Brief of the Case Law Study

Case Law in Criminal Cases regarding Criminal Offences against Morality and Sexual Integrity against a Minor

Study "Case Law in Criminal Cases regarding Criminal Offences against Morality and Sexual Integrity against a Minor", commissioned by the Latvian Judicial Training Centre, has been conducted in the framework of project "Professional Training for Judges and Prosecutors: Combatting Sexual Violence against Children".

The aim of the study is to ensure uniform understanding and application of legal norms. The study compiles case law in criminal cases regarding criminal offences against morality and sexual integrity committed against minors. The study covers case law of courts of all instances in the period from 2014 to 2016 regarding criminal offences, with respect to which a court's ruling has entered into force.

The study provides an overview of case law on criminal offences that are envisaged in the second and third part of Section 159, the third, fourth, fifth and sixth part of Section 160, Section 161, Section 162 and Section 162^1 of the Criminal Law, taking into account the law of 15 May 2014 "Amendments to the Criminal Law", which entered into force on 14 June 2014. These amendments were initiated by the Ministry of Justice, ensuring transposition of the Directive 2011/93/EU of the European Parliament and the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework-Decision 2004/68/JHA. The Directive sets the minimum standards with respect to such constitutive elements of crime and sanctions that are related to sexual abuse and sexual exploitation of children, and child pornography.

The Ministry of Justice substantiated the need for amendments by the facts established in the compilation of case law prepared by the Supreme Court of the Republic of Latvia in 2007 regarding case law in criminal cases on the basis of Section 160 and Section 162 of the Criminal Law; i.e., problems in qualification of crimes were identified, pointing to unclearly defined criteria allowing to differentiate, whether an offence, which is not manifested as physical contact with the victim, should be considered as being violent sexual gratification or depraved activities. It was also concluded in this compilation that in qualifying crimes envisaged in Section 160 and Section 162 of the Criminal Law sometimes different understanding of their constituent elements and qualifying characteristics was observed, which had caused erroneous solution to qualification.

The relevance of the study follows also from the fact that amendments introduced to the Criminal Law totally changed the constituent elements of criminal offences, significantly altering the content of the objective side of criminal offences.

With the law of 15 May 2014 "Amendments to the Criminal Law", which entered into force on 14 June 2014, Section 159 (rape), Section 160 (sexual violence), Section 161 (acts of sexual nature with a person who has not attained the age of sixteen years), Section 162 (leading to depravity) and Section162^1 (encouraging to involve in sexual acts) of the Criminal Law were expressed in new wording. The legislator, in introducing amendments to the Criminal Law, has not defined transitional provisions, therefore in examining cases of criminal offences that have been committed before the amendments entered into force, general provisions of the Criminal Law on the time when a law is in force must be observed (Section 5 of the Criminal Law).

It is concluded in the study that in some instances mistakes can be identified in case law that are linked to validity of qualification of these criminal offences, by no abiding by amendments introduced to the Criminal Law or due to inaccurately identified qualifying features. Some errors occur also in determining punishment, in providing reasoning for the choice of punishment, if the sanction set in the Section provides for alternative punishments, whereas in cases of conditional sentencing – absence of reasoning that would comply with the law. In some cases deficiencies have been identified also in establishing mitigating or aggravating circumstances.

Rulings in 153 cases that had entered in to force were analysed in the study. Of these in 8 cases a person had been charged with committing a crime envisaged in the third part of Section 159 of the Criminal law, in 37 cases – committing a crime envisaged in the second, third, fourth, fifth or sixth part of Section 160 of the Criminal Law, in 57 cases – committing a crime envisaged in Section 161 of the Criminal Law, in 45 cases – committing a crime envisaged in Section 162 of the Criminal Law, in 6 cases – committing a crime envisaged in Section 162^1 of the Criminal Law. Currently these criminal offences are to be recognised as being crimes – serious or especially serious crimes.

The summary of the study comprised conclusions both on identifying features of constitutive elements of criminal offences envisaged in the second and third part of Section 159, the third, fourth, fifth and sixth part of Section 160, Section 161, Section 162, and Section162^1 of the Criminal Law, and on determining punishment for these crimes.

In view of the fact that amendments were introduced to Sections 159-162^1 of the Criminal Law, significant circumstance that must be established and indicated in indictment is the concrete time when the criminal offence was committed, because time can influence qualification of the criminal offence and punishment.

The practice of applying punishment in cases regarding crimes that are envisaged in the second and third part of Section 159, the third, fourth, fifth and sixth part of Section 160, Section 161, Section 162, and 162^1 of the Criminal Law can be characterised as stable, courts examine circumstances that influence the type and amount of punishment, courts take into consideration duration of crime, number of victims, at the same time it can be concluded that some errors are made in providing reasoning for choosing the type punishment or in examining circumstances that influence the amount of punishment.

If the sanction of the Section (Section 161, Section 162, Section 162^1 of the Criminal Law) provides for alternative basic punishments, then the court, in choosing the one to apply, must provide its reasoning for selecting it. Moreover, it must be taken into consideration that

pursuant to the second part of Section 46 of the Criminal Law, in determining the type of punishment, the character of and harm caused by the criminal offence committed, as well as the personality of the offender must be taken into account; this enumeration of circumstances that influence the type of punishment is exhaustive and cannot be interpreted broadly. Financial circumstances of the accused may not be a cause that would prohibit from applying a monetary fine and for setting a more severe punishment. Likewise, the fact that the perpetrator is serving a prison sentence does not fall within the range of those circumstances that, pursuant to the second part of Section 46 of the Criminal Law, must be taken into consideration in determining the type of punishment for the perpetrator. In determining the amount of punishment, pursuant to the third part of Section 46 of the Criminal Law, the circumstances mitigating or aggravating the liability are taken into account. There are no grounds to recognise circumstances as being aggravating, if such were not envisaged in law at the time, when the criminal offence was committed; whereas the court of appeals instance, upon establishing new circumstances mitigating the liability, has the grounds to review the amount of punishment, if it had been determined without taking into consideration these circumstances.

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