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GLOSS
on the Supreme Court ruling of 19 January 2017, I KZP 11/16[1] (with reference to the Supreme Court judgement of 21 June 2017, I KZP 3/17)[2]

The statement of the ruling is as follows:

"(...) [T]he normative phrase 'whoever being deprived of liberty based on a court's decision self-frees' should also be interpreted as an action that constitutes unlawful freeing from serving the penalty of deprivation of liberty in the system of electronic monitoring, and the perpetrator should be subject to criminal liability under Article 242 §1 CC."

The Supreme Court judgements indicated in the title are in close relationship and they should be discussed together. They were issued in connection with the following facts. In accordance with the decision of the Regional Court in K. of 14 October 2008, P. P. was sentenced to eight months of deprivation of liberty suspended for three years' probation. On 15 September 2011, the Court decided to execute the penalty. In the course of the executive proceedings, on 18 September 2014, the District Court in K. issued a decision letting the convict P. P. serve the penalty of deprivation of liberty outside prison in the system of electronic monitoring. On 9 November 2014, the convict left his place of residence without permission and failed to stay there until 19 November 2014. He did not contact the probation officer and did not answer his telephone calls. In the situation, on 17 November 2014, the District Court in K. issued a decision revoking the permission to serve the sentence in the system of electronic monitoring. P. P. was accused of "self-freeing in the period from 9 November 2014 to 17 November 2014 from the execution of the penalty of deprivation of liberty to which

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1 The ruling is available at http://www.sn.pl/sprawy/SiteAssets/Lists/Zagadnienia_prawne/EditForm/I-KZP-0011-16_p.pdf.

2 The judgement is available in the Legalis system.

he was sentenced by the Regional Court in K. on 14 October 2008 for the commission of an act under Article 178a §1 CC while serving the penalty in the system of electronic monitoring based on the decision of the District Court in K. of 18 September 2014, i.e. the commission of an offence under Article 242 §1 CC". On 5 June 2016, the Regional Court issued a sentence acquitting P. P. of committing the act he was accused of. The counsel for the defence and the prosecutor filed an appeal against the sentence (as far as other acts, not of our interest, are concerned). Hearing the appeal, the District Court in K. had doubts requiring the interpretation of statute and asked a prejudicial question whether "the convict's departure from the place of serving the sentence of deprivation of liberty in the system of electronic monitoring can be classified as the features of a causative act of an offence of self-freeing determined in the provision of Article 242 §1 CC".

The Supreme Court standard bench examining the matter issued a ruling of 19 January 2017, I KZP 11/16, and based on Article 441 §2 Criminal Procedure Code (henceforth: CPC) decided to refer the prejudicial question to the extended bench of the Supreme Court.[3] In the justification for the decision, the Supreme Court indicated that, in fact, "the question asked by the District Court concerns the problem of whether the normative phrase 'whoever being deprived of liberty based on a court's decision self-frees' should be interpreted in accordance with its literal understanding (the colloquial language directive) as freeing oneself from a locked area, convoy or monitoring by breaking 'the guard's fetters' or (in accordance with the legal language directive) also as any other activity that constitutes unlawful freeing from the regime of serving a sentence of deprivation of liberty in the system of electronic monitoring. In more precise terms, it is necessary to emphasize that what is of critical importance in the discussed case is the phrase 'whoever being deprived of liberty based on a court's decision self-frees'". The Court also noticed that: "the attempt to determine the present meaning of the provision of Article 242 §1 CC may be performed based on the selection of the appropriate linguistic interpretation directive. This makes it possible to avoid the kind of interpretation that by the use of purpose- or system-related method may create doubts concerning the violation of the *lex certa* principle. The interpretation goes beyond common interpretation because it results in defining the meaning of the provision of the substantive criminal law in the new normative situation [it concerns the introduction of the possibility of executing the penalty of deprivation of liberty in the system of electronic monitoring – P.P.], which forces the law enforcement body to establish new legal norms for determining criminal liability". Taking into consideration the legal language directive to interpret Article 242 §1 Criminal Code (henceforth: CC), the Supreme Court stated that the normative phrase "whoever being deprived of liberty based on a court's decision self-frees" used in the provision may also cover a convict's freeing from obligations resulting from a court's sentence of deprivation of liberty in the system of electronic monitoring. Justifying its stand, the Supreme

[3] The Supreme Court indicated that it did it having in mind diverse opinions on the issue and the importance of the adjudication for a court practice and legal consequences depending on the interpretation of the problem in question.

Court added that the concept of "self-freeing" has a broader meaning than "escape" and may also cover situations in which a perpetrator has not broken "the guard's fetters". The purpose- and system-related interpretation seems to support the Supreme Court's opinion. The Court also referred to the European Court of Human Rights case law based on Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[4] which results in broad interpretation of the concept of "deprivation of liberty",[5] however, it also pointed out judgements demonstrating narrow interpretation of the concept in question.[6] Eventually, the Supreme Court stated that "it would be justified to assume that the normative phrase 'whoever being deprived of liberty based on a court's decision self-frees' should also be interpreted as an action that constitutes unlawful freeing from serving the penalty of deprivation of liberty in the system of electronic monitoring, and the perpetrator should be subject to criminal liability under Article 242 §1 CC".

During the extended bench session on 26 April 2017, based on Article 441 §5 CPC, the Supreme Court decided to examine the appeal against the Regional Court in K. sentence of 5 April 2016. The Supreme Court justified its decision by the occurrence of a legal problem concerning intertemporal law. The Supreme Court judgement of 21 June 2017, I KZP 3/17, upheld the Regional Court judgement concerning the acquittal of P. P. from the commission of an offence under Article 242 §1 CC justifying it by stating that when the first instance court issued its sentence, electronic monitoring was a form of execution of the penalty of limitation of liberty and, although on 15 April 2016 the system was again connected with the penalty of deprivation of liberty, in accordance with the wording of Article 4 §1 CC, the statute more favourable for the perpetrator should be applied, i.e. Article 242 §1 CC in the normative context linking monitoring with the penalty of limitation of liberty. The Supreme Court did not express a clear stand concerning the possibility of applying Article 242 §1 CC to a person who "self-freed" from electronic monitoring. However, if it recognised Article 242 §1 CC in connection with the provisions determining electronic monitoring as a form of the penalty of limitation of liberty as the statute that is more favourable in the discussed case in the meaning of Article 4 §1 CC, a conclusion can be drawn that its stand was the same as in the ruling of 19 January 2017.

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The answer to the question that the District Court asked, i.e. whether the convict's departure from the place of serving the penalty of deprivation of liberty in the system of electronic monitoring can be classified as the features specifying a causative act of an offence of self-freeing laid down in the provision of Article 242 §1 CC,

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[4] Journal of Laws [Dz.U.] of 1993, No. 61, item 284; hereinafter: ECHR.

[5] The Court stated that: "the type and intensity of limitations typical of the penalty of deprivation of liberty served in the system of electronic monitoring in their nature may be considered a form of 'deprivation of liberty' in the meaning of the Convention".

[6] Case of *Trijonis v. Lithuania* (the ECtHR judgement of 15 December 2005, Application no. 2333/02); case of *Raimondo v. Italy* (the ECtHR judgement of 22 February 1994, Application no. 12954/87).

requires examining two issues. Firstly, it is necessary to specify the scope of the meaning of the concept of "deprivation of liberty" in accordance with Article 242 §1 CC. Secondly, it is necessary to establish the legal and physical situation of the convict serving the penalty of deprivation of liberty in the system of electronic monitoring.

DEPRIVATION OF LIBERTY

It cannot raise doubts that the concept of "liberty" in accordance with Article 242 §1 CC should be interpreted in the same way as in case of unlawful deprivation of liberty (Article 189 CC). However, the provision refers to a perpetrator's "self-freeing". Apart from that, in accordance with one of the basic rules of law interpretation, the same terms functioning in the same legal act cannot be given different meanings (a ban on homonymous interpretation). Thus, what matters is the physical aspect of liberty, referred to as the mobility freedom, i.e. a person's freedom to change the place of stay according to his or her will.[7] Article 41 para. 1 Constitution of the Republic of Poland ("Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute") also deals with liberty in this meaning.[8] The situation of a perpetrator of an offence under Article 242 §1 CC should be examined in two aspects: physical and legal (formal) ones. Firstly, a perpetrator of an offence under Article 242 CC must really be deprived of liberty,[9] i.e. be in a situation in which he or she cannot change the place of stay according to his or her will. Of course, the concept of "the place of stay" should be interpreted rationally, as a room,

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[7] See M. Mozgawa, [in:] J. Warylewski (ed.), *System prawa karnego*, Vol. 10: *Przestępstwa przeciwko dobrom indywidualnym*, Warsaw 2016, p. 362. Thus also the judgement of the Appellate Court in Lublin of 15 December 1994, II AKr 202/94, OSA 1997, No. 11, p. 109.

[8] In its judgement of 11 October 2011, K 16/10 (OTK-A 2011, No. 8, item 80), the Constitutional Tribunal characterised a person's freedom as "an individual's ability to take decisions according to his or her own will, to have free choice of conduct in public and private life, not limited by other persons". Based on the Constitution, it is said that deprivation of liberty means preventing an individual from exercising that freedom (B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 267); on the other hand, the limitation of liberty consists in a ban on exercising some possibilities included in a person's freedom *sensu stricto* (e.g. a ban on changing the place of residence, a ban on driving) or forcing a person to perform some activities that the person would not do otherwise (e.g. obligation to do a certain job), while all other possibilities of "personal freedom" are left for an individual's disposal (P. Sarnecki, *Komentarz do art. 41 Konstytucji*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warsaw 2003, p. 4).

[9] It is *opinio communis* so, for example, in the light of the Criminal Codes of 1997, 1969 and 1932, see: B. Kunicka-Michalska, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 222–316*, Vol. 2, Warsaw 2010, p. 337; A. Wojtaszczyk, W. Wróbel, W. Zontek, [in:] L. Gardocki (ed.), *System prawa karnego*, Vol. 8: *Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warsaw 2013, pp. 668–669; M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warsaw 1977, p. 682; W. Wolter, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warsaw 1973, p. 775 and 796; O. Chybiński, [in:] W. Świda (ed.), *Prawo karne. Część szczególna*, Wrocław–Warsaw 1980, p. 483; W. Makowski, *Kodeks karny. Komentarz*, Warsaw 1937, p. 483.

a set of rooms, or even the whole building or another unlocked place that cannot be left, which is protected by the establishment of guards or the application of adequate technical measures making it impossible to escape.[10] In the opinion of the Supreme Court, "The state of 'deprivation of liberty' is also a state in which a particular person is in a proper locked place or under supervision, and self-freeing is getting out of this locked place or supervision".[11] In another judgement, it was indicated that: "The possibility of committing an offence under Article 256 para. 1 CC [the equivalent of Article 242 §1 CC of 1997 – P.P.] starts when a perpetrator is in a locked place or 'under guard' and an offence is committed the moment 'the guard's fetters are broken'. The opinion is supported in literature where it is stated that the occurrence of an offence requires that a perpetrator should be deprived of liberty based on a legal decision of a competent body and it is not enough for him or her to know about the application of deprivation of liberty to him or her. It is also emphasized that only a person deprived of liberty may be a perpetrator of the offence and not a person who was sentenced to the penalty which has not been executed".[12] Thus, until a perpetrator has been physically deprived of liberty (locked or taken "under guard"), he or she cannot commit an offence of self-freeing. As it has been mentioned above, it is also not enough to physically deprive the perpetrator of liberty. The situation must be based on a court's decision or a legal order issued by another state body (a legal formal aspect of deprivation of liberty).

The establishment of the legal and physical situation of a convict serving the penalty of deprivation of liberty in the system of electronic monitoring requires the analysis of the regulations of the Criminal Procedure Code, in particular those concerning such person's rights and obligations. The penalty of deprivation of liberty in the system of electronic monitoring[13] is executed as stationary supervision (Article 43c §1 sentence 1 Penalty Execution Code, hereinafter: PEC), which consists in checking whether a convict stays in the places indicated by a court on particular days of the week and hours (Article 43b §3(1) PEC). A convict serving the penalty of deprivation of liberty in the system of electronic monitoring is obliged to: (1) carry a transmitter non-stop; (2) take care of technical means given to him or her, inter alia, in particular, protect them against loss, destruction, damage, or making them unfit for use, and ensure constant power supply to them; (3) give a monitoring body access to technical means provided in order to check them, repair or exchange every time the body demands it, including giving the employees of such body access to rooms in which the convict stays or to real estate the convict owns or has the right of management of; (4) provide information concerning the course of penalty service

[10] It cannot be claimed that deprivation of liberty takes place only when someone cannot move; actually, even a person serving the penalty of deprivation of liberty in prison can freely walk in the cell.

[11] The Supreme Court judgement of 23 September 1992, III KRN 129/92, OSNKW 1993, No. 1–2, item 6.

[12] The Supreme Court judgement of 9 December 1997, V KKN 26/97, Prokuratura i Prawo-wkł. 1998, No. 7, item 7.

[13] Electronic monitoring is the supervision of a convict's conduct with the use of technical means (Article 43b §1 PEC). On the other hand, the system of electronic monitoring signifies all the methods and technical means used to perform electronic monitoring (Article 43b §2 PEC).

and the imposed obligations fulfilment to a court president or an authorised judge, a probation officer, a supervising body and a body managing a monitoring centre, and appear before a judge or a probation officer each time they demand it; (5) remain in the place indicated by a court for a set period; (6) answer calls connected to the landline recorder; (7) enable a professional probation officer to enter an apartment or real estate where the call recorder is placed; (8) provide information referred to in para. (4) to all authorised persons when they demand it, also with the use of the landline recorder (Article 43n §1 and §2 PEC). The obligation referred to in para. (5) concerns a convict's stay in the place of permanent residence or another place indicated in particular time (Article 43na sentence 1 PEC). It should be noticed that in accordance with Article 43na sentence 2 PEC, a penitentiary court is obliged to determine the periods within the day and particular days of the week when a convict can leave the place of permanent residence or another indicated place for a period not exceeding 12 hours per day, especially for the purpose of (1) working; (2) performing religious practices or using religious services; (3) taking care of a minor, a disabled or a sick person; (4) education and self-education, and one's own creative activities; (5) using cultural, educational and sports facilities and taking part in cultural, educational and sports activities; (6) contacting his or her counsel for the defence, proxy or a chosen representative referred to in Article 42 PEC; (7) contacting entities referred to in Article 38 §1 PEC; (8) keeping in touch with the family and other close people; (9) using medical services or taking part in a therapy; (10) doing necessary shopping. It should be added that in situations that are especially important for a convict justified by health and family-related or personal reasons, a probation officer may let a convict leave the place of monitoring for a period not exceeding seven days at a time, if necessary in company of a close relation or a trustworthy person, immediately informing a court president, an authorised judge or a penitentiary judge about the fact and entering the information into the communication-monitoring system (Article 43p §1 PEC). As the concept of "deprivation of liberty" in accordance with Article 242 §1 CC cannot be identified with absolute deprivation of a person's freedom to choose the place of stay (isolation in a cell or even overpowering with the use of coercion measures), it should be pointed out that pursuant to the above-mentioned provision, deprivation of liberty differs from limitation of liberty by: (1) intensity of the limitation of a person's freedom to choose the place of stay, and (2) the level of ensuring the execution of the limitations imposed on a person (intensity of supervision and the type of technical means used). Taking into account the above-mentioned PEC regulations, one should state that if a convict has the right to leave the place of permanent residence or another indicated place for a period of 12 hours per day (in the periods determined by a penitentiary court), one cannot say that he or she is deprived of liberty, i.e. he or she cannot freely change the place of stay. It is true that the movement freedom is limited to indicated periods but, in fact, the deprivation of liberty that is connected with serving the penalty of deprivation of liberty in a traditional way means that a convict does not use the movement freedom (of course, in a certain range, i.e. he or she cannot leave a cell, prison or a place of stay outside prison, e.g. a workplace) without permission. Electronic monitoring is

a modern form of supervision of a place of a convict's stay, however, unlike a locked or another place under the supervision of particular persons, it does not make it impossible for the monitored person to leave the place without permission. Such a person can change the place of stay at any time without any obstacles. The only thing that stops him or her from doing it is a psychological barrier connected with the fact that failure to meet the conditions of serving the penalty in the discussed system carries a risk that a penitentiary court may revoke the permission and place him or her in prison. Thus, it should be stated that serving the penalty of deprivation of liberty in the system of electronic monitoring is not connected with depriving a convict of liberty but, in fact, a form of limitation of liberty.[14] It can be even

[14] Also compare K. Mamak, *Dozór elektroniczny – rozważania na tle kary pozbawienia wolności, kary ograniczenia wolności oraz przestępstwa samouwolnienia (art. 242 § 1 k.k.)*, e-CzPKiNP No. 3, 2017, p. 17; see the author's detailed comments on the differences between the "traditional" penalty of deprivation of liberty and the penalty executed in the system of electronic monitoring, *ibid.*, pp. 12–21. He also indicates that imminent features of the penalty of deprivation of liberty that do not occur in electronic monitoring are as follows: isolation, forced social integration, specific discipline and devastating influence on family and social life (*ibid.*, p. 29). As a result, he proposes to adopt a distinction between formal and physical deprivation of liberty. In such classification, electronic monitoring would constitute formal deprivation of liberty (*ibid.*, p. 21). Also see M. Szewczyk, A. Wojtaszczyk, W. Zontek, [in:] W. Wróbel and A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. 2: *Komentarz do art. 212–277d*, Warsaw 2017, p. 388; K. Postulski, *Zezwolenie na odbycie kary pozbawienia wolności w systemie dozoru elektronicznego*, Prokuratura i Prawo No. 1, 2017, p. 49; *idem*, *Kodeks karny wykonawczy. Komentarz*, Warsaw 2017, p. 320. In accordance with the already not binding Act of 7 September 2007 on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring (uniform text, Journal of Laws [Dz.U.] of 2010, No. 142, item 960, as amended), it was also assumed that the penalty of deprivation of liberty in the form of electronic monitoring was not connected with deprivation of liberty, see A. Kiełtyka, A. Ważny, *Ustawa o wykonywaniu kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego. Komentarz*, Warsaw 2011, p. 57; M. Rusinek, *Ustawa o dozorze elektronicznym. Komentarz*, Warsaw 2010, pp. 30–31; M. Jankowski, A. Kotowski, S. Momot, A. Ważny, *Przyczyny niedostatecznego wykorzystywania ustawy o dozorze elektronicznym*, Instytut Wymiaru Sprawiedliwości, Warsaw 2012, p. 34. Also, R.A. Stefański indicated that the penalty of deprivation of liberty in the system of electronic monitoring is executed in non-custodial conditions. It is, therefore, getting close to the penalty of limitation of liberty, and what links it to the penalty of deprivation of liberty is first of all its name (R.A. Stefański, *Kara pozbawienia wolności w systemie dozoru elektronicznego*, Wojskowy Przegląd Prawniczy No. 4, 2007, p. 31). It should be remembered that the obligations of a convict pursuant to the Act of 7 September 2007 were the same as those that a convict serving the penalty in the system of electronic monitoring has at present (see Articles 8 and 10 of the Act). K. Zawiślan's opinion based on the above-mentioned statute was different; according to her, a person serving a penalty in the system of electronic monitoring is deprived of liberty, he or she is in isolation from the community (K. Zawiślan, *Dozór elektroniczny: izolacja czy iluzja?*, Państwo i Społeczeństwo No. 4, 2014, pp. 12 and 23). It should be noticed that the justification for the Bill on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring mentions electronic monitoring in the context of non-custodial measures (see Sejm of the Republic of Poland of the 5th term, paper no. 1237, pp. 2, 37–38). The justification for the Bill of 25 May 2012 amending the Act on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring also drew attention to the non-custodial aspect of the supervision (see Sejm of the Republic of Poland of the 7th term, paper no. 179, pp. 6–7). Similarly, the justification for the Bill of 11 March 2016 amending the Act: Criminal Code and the Act: Penalty Execution Code, which brought back the possibility of serving the penalty of deprivation of liberty in the system of electronic monitoring, stated that "electronic monitoring ensures a higher level of hardship and control than the probation measures used before and,

claimed that serving the penalty of limitation of liberty (actually nobody will question it that the penalty is not connected with depriving a convict of liberty) will sometimes be more troublesome for a convict than serving the penalty of deprivation of liberty in the system of electronic monitoring. It will be so, for example, in a situation when a court sentences a perpetrator of an offence to the penalty of limitation of liberty and imposes an obligation to perform supervised community service without remuneration and one or a few obligations referred to in Article 72 §1(2) to (7a) CC. It should be also remembered that in the course of serving the penalty of limitation of liberty, a convict cannot change the place of permanent residence without a court's permission and is obliged to provide information concerning the course of the penalty service[15] (Article 34 §2 CC). A convict is also under a probation officer's supervision (Article 55 §2 PEC).[16] It should be stated that as a convict serving the penalty of deprivation of liberty in the system of electronic monitoring is not really deprived of liberty, violating the conditions of supervision he or she does not commit an offence of self-freeing classified in Article 242 §1 CC.[17] However, he or she is subject to consequences of the violation of the conditions of serving the penalty in the system of electronic monitoring. In such a situation a penitentiary court revokes the permission to serve the penalty of deprivation of liberty in the system of electronic monitoring (Article 43zaa §1(2) PEC), however, in extraordinary situations justified by special circumstances, it may renounce it (Article 43zaa §2 PEC). A penitentiary court may revoke the permission to serve the penalty of deprivation of liberty in the system of electronic monitoring if a convict having the permission referred to in Article 43p fails to return to an indicated place until a set deadline (Article 43zab PEC). In case the permission referred to in Article 43zaa §1 or Article 43zab is revoked, a penitentiary court orders to place a convict in prison, about which he or she should be informed (Article 43zad PEC). Moreover, in case of intentional destruction, damage, making a transmitter and landline or mobile recorder unfit for use, a court may impose a compensation for the monitoring entity (Article 43s §1 PEC).[18]

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at the same time, a lower level of negative consequences of the penalty execution than in case of convicts' isolation" (Sejm of the Republic of Poland of the 8th term, paper no. 218). It should be indicated, although the value of it is just illustrative and it is not a convincing argument, that the Committee of Ministers of the Council of Europe, in para. 39 of its recommendation of 19 February 2014 on electronic monitoring, determines this monitoring as "a means of restricting the liberty of suspects or offenders"; Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c64a7 [accessed on 18/12/2017].

15 In accordance with Article 60 PEC, a court as well as a probation officer at any time may demand that a convict informs them about the course of the penalty of deprivation of liberty service and in order to do so ask a convict to appear in person.

16 In the same way as in case of the execution of the penalty of deprivation of liberty in the system of electronic monitoring, see Article 43d §3 PEC.

17 Thus also, K. Mamak, *Dozór elektroniczny…*, pp. 22 and 25; A. Wojtaszczyk, W. Wróbel, W. Zontek, [in:] *System prawa karnego…*, pp. 674–675; M. Szewczyk, A. Wojtaszczyk, W. Zontek, [in:] *Kodeks karny…*, p. 389, and L. Tyszkiewicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1415.

18 Such conduct also constitutes a misdemeanour under Article 66a Misdemeanour Code.

COMMENTS ON THE SUPREME COURT'S ARGUMENTS

According to the Supreme Court, its opinion finds support in: (1) the linguistic interpretation of the provision, which must sometimes take into account not the colloquial meaning of a given concept but the meaning resulting from the normative context (pp. 14 and 17 of the justification),[19] (2) the historic interpretation (p. 18 of the justification), (3) the systemic interpretation (pp. 18–19 of the justification), (4) the purpose-related interpretation (p. 19 of the justification), and (5) the broad interpretation of the concept of "deprivation of liberty" based on Article 5 Convention for the Protection of Human Rights and Fundamental Freedoms (pp. 20–23 of the justification).

Re 1: In the conclusions concerning the linguistic interpretation, the Supreme Court stated that the interpreter of the features of an offence under Article 242 §1 CC "outright has an obligation to take into account changes in 'the normative surroundings' of the offence, unless it violates the *nullum crimen sine lege certa* principle, which does not take place in this case". It is necessary to agree with the Supreme Court that sometimes the linguistic interpretation should take into consideration the normative context of the provision interpreted. However, it is necessary to remember about the specificity of substantial criminal law and one of its basic principles, i.e. the ban on the application of an extended interpretation unfavourable for a perpetrator (*nullum crimen sine lege stricta*). In the discussed case, one cannot abandon, as the Supreme Court would like to, the traditional, colloquial meaning of the concept of "deprivation of liberty" because it would be in conflict with the above-mentioned principle. In a situation concerning criminal liability of a perpetrator of an act it is inadmissible to depart from the established concepts only because the legislator shaped a particular legal instrument (in this case, the penalty of deprivation of liberty) in this or that way. The fact that at present electronic monitoring is connected with the penalty of deprivation of liberty and not the limitation of liberty should not be important. The reading of PEC leads to a conclusion that the rights and obligations of a convict serving the penalty of deprivation of liberty in the system of electronic monitoring do not basically differ from those of the time when electronic monitoring was a form of limitation of liberty. Thus, should "the normative circumstances" suddenly change the meaning of the state of "deprivation of liberty"? What used to be the limitation of liberty instantly became the deprivation of liberty because a few words in statute changed? Thus, the reasoning based on legislative solutions may be fallible and when the case is connected with criminal liability, there can be no doubts about the meaning of a provision and even when they arise, in accordance with the *crimen sine lege stricta* principle, a provision should be interpreted precisely.[20] One can have an impression that the Supreme Court actually did not consider whether the conditions of serving the penalty of deprivation of liberty in the system of electronic monitoring constitute

[19] The Supreme Court used other methods of interpretation as auxiliary ones because the Court assumed the linguistic interpretation was clear and obvious.

[20] It is also necessary to remember about the (controversial in fact) possibility of using the *in dubio pro reo* principle (Article 5 §2 CPC) in relation to doubts that are legal in nature.

the deprivation of liberty but whether the penalty of deprivation of liberty served in the system of electronic monitoring is a form of the penalty of deprivation of liberty.[21] Obviously, it is an erroneous approach because Article 242 §1 CC concerns a person "deprived of liberty" and not a person "serving the penalty of deprivation of liberty". The error in the reasoning of the Supreme Court is also revealed in the following statement: "However, it does not seem that, apart from the broader scope of the concepts [electronic monitoring and the system of electronic monitoring – P.P.], the amendment [to PEC by the Act of 11 March 2016 – P.P.] changed the meaning in such a way that it excluded the recognition of the penalty of deprivation of liberty served at present in the system of electronic monitoring as a penalty that is absolute in nature, i.e. as 'deprivation of liberty' as laid down in Article 242 §1 CC". Unfortunately, two aspects of the penalty of deprivation of liberty were mixed: its (as a rule) absolute nature and physical isolation usually associated with this penalty. An absolute penalty of deprivation of liberty means in the legal language a penalty the execution of which has not been conditionally suspended. And one cannot deny that the penalty of deprivation of liberty in the system of electronic monitoring is absolute in nature in the indicated meaning. However, this does not mean that it is connected with the deprivation of liberty referred to in Article 242 §1 CC. All the same, it should be pointed out here that there are situations when a convict serves the penalty of deprivation of liberty and is really deprived of liberty. It occurs when he or she is temporarily permitted to leave prison without supervision (compare Article 242 §2 CC).[22] In such situations, although a convict is not deprived of liberty, he or she has obligations laid down in Article 140 PEC.[23]

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[21] One can read in the justification: "However, it should be emphasized that in the opposition to the above opinions [treating the penalty of deprivation of liberty in the system of electronic monitoring as a form of the penalty of limitation of liberty or a probation measure – P.P.], still in accordance with the former legal state, there is an opinion that the linguistic interpretation of Article 2 para. 1 Act on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring containing a legal definition of the system of electronic monitoring indicates that 'serving a penalty in the system of electronic monitoring is a type of service of the penalty of deprivation of liberty' (J. Róg, *Wykonywanie kary w systemie dozoru elektronicznego a prawo do zabezpieczenia społecznego*, Państwo i Prawo No. 2, 2012, p. 85)", and: "Attention should be drawn to the fact that in the judgement of 23 May 2014, III KK 16/14 (Lex No. 1469141), the Supreme Court recognised that serving the penalty of deprivation of liberty in the system of electronic monitoring is not an obstacle to assume that a perpetrator acted in the conditions of Article 64 §1 CC. It seems that the opinion may be recognised as an expression of uniform comprehension of the same penalty of deprivation of liberty but only in the different forms, and thus an indirect argument for the interpretation of the features of an offence of self-freeing, which was conducted by the Supreme Court". *Nota bene*, J. Róg quoted by the Supreme Court speaks in her article about the penalty of deprivation of liberty served in the system of electronic monitoring as a non-custodial measure (J. Róg, *Wykonywanie kary w systemie dozoru elektronicznego…*, p. 87).

[22] In accordance with Article 140 §4 PEC, the time when a convict stays outside prison based on permits referred to in §1 (it concerns awards listed in Article 138 §1(7) or (8)) or a permit referred to in Article 141a or in Article 165 §2), is not subtracted from the period of serving the penalty, unless a penitentiary judge rules otherwise in case of a convict's breach of trust.

[23] In case a convict makes use of the awards referred to in Article 138 §1(7) or (8) PEC or a permit referred to in Article 141a or in Article 165 §2 PEC, he or she is obliged to immediately appear at the Police station operating in the place of his or her residence at the time of permit

Re 2: The Court pointed out that: "In the context of previous considerations, it is also necessary to draw attention to a historic aspect. The Criminal Code of 1969 within the scope of offences against the justice system used two concepts: 'escape' and 'self-freeing'[24] (see E. Hansen, *Przestępstwa więźniów w okresie izolacji penitencjarnej*, Warsaw 1982, pp. 26–27). Against the background of the concept 'escape', the term 'self-freeing' has a broader semantic capacity and makes it possible to cover also such an activity (but not omission) that does not consist in 'breaking the guard's fetters'. One cannot fail to notice that the results of the presented interpretation may lead to questions whether minor failures to fulfil obligations resulting from electronic monitoring as the penalty of deprivation of liberty will also match the features of an offence of self-freeing". The Court referred to the distinction between "escape" and "self-freeing" made by E. Hansen based on the Criminal Code of 1969 (by the way, the author wrote about "absence without leave"). However, the difference between the concepts is not such as the Supreme Court indicates. According to E. Hansen, "escape" is connected with the intention to avoid serving a penalty for some reason (someone escapes "from something" or "to something").[25] An escape consists of three stages: the initial one (absence without leave), the next one (hiding) and the final one (finishing hiding).[26] On the other hand, absence without leave means that a person deprived of liberty departs from a place where he or she must stay without permission and against the given permission. The perpetrator's intention is to leave the place where he or she stays without permission and against the permission of a competent body.[27] In both cases, an escape and (self-freeing) absence without leave, a particular person deprived of liberty "breaks the guard's fetters"; the difference consists only in the perpetrator's intention and the period of being away from the guard.

Re 3: The Court indicated that: "Taking into consideration the systemic reasons, it is necessary to draw attention to the content of the provision of Article 244a §2 CC, which classifies an offence of preventing or hampering the electronic supervision of the ruled obligation connected with the penalty of a ban on taking part in mass events. The sanction laid down in this provision is the same as the sanction under Article 242 §1 CC. Thus, it seems that if the legislator decided to penalise the conduct consisting in avoiding electronic monitoring ruled in connection with a penal measure, it would be incomprehensible to assume that a similar conduct connected with avoiding the execution of the basic penalty of deprivation of liberty could be exempt from punishment". The statement made by the Supreme Court that if, in Article 244a §2 CC, the legislator penalised preventing and hampering the

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in order to confirm the place of stay (§1); a convict using permits referred to in §1 is obliged to report every instance of the change of place of stay at the Police station operating in the new place of his or her stay (§2); a prison director may oblige a convict using permits referred to in §1 to particular conduct, especially to stay in places determined in permits or to appear at the Police station more frequently (§3).

[24] By the way, the Criminal Code in force also uses both concepts.

[25] E. Hansen, *Przestępstwa więźniów w okresie izolacji penitencjarnej*, Warsaw 1982, pp. 27–28.

[26] *Ibid.*, p. 31.

[27] *Ibid.*, pp. 28 and 30; also see E. Hansen, *Samouwalnianie się skazanych pozbawionych wolności (Art. 256 k.k.)*, Nowe Prawo No. 4, 1978, p. 599.

electronic supervision of a perpetrator's obligation to stay in the place of permanent residence ruled in connection with the ban on entering mass events or the obligation to come to the Police station or a place indicated by the county, regional or city Police commander who has jurisdiction over the convict's place of residence during the mass event, it would not be understandable not to criminalise the conduct of avoiding to serve the basic penalty of deprivation of liberty in this form, becomes dangerously close to the reasoning inadmissible in substantive criminal law that if little is banned, much must be banned even more (*a minori ad maius*).[28] It cannot be an argument for the thesis made by the Supreme Court.

Re 4: The purpose-related interpretation makes the Supreme Court conclude that "the provision of Article 242 §1 CC protects the interest consisting in the proper functioning of the justice system; the interest is violated by a perpetrator by hampering the execution of parts of sentences concerning deprivation of liberty (compare the Supreme Court judgement of 5 October 2000, II KKN 31/00, Lex No. 50922). In other words, the proper execution of a court's sentence or a legal order issued by another state body is the direct object of protection. There is no doubt that the same object of protection is also typical of offences under Article 243 CC and under Article 244a §2 CC. It also fully concerns the protection of the execution of the penalty of deprivation of liberty served in the system of electronic monitoring". The Supreme Court is right to notice that the proper functioning of the justice system is the object of protection under Article 242 §1 CC. However, resorting to taking into consideration the protected interest for the interpretation of criminal law cannot disregard the statutory features of an offence and the indicated provision clearly refers to a person deprived of liberty. The protected object can only be important for the limitation of the scope of the concept of the "deprived of liberty",[29] and cannot influence the extension of the area of penalisation against the wording of a provision.

Re 5: The Supreme Court quoted the judgement of the European Court of Human Rights, where the concept of "deprivation of liberty" is broadly interpreted and may cover the penalty of deprivation of liberty served in the system of electronic monitoring. It should be noted, however, that there is a fundamental difference between Article 5 ECHR and Article 242 §1 CC. The former provision protects a man against unlawful deprivation of liberty by a state, while the latter lays down a penalty for self-freeing of a person who was deprived of liberty in accordance with the law. While in the former case a broad interpretation of "deprivation of liberty" is admissible because it does not harm an individual but is outright favourable to

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[28] See P. Hofmański, S. Zabłocki, *Elementy metodyki pracy sędziego w sprawach karnych*, Warsaw 2011, p. 239.

[29] In connection with that, some types of physical deprivation of liberty do not constitute deprivation of liberty in the meaning of Article 242 §1 CC because they are not related to the system of justice execution, e.g. preventive (order-related) detention by the Police in accordance with Article 15 para. 1(3) Act of 6 April 1990 on the Police (uniform text, Journal of Laws [Dz.U.] of 2017, item 2067, as amended) or administrative detention pursuant to Article 40 para. 1 Act of 26 October 1982 on upbringing in sobriety and preventing alcoholism (uniform text, Journal of Laws [Dz.U.] of 2016, item 487, as amended).

one (interpretation *pro homine*),[30] in the latter case, the broader understanding of the concept in question is adopted, the broader the scope of criminalisation and the bigger disadvantage for a perpetrator will occur. And thus, we return to the *nullum crimen sine lege stricta* principle.

CONCLUSIONS

Summing up, it is necessary to criticise the stand presented by the Supreme Court and discussed in the gloss. It seems that the reasons of the Supreme Court were articulated in the following sentence: "Although it does not result *expressis verbis* from the statutory provisions, the type of the penalty of deprivation of liberty served [in the system of electronic monitoring – P.P.] is, in fact, some kind of award for a convict. Thus, the Court asking a prejudicial question is right to notice that it should not result in impunity of a person self-freeing only because the penalty of deprivation of liberty has a little bit different formula than the 'classical' one and this formula results from generally more relative assessment of a convict by a court". Thus, the Supreme Court tried to find such interpretation of Article 242 §1 CC that would be just and would not award again someone who has already received something advantageous (serving the penalty outside prison). Such an assumption led, in my opinion, the Supreme Court to adopt extended interpretation of the provision in question. One can consider whether a penitentiary court's revocation of permission to serve a penalty in this form is a sufficient sanction for a convict who has evaded the penalty service in the system of electronic monitoring or whether the conduct should also be subject to criminal punishment. It is an open question but it is the legislator's task to take the decision and *in abstracto* analyse social harmfulness of this type of acts in the context of criminal law *ultima ratio.*

There is one more comment that is not important in case of the adoption of my stand; however, in case of the Supreme Court's stand is adopted, it has an impact on the determination of a convict's criminal liability. The possibility of attributing an offence under Article 242 §1 CC depends on a perpetrator's awareness of being deprived of liberty. It should be assumed that most people serving the penalty of deprivation of liberty in the system of electronic monitoring believe their state is the limitation of liberty at the most. This belief is strengthened by information from

[30] This interpretation is for the implementation of human rights, see C. Mik, *Metodologia interpretacji traktatów z dziedziny ochrony praw człowieka*, Toruński Rocznik Praw Człowieka i Pokoju No. 1, 1992, Toruń 1993, p. 19. In this context, it is necessary to refer to the judgement of the Supreme Administrative Court of 3 December 2009, II FSK 917/08 (Legalis), in which it is indicated that "In accordance with Article 31 para. 1 Vienna Convention on the Law of Treaties of 26 May 1969 (Journal of Laws [Dz.U.] of 1990, No. 74, item 439), a treaty should be interpreted in good faith, in compliance with common meaning that should be attributed to words used in their context and in the light of its subject matter and purpose. Thus, unlike in the system of an act of domestic law, the directives of the interpretation of international agreements require that always in the process of interpretation not only the linguistic interpretation be taken into account but also functional (teleological) interpretation, even in case the provisions of an agreement are linguistically clear".

the official sources. One can read on the website of System of Electronic Monitoring (*System Dozoru Elektronicznego*) that electronic monitoring is "the most modern *non-custodial* [emphasis added by P.P.] system of serving the penalty of deprivation of liberty. It supervises the fulfilment of obligations imposed on a convict by a court with the use of electronic equipment and makes it possible to serve the penalty of deprivation of liberty outside prison".[31] On the websites of the District Court in Białystok and the Regional Court in Zielona Góra, one can read that "Electronic monitoring lets a convict serve the penalty *in non-custodial conditions* [emphasis added by P.P.] in the place of residence with the use of electronic systems limiting his or her movement freedom and the change of the place of stay. (…) The system of electronic monitoring makes it possible, regardless of some restrictions, to live a relatively normal personal life, especially to keep in touch with the family, learn and work".[32] And the last but the strongest argument comes from the legislator. An annex to the regulation of the Minister of Justice of 10 October 2016 based on Article 43k §8 PEC[33] concerning a specimen of written information about a convict's rights and obligations connected with electronic monitoring as well as the consequences of evading those obligations[34] in the part entitled "Consequences of evading obligations by a convict", with regard to the issue of criminal liability, quotes Article 244a §2 and Article 244b CC. According to the legislator, a person who evades serving the penalty of deprivation of liberty in the system of electronic monitoring does not match the features of an offence under Article 242 §1 CC.

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[31] www.dozorelektroniczny.gov.pl/?page_id=18 [accessed on 18/12/2017].

[32] http://bialystok.so.gov.pl/pomoc-prawna/system-dozoru-elektronicznego.html; http://www.zielona-gora.so.gov.pl/?mod=188 [accessed on 18/12/2017].

[33] In accordance with the provision, the Minister of Justice shall determine, in the form of regulation, a specimen of written information referred to in §4, taking into consideration the necessity to understand this information also by people not using the assistance of a counsel for the defence. Article 43k §4 PEC stipulates that after the announcement or delivery of a decision on starting electronic monitoring, or a decision on granting permission to serve the penalty of deprivation of liberty in the system of electronic monitoring, a convict should be delivered written information on his or her rights and obligations connected with electronic monitoring as well as about consequences of evading those obligations.

[34] Journal of Laws [Dz.U.] of 2016, item 1692.

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GLOSS ON THE SUPREME COURT RULING OF 19 JANUARY 2017, I KZP 11/16 (WITH REFERENCE TO THE SUPREME COURT JUDGEMENT OF 21 JUNE 2017, I KZP 3/17)

Summary

The gloss discusses the question whether evading execution of the punishment of deprivation of liberty in the system of electronic monitoring by a convict can be treated as the offence of self-freeing from isolation referred to in Article 242 §1 of the Criminal Code. The author disagrees with the opinion of the Supreme Court that such conduct matches the statutory features of self-freeing.

Keywords: offence of self-freeing (Article 242 §1 CC), system of electronic monitoring, penalty of deprivation of liberty, lawful deprivation of liberty

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 19 STYCZNIA 2017 R., I KZP 11/16 (NA TLE WYROKU SĄDU NAJWYŻSZEGO Z DNIA 21 CZERWCA 2017 R., I KZP 3/17)

Streszczenie

Glosa dotyczy kwestii możliwości zakwalifikowania uchylenia się skazanego od wykonywania kary pozbawienia wolności w systemie dozoru elektronicznego jako przestępstwa samouwolnienia określonego w art. 242 § 1 k.k. Autor nie zgadza się z poglądem Sądu Najwyższego, że wskazane zachowanie wyczerpuje znamiona przestępstwa samouwolnienia.

Słowa kluczowe: przestępstwo samouwolnienia (art. 242 § 1 k.k.), system dozoru elektronicznego, kara pozbawienia wolności, legalne pozbawienie wolności

Cytuj jako:

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