобрело соответствующие права после выдачи исполнительного листа (ст. 25 § 1 УИК); признал недопустимость жалобы на постановление об отказе в принятии ходатайства о составлении и вручении мотивировочной части приговора суда второй инстанции, вынесенное в ходе производства по делу об административном правонарушении (ст. 109 § 1 КоАП); высказался в пользу продолжения производства в данной инстанции в прежнем составе в случае его изменения в результате внесения поправок в положения о составе суда (ст. 30 Закона от 27 сентября 2013 года, вносящего изменения в УПК и некоторые иные законодательные акты); подтвердил, что каждый из участников полного товарищества обязан предоставить уполномоченному органу информацию о том, кому он доверил управление транспортным средством либо передал его в пользование в течение определенного времени (ст. 78 п. 5 Закона «О дорожном движении»). Кроме того, Верховный суд разъяснил условия передачи ему для рассмотрения юридических вопросов, требующих фундаментального толкования (ст. 441 § 1 УПК), а также вызывающих в судебной практике расхождения в толковании положений законодательства, являющихся основанием для принятия решений (ст. 83 § 1 Закона «О Верховном суде»).

Ключевые слова: абстрактные правовые вопросы; решение о принудительном исполнении; оперативная проверка; отказ в возбуждении предварительного производства; опечатка; производство по делам об административных правонарушениях; юридические вопросы; Верховный суд; состав суда; полное товарищество; отмена приговора; прекращение предварительного производства; совокупный приговор; обжалование

ÜBERBLICK ÜBER DIE BESCHLÜSSE DER STRAFKAMMER DES SĄD NAJWYŻSZY IM BEREICH DES STRAFPROZESSRECHTS FÜR/IM JAHR 2018

Zusammenfassung

Gegenstand des Artikels ist eine Analyse der Entscheidungen der Strafkammer des Sąd Najwyższy, des Obersten Gerichts und höchsten Instanz in Zivil- und Strafsachen in Polen im Jahr 2018 im Rahmen der Klärung von Rechtsfragen im Bereich des Verfahrensstrafrechts, die

eine grundlegende Auslegung des Gesetzes (Artikel 244 der polnischen Strafprozessordnung) erfordernund die ernsthafte Zweifel an der Auslegung der gesetzlichen Bestimmungen aufkommen lassen (Artikel 82 § 1 des polnischen Gesetzes über das Sąd Najwyższy) oder die in der Rechtsprechung der Gerichte zu unterschiedlichen Auffassungen bei der Auslegung der ihnen zugrunde liegenden gesetzlichen Bestimmungen führen (Artikel 83 § 1 des polnischen Gesetzes über das Sąd Najwyższy). Bei der Klärung der ihm vorgelegten Fragen sprach sich das polnische Oberste Gericht für die Zulässigkeit der Berichtigung von Schreib- und Tippfehlern bei der voneinander abweichenden Angabe des Strafmaßes in Ziffern und in Worten (Artikel 105 § 1 der polnischen Strafprozessordnung) als offensichtlich aus und darüber hinaus für die Möglichkeit der Entscheidung des Staatsanwalts über die Verwendung von Beweismitteln in Strafverfahren, die im Ergebnis einer auf Antrag einer befugten Stelle angeordneten operativen Kontrolle in Bezug auf eine andere, von Amts wegen verfolgten Straftat oder eine andere Steuerstraftat als die von der Anordnung der operativen Kontrolle erfassten Straftat erhoben wurden, jedoch nur dann, wenn es zulässig ist, eine solche Prüfung für diese andere Straftat anzuordnen (Artikel 168b der polnischen Strafprozessordnung); die Nichtanfechtung der erneuten Entscheidung über die Ablehnung der Einleitung eines Ermittlungsverfahrens oder dessen Einstellung nach der damaligen Rechtslage (Artikel 330 § 2 der polnischen Strafprozessordnung); die Möglichkeit der Aufhebung eines Freispruchs oder der Entscheidung über die Einstellung des Strafverfahrens und Rückverweisung einer Sache zur erneuten Entscheidung im Zusammenhang mit der ne Peius-Regel (Artikel 454 § 1 der polnischen Strafprozessordnung); eine Beschränkung des mit der Klage befassten Gerichts auf die Entscheidung über die Aufhebung des Urteils des erstinstanzlichen Gerichts und Zurückverweisung der Rechtssache an dieses Gericht zur Prüfung, ob der von der Rechtsmittelinstanz festgestellte Verfahrensfehler die Grundlage für eine kassatorische Entscheidung bildet (Artikel 539a § 1 und 3 der polnischen Strafprozessordnung); die Zulässigkeit des Fällens eines Gesamturteils durch das Rechtsmittelgericht (erste Verurteilung mit Gesamtstrafenbildung) oder der Strafverhängung mit einem anderen Strafrahmen als von dem erstinstanzlichen Gericht entschieden (Artikel 568a § 2 der polnischen Strafprozessordnung); die Erhebung einer Verfahrensgebühr *f*ür den Antrag auf Vollstreckbarerklärung in einem Strafvollstreckungsverfahren durch eine andere als die im Vollstreckungstitel angegebene Person, auf die die nach Erlass des Titels entstandenen Ansprüche übergegangen sind (Artikel 25 § 1 des polnischen Strafvollstreckungsgesetzbuches); die Unzulässigkeit des Widerspruchs gegen die Ablehnung des Antrags auf schriftliche Ausfertigung und Zustellung der Begründung eines in einem Ordnungswidrigkeitsverfahren erlassenen und verkündeten Urteils der Rechtsmittelinstanz (Artikel 109 § 1 des polnischen Strafvollstreckungsgesetzbuches); die Fortführung eines Verfahrens in der betreffenden Instanz in der bisherigen Besetzung im Falle von Änderungen zu der Besetzung infolge einer Aktualisierung der Vorschriften über die Zusammensetzung des Gerichts (Artikel 30 des polnischen Gesetzes vom 27. September 2013); dass jeder Partner einer offenen Handelsgesellschaft nach polnischen Recht (Spółka jawna) verpflichtet ist, der zuständigen Behörde Auskunft darüber zu erteilen, wem er zu einem bestimmten Zeitpunkt ein Kraftfahrzeug zum Fahren oder zur Nutzung überlassen hat (Artikel 78 § 5 des polnischen Straßenverkehrsgesetzes). Darüber hinaus erläuterte das Gericht die Voraussetzungen für die Vorlage von Rechtsfragen beim Sąd Najwyższy, die einer grundlegenden Auslegung bedürfen (Artikel 441 § 1 der polnischen Strafprozessordnung) und die in der Rechtsprechung der Gerichte zu einer unterschiedlichen Auslegung der Rechtsvorschriften führen, die Grundlage für die Entscheidung sind (Artikel 83 § 1 des Gesetzes über das Sąd Najwyższy).

Schlüsselwörter: abstrakte Rechtsfrage, Vollstreckbarkeitsklausel, operative Kontrolle, Ablehnung der Einleitung eines Ermittlungsverfahrens, Schreibfehler, Ordnungswidrigkeitsverfahren,

Rechtsfrage, Sąd Najwyższy (Oberstes Gericht der Republik Polen), Zusammensetzung des Gerichts, spółka jawna, offene Handelsgesellschaft nach polnischem Recht, Urteilsaufhebung, Einstellung des Ermittlungsverfahrens, Gesamtstrafenbildung durch Urteil, Beschwerde

APERÇU DES RÉSOLUTIONS DE LA CHAMBRE PÉNALE DE LA COUR SUPRÊME DANS LE DOMAINE DU DROIT DE LA PROCÉDURE PÉNALE POUR 2018

Résumé

Le sujet de l'article est une analyse des décisions de la Chambre pénale de la Cour suprême, prises en 2018 dans le cadre de la résolution de problèmes juridiques nécessitant une interprétation fondamentale de l'acte (article 244 du code de procédure pénale), soulevant de sérieux doutes quant à l'interprétation des dispositions légales (article 82 § 1 de la loi sur la Cour suprême) ou provoquant des divergences dans la jurisprudence des tribunaux dans l'interprétation des dispositions légales servant de fondement à leur décisions (article 83 § 1 de la loi sur la Cour suprême) dans le domaine du droit de la procédure pénale. Lors de la résolution des problèmes qui lui ont été présentés, la Cour suprême: s'est prononcée: en faveur de la recevabilité de la rectification en tant qu'erreur typographique manifeste de la définition de la peine d'une manière numérique et verbale différente (article 105 § 1 du CPP); la possibilité pour le procureur de prendre des décisions sur l'utilisation d'éléments de preuve dans le cadre d'une procédure pénale, obtenus à la suite d'un contrôle opérationnel ordonné à la demande d'un organisme habilité, en relation avec une autre infraction poursuivie d'office ou une infraction fiscale autre que l'infraction couverte par l'ordonnance de contrôle opérationnel, mais uniquement si pour cette autre infraction il est permis d'ordonner un tel contrôle (article 168b du code de procédure pénale); de ne pas faire appel, dans l'état juridique de l'époque, d'une autre décision de refuser d'ouvrir une procédure préparatoire ou de la suspendre (article 330 § 2 du CPP); la possibilité d'annuler le jugement d'acquittement ou de clôture de la procédure pénale et de renvoyer l'affaire pour réexamen dans le cadre de la règle du *ne peius* (article 454 § 1 du CPP); la limitation de la juridiction saisie du grief contre l'arrêt pour annuler le jugement du tribunal de première instance et renvoyer l'affaire pour réexamen pour examen afin de déterminer si le défaut constaté par la cour d'appel donne lieu à un jugement de cassation (article 539a § 1 et 3 du CPP); la recevabilité de prononcer une condamnation commune pour la première fois par la cour d'appel ou de la juger dans un champ différent de celui de la décision du tribunal de première instance (article 568a § 2 du code de procédure pénale); la perception de frais dans une procédure pénale d'exécution sur une demande de clause exécutoire présentée par une personne autre que celle indiquée dans le titre exécutoire, à qui les droits ont été transmis après la création du titre (article 25 § 1 du code de procédure exécutive); l'irrecevabilité d'une plainte contre une décision de refus d'accepter une demande de préparation par écrit et de signification des motifs du jugement de la cour d'appel rendu dans le cadre d'une procédure en matière de délit (art. 109 § 1 du code de procédure exécutive); la poursuite de la procédure dans une instance donnée avec la magistrature actuelle en cas de modification de celle-ci suite à une modification des dispositions relatives à la composition de la juridiction (article 30 de la loi du 27 septembre 2013); chaque associé d'une société en nom collectif est tenu de fournir à l'organisme habilité des informations sur la personne à qui il a confié le véhicule à conduire ou à utiliser à un moment donné (article 78, paragraphe 5, du code de la route). En outre, l'autorité a expliqué les raisons de présenter à la Cour suprême des questions juridiques nécessitant une interprétation

fondamentale (article 441 § 1 du CPP) et provoquant des divergences dans la jurisprudence des tribunaux dans l'interprétation des dispositions légales servant de fondement à leur décisions (article 83 § 1 de la loi sur la Cour suprême).

Mots-clés: question juridique abstraite, clause d'exécution, contrôle opérationnel, refus d'engager une procédure préparatoire, erreur matérielle, procédure en matière délictuelle, question juridique, Cour suprême, composition du tribunal, société en nom collectif, révocation du jugement, abandon de la procédure préparatoire, jugement conjoint, plainte

RASSEGNA DELLE DELIBERE DEL 2018 DELLA CAMERA PENALE DELLA CORTE SUPREMA NELL'AMBITO DEL DIRITTO PENALE PROCESSUALE

Sintesi

Oggetto dell'articolo è un'analisi delle sentenze del 2018 della Camera Penale della Corte Suprema, nell'ambito della soluzione di questioni giuridiche che richiedono un'interpretazione fondamentale della legge (art. 244 del Codice di procedura penale), che evocano seri dubbi circa l'interpretazione di norme giuridiche (art. 82 § 1 della legge sulla Corte Suprema), o che determinano nella giurisprudenza dei tribunali divergenze nell'interpretazione delle norme di legge che costituiscono la base delle loro sentenze (art. 83 § 1 della legge sulla Corte Suprema), nell'ambito del diritto penale processuale. Risolvendo le questioni presentate la Corte Suprema si è pronunciata circa: ammissibilità della rettifica dell'evidente errore redazionale di indicazione diversa, a cifre e a lettere, della durata della pena (art. 105 § 1 del Codice di procedura penale); possibilità, da parte del pubblico ministero, di decisione circa l'utilizzo, nel procedimento penale, di un mezzo di prova ottenuto come risultato di un controllo operativo attuato su richiesta di un'autorità autorizzata, in relazione ad un altro reato perseguito d'ufficio o di un reato tributario diverso dal reato compreso nell'ordinanza di controllo operativo, ma solo nel caso in cui in questo altro reato sia ammessa l'ordinanza di tale controllo (art. 168b del Codice di procedura penale); non impugnazione, nell'attuale status giuridico, di una nuova ordinanza di rifiuto di avvio del procedimento di indagine o di sua archiviazione (art. 330 § 2 del Codice di procedura penale); possibilità di annullamento della sentenza di assoluzione o di archiviazione di un procedimento penale e di rinvio della causa in esame legata alla regola *ne peius* (art. 454 § 1 del Codice di procedura penale); limitazione del tribunale che esamina il ricorso avverso una sentenza di annullamento della sentenza di primo grado e rinvio della causa in esame, per valutare se l'inadempimento rilevato dal tribunale di appello costituisca la base per emettere una sentenza di cassazione (art. 539a § 1 e 3 del Codice di procedura penale); ammissibilità dell'emissione, da parte del giudice di appello, di una sentenza cumulativa di pena cumulativa per la prima volta o di sua statuizione in misura diversa da quanto statuito dal giudice di primo grado (art. 568a § 2 del Codice di procedura penale); riscossione, nel procedimento penale esecutivo, di tassa sulla domanda di apposizione della formula esecutiva, da parte di una persona diversa da quella indicata nel titolo esecutivo, alla quale sono stati trasferiti i diritti dopo l'emissione del titolo (art. 25 § 1 Codice penale esecutivo); inammissibilità del reclamo avverso l'ordinanza di rigetto della domanda di redazione per iscritto e di notifica della motivazione della sentenza di un tribunale di appello emessa in un procedimento di contravvenzione (art. 109 § 1 del Codice di procedura penale); continuazione del procedimento in un determinato grado di giudizio nella composizione precedente del tribunale in caso di modifica della composizione in seguito alla riforma delle norme di legge sulla composizione del tribunale (art. 30 della legge del 27 settembre 2013);

ogni socio di una società in nome collettivo è tenuto a trasmettere all'autorità autorizzata l'informazione su chi abbia ricevuto un veicolo da condurre o da utilizzare in un determinato momento (art. 78 comma 5 della legge sulla circolazione stradale).

Parole chiave: questione giuridica astratta, clausola di esecutività, controllo operativo, rifiuto di avvio del procedimento di indagine, errore redazionale, procedimento di contravvenzione, questione giuridica, Corte Suprema, composizione del tribunale, società in nome collettivo, annullamento della sentenza, archiviazione del procedimento di indagine, sentenza cumulativa, reclamo

Cytuj jako:

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