

**ON BEHALF OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**THE CASE ON CONFORMITY OF ARTICLE 426.1, PART 1 OF THE CRIMINAL
PROCEDURE CODE OF THE REPUBLIC OF ARMENIA WITH THE CONSTITUTION OF
THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE
PROSECUTOR GENERAL OF THE REPUBLIC OF ARMENIA**

Yerevan

4 February 2011

The Constitutional Court of the Republic of Armenia composed of the Chairman G. Harutyunyan, Justices K. Balayan, F. Tokhyan, M. Topuzyan, A. Khachatryan, V. Hovhannisyan (Rapporteur), H. Nazaryan, A. Petrosyan, V. Poghosyan,

with the participation of the representative of the Applicant, V. Shahinyan, the Head of the Department for Crimes Against the Person of the General Prosecutor's Office of the Republic of Armenia

the Respondent: the National Assembly of the Republic of Armenia, officially represented by D. Melkonyan, the Adviser to the Chairman of the National Assembly of the Republic of Armenia pursuant to Article 100, Point 1, Article 101, Part 1, Point 7 of the Constitution of the Republic of Armenia, Articles 25 and 71 of the Law on the Constitutional Court of the Republic of Armenia,

examined in a written procedure in a public hearing the Case on conformity of Article 426.1, Part 1 of the Criminal Procedure Code of the Republic of Armenia with the Constitution of the Republic of Armenia on the basis of the application of the Prosecutor General of the Republic of Armenia.

The Case was initiated on the basis of the applications submitted to the Constitutional Court of the Republic of Armenia by the Prosecutor General of the Republic of Armenia on 27.09.2010.

Having examined the written report of the Rapporteur on the Case, the written explanations of the Applicant and the Respondent, having studied the Criminal Procedure Code of the Republic of Armenia and other documents of the Case, the Constitutional Court of the Republic of Armenia **ESTABLISHES:**

1. The RA Criminal Procedure Code was adopted by the National Assembly of the Republic of Armenia on 1 July 1998, signed by the President of the Republic of Armenia on 1 September 1998 and came into force on 12 January 1999.

Article 426.1, Part 1 of the Code, which is titled “The court entitled to review the judgment due to newly revealed or new circumstances”, states: “Only the judgment in force is reviewable due to newly revealed or new circumstances”.

2. The procedural background of the Case is the following: within the criminal case on swindling initiated by Malatia Investigation Department of the RA Police, it was established that Arsen Y. Simonyan convicted of theft for four times and being sentenced to imprisonment for the fifth time for the term of 13 years, got acquainted with Anush M. Nersisyan in the prison. A. Simonyan,

abusing the confidence of the latter, with the help of his friend Arusyak N. Shelelenkyan, defrauded a particularly large amount of jewelry and money in sum of 3.050.030 AMD. During the proceeding of the criminal case a decision dated 26.01.2010 was made to separate the part from the criminal case concerning Arusyak N. Shelelenkyan, dismiss the proceeding regarding the mentioned part on the basis of Article 35, Part 2 of the RA Criminal Procedure Code and refusal from criminal prosecution against her.

The criminal case on charges against Arsen Y. Simonyan on 10 February 2010 was forwarded to the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts based on Article 178, Part 3, Points 1 and 3 of the RA Criminal Code. A. Simonyan was sentenced to 10 years' imprisonment without confiscation of property by the judgment from 15 June 2010 delivered by the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts. On 22 June 2010 the Trial Judge sent a letter stating that in the trial of the mentioned criminal case new circumstances were revealed substantiating the fact of A. Shelelenkyan's assistance to the commission of the given swindling, which necessitated abrogating the decision dated 26.01.2010 on refusal from the criminal prosecution against her, dismissing the part of the Case and to consider the issue of imposing criminal liability on her.

On 24.08.2010 the Prosecutor's Office of Yerevan Malatia-Sebastia Administrative District made a decision on initiation of proceeding due to newly revealed circumstances and the Malatia Investigation Department of the RA Police was assigned to carry out investigation.

3. Challenging the constitutionality of Article 426.1, Part 1 of the Code, the Applicant finds that it contradicts Articles 3, 18, 19 and 103 of the RA Constitution.

From the viewpoint of the Applicant, in the conditions of such a wording of the challenged legal norm, in essence, the review of the decisions of criminal prosecution body to dismiss the proceeding and terminate the criminal prosecution due to newly revealed or new circumstances is excluded. According to the Applicant, in this situation the constitutional rights of the persons injured by the crime, the legislative systematic regulation of that problem and the scope and logic of execution of constitutional powers of the Prosecutor's Office are violated.

The Applicant finds that the constitutional wording "... to restore his/her violated rights" stipulated in Article 19, Part 1 of the RA Constitution, concerns also the injured person in the criminal case. Hence, mechanisms shall be defined on review and abrogation of the decisions adopted in violation of law by the state bodies of criminal prosecution and judiciary. According to the Applicant, in the aspect of newly revealed circumstances, the current Criminal Procedure determines such mechanisms which concern only the review of judgments in legal force, thus excluding the necessity of those also for the acts adopted in pre-trial proceeding.

Based on comparative analysis of previous and current legal regulations concerning the review of the acts adopted in pre-trial and trial proceedings, due to newly revealed or new circumstances, the Applicant finds that the legal norms of the Code of primary edition regulating the challenged legal relation, particularly Articles 21 and 408-410 of the Code, have been in a systematic connection, while Article 21 and the provisions of Section 12.1 of the Code of current edition do not ensure the systematic and unified regulation of the problem. The Applicant's position is based on the argument that the analysis of the norms of Article 21 and Section 12.1 of the Code of current edition states that

both the judgments and the decisions on dismissal of the proceeding and termination of the criminal prosecution made in pre-trial proceeding, are reviewable due to newly revealed circumstances.

Considering the challenged norm in the context of the scopes and the logic of implementation of constitutional powers of the Prosecutor's Office, analyzing Article 103, Part 5, Point 2 of the RA Constitution, as well as Article 53, Part 2, Point 13 of the Code, the Applicant concludes that the review of the decision to dismiss the proceeding, including the review of the decision due to newly revealed circumstances is the Prosecutor's exclusive authority, and this argument is substantiated by positions expressed in the decision DCC-884 of the RA Constitutional Court dated 07.12.2009 regarding the interrelation between the prosecutor's supervision and judicial control over the pre-trial proceeding.

4. Opposing to the arguments of the Applicant, the Respondent finds that Article 426.1, Part 1 of the RA Criminal Procedure Code is in conformity with the RA Constitution. For substantiating this position, the Applicant notes that the norms of Section 12.1 of the RA Criminal Procedure Code titled "Judgments review due to newly revealed or new circumstances" concern only the judgments review. Meanwhile, "The RA current Criminal Procedure Code does not determine the procedure for abrogating the decisions on dismissal of the proceeding or termination of the criminal prosecution by the Prosecutor, due to newly revealed and new circumstances."

The Respondent insists that "While the current Criminal Procedure Code provide no precise procedural rules for abrogating the decisions on dismissal the proceeding or termination of the criminal prosecution by the Prosecutor due to newly revealed circumstances, ... the declaration of Article 426.1, Part 1 of the Code contradicting the RA Constitution and void, may lead to legal uncertainty, violation of the constitutional and conventional right not to be under double jeopardy."

The Respondent also states that in "the concept of the RA new Criminal Procedure Code" the mechanism of the proceeding due to new and newly revealed circumstances is suggested to be also applied to the final acts made in pre-trial proceeding.

5. Within this Case, the RA Constitutional Court necessitates examining the challenged legal norm in the context of the entire legal regulation concerning the review of procedural acts, taking into account the necessity of balancing the interests of the injured on the one hand and the principle of inadmissibility of double jeopardy, as a public interest, on the other.

According to Article 21, Part 3 of the Code: "The decision of criminal prosecution body on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution, excludes the reopening of the criminal case, if it may lead to exacerbation of the status of a person, except for the cases prescribed by part four of this Article."

According to the analysis of Article 6, Points 2, 4 and 5 of the Code which define, respectively, the content of the concepts "criminal case", "proceeding", "pre-trial criminal proceeding", the Constitutional Court states that the phrase "reopening of the criminal case" in Article 21, Part 3 of the Code **may equally concern** criminal cases both in trial and in pre-trial proceedings or the criminal cases **finished** during one of the mentioned proceedings.

Based on the fact that the nature of new or newly revealed circumstances does not allow the body of preliminary inquiry or investigation to be aware of them, while conducting the proceeding of the given Case, the Constitutional Court also states that during the supervision over the legitimacy of the preliminary inquiry and investigation, the Prosecutor objectively may not regard the fact that the

body of preliminary inquiry or investigation did not consider the new or newly revealed circumstance as a procedural mistake made in the process of conducting the proceeding of this Case.

As for the possibility of performance by the Prosecutor's Office the supervisory functions over the pre-trial proceeding caused by newly revealed or new circumstances after the expiry of the time limit mentioned in Article 21, Part 4 of the Code, then it is regulated by Article 21, Part 5 of the Code, which, in its turn, refers to the provisions of Section 12.1 of the Code. That is, it follows from the analysis of the provisions of Article 21, Parts 3, 4 and 5 of the Code that the legislator has envisaged the performance by the Prosecutor's Office of the supervisory functions over the pre-trial proceeding caused by newly revealed or new circumstances after the expiry of the time limit mentioned in Article 21, Part 4 of the Code and it has predetermined the necessity of providing the appropriate legal guarantees for realization of such possibility through the norms of Section 12.1 of the Code. Moreover, the review of the decisions on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution made by the Prosecutor in pre-trial proceeding, is considered to be a separate type of control over the legitimacy of the preliminary inquiry and investigation; it concerns the fulfillment of the Prosecutor's obligation to institute a criminal prosecution and to disclose the crime determined by Article 103, Part 1, Point 1 of the RA Constitution and Article 27 of the Code, it is an independent proceeding and, therefore, has certain peculiarities.

6. Based on the analysis of Section 12.1 of the Code, the Constitutional Court states that the mentioned Section concerns the relations regarding **exclusively the judgments** review due to new or newly revealed circumstances. This conclusion is based not only on the norms of Section 12.1 of the Code, but also on the titles of the mentioned Section and the titles of separate Articles. Moreover, there was no consistency in the process of the legislative amendments concerning the clarification of the subject matter of the legal regulation. For example, the challenged Article is titled "The court entitled to review the judgment due to newly revealed or new circumstances", while the subject matter of legal regulation of Part 1 of that Article is the system of legal acts, from which **only** the judgment "**in legal force**" is specified. This wording is also a manifestation of inertia of legal thinking, whereas there may not be concepts of "a judgment in legal force" and "a judgment in illegal force" so that the choice between them will be made through the restrictive concerning part of speech "**only**".

As it follows from the grammatical analysis of the current wording, the expression "... **only** the judgment in legal force" of Article 426.1 of the Code is not limited with the stress on the circumstance of the judgment in "legal" force. The expression "**only**" in this phrase as a restrictive concerning part of the speech presumes that, in criminal proceedings no other final legal act may be reviewed due to newly revealed or new circumstances. Similar exception and stress like that demand to express fundamental constitutional legal position, concerning the issue, whether the blockage of the review of the final legal act due to newly revealed or new circumstances in pre-trial proceeding causes problems for assurance of effective protection of human rights. The issue of procedure types set forth by the legislator for the lawful implementation of this institution is another matter.

Purely from the viewpoint of necessity and overcoming the mentioned problems, the Respondent gives an exhaustive answer to the question, stating that "... taking into consideration the importance and conceptual significance of the problem, as well as realizing that it may be effectively solved only in the case of systematic regulation ..., **in the concept of the RA new Criminal Procedure Code the mechanism of the proceeding due to new and newly revealed circumstances is offered to be also applied to the final acts adopted in pre-trial proceeding.**"

The Constitutional Court finds that in practice, first of all, the absence of the legislative mechanism for review of final decisions on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution, made in pre-trial proceeding of criminal case due to new or newly revealed circumstances should be practically considered as a violation of the rights and dignity of the person injured by the crime.

Realizing that the non-enjoyment of the right to access to justice by the injured violates the principle of equality before the court, thereby making meaningless the idea of justice itself, a number of international legal instruments determined the scopes of the obligations of States, which shall support the effective protection of the procedural rights of the injured. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power A/RES/40/34, adopted by the UN General Assembly on 29 November, 1985 and Recommendation No. R(85)11 of the Committee of Ministers of the Council of Europe on “The position of the victim in the framework of criminal law and procedure” recommended to take internal measures to protect the rights of the injured, in particular to improve the judicial and administrative mechanisms of compensation of damages caused to the injured, to determine the status of the injured during the proceeding of the criminal case, the nature of the rights and duties of the court concerning the issue of guaranteeing his/her rights. According to the mentioned documents, one of the most important functions of criminal justice is to satisfy the demands of the injured and protect his/her interests and to increase confidence of the injured towards criminal justice.

7. The RA Constitutional Court states that the absence of the systematic legal regulation of the possibility to review the final decision of the body of criminal prosecution on dismissal of the proceeding, termination of the criminal prosecution or refusal from the criminal prosecution due to new or newly revealed circumstances, first of all, is caused by the current wording of Article 426.1, Part 1 of the RA Criminal Procedure Code, as a result of which the right of the person to effective remedies to protect his/her rights and remedies before judiciary, as well as other public bodies, is jeopardized.

Proceeding from the consideration of the Case and governed by Article 101, Part 1, Point 7, Article 102 of the Constitution, Articles 63, 64, 68 and 71 of the RA Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare the expression "**only**" in Article 426.1, Part 1 of the Criminal Procedure Code of the Republic of Armenia, insofar as it excludes the review of other final legal acts prescribed by law due to newly revealed or new circumstances thereby jeopardizing, particularly, the person's right to effective legal remedies before the competent public bodies during pre-trial proceeding, as contradicting to the requirements of Article 18, Part 1 of the RA Constitution and void.

2. Pursuant to Article 102, Part 2 of the RA Constitution this Decision is final and enters into force from the moment of its announcement.

Chairman

G. Harutyunyan

4 February 2011

DCC-935