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Gloss on the Supreme Court ruling of 24 January 2018, II KK 10/18[1]

The time of the commission of an act is one of the elements of the objective aspect of the offence. It is determined by court and may be specified as different from that in the description of the act which constitutes a charge presented in the indictment, provided that the evidence taken in the trial gives grounds for such a change. The determination itself that the event(s) covered by the indictment took place at the time different from that stated in the indictment is admissible and does not mean going beyond the limits of a prosecutor's complaint.

In the analysed ruling, the Supreme Court dealt with the issue of the time of the commission of an offence as an element of its objective aspect. In particular, it analysed the allegation that the determination of the time limits for the commission of an offence in a sentence that differs from what the prosecutor's complaint states goes beyond the limits of the indictment.

The counsel for the defence claimed the infringement of Article 14 § 1 Criminal Procedure Code (henceforth CPC) in conjunction with Article 17 § 1(9) CPC and Article 399 § 1 CPC by means of the assumption that the accused committed the alleged act in the period between February 2015 and 31 August 2015 in a situation when the indictment covered the period between June 2015 and 31 August 2015. This, in their opinion, constituted the breach of the principle of accusatorial system because of the lack of a complaint filed by the entitled prosecutor with reference to the scope of conduct of the accused in the period between February and June 2015, which was not referred to in the indictment. As it was raised in the cassation, the role of the accused in criminal proceedings is not to defend against a hypothetical charge but a charge precisely determined in a prosecutor's complaint in terms of both the description of the conduct of the accused and the time when it took place. At the same time, this misconduct results in the occurrence of absolute grounds

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[1] LEX No. 2439961.

for an appeal laid down in Article 439 § 1(9) CPC, especially as the accused was charged under Article 190a § 1 CC, in case of which the examination of the period when the incriminated conduct took place is important for the assessment whether the features of the prohibited act were matched.

The Supreme Court did not share the arguments and rightly stated that, in accordance with the principle of accusatorial system (Article 14 § 1 CPC), the frameworks of the jurisdictional procedure are determined by a historical event described in the indictment and not by particular elements of this description. The time of committing an act is one of the elements of the objective aspect of an offence. It must be determined by a court and may be specified in a way different from that in the description of an act in the indictment if the evidence taken in the course of a trial justifies such a change. The determination alone that an event (events) took place at a time different from that stated in the indictment is admissible and does not mean going beyond the limits of a prosecutor's complaint.

The principle of accusatorial system does not negate this statement, either. On the one hand, it states that a court cannot go beyond the limits of the indictment because the initiative to prosecute is a prosecutor's competence and only a prosecutor determines the framework of the indictment; e.g. it cannot adjudicate in the case concerning the accused that is not included in the indictment and on an act that is not the subject matter of a complaint.[2] On the other hand, the act specified in the indictment is hypothetical and the version of events presented by the prosecutor and their legal classification cannot be recognised as final. It is a trial that is to make it possible to verify that hypothesis. The legal classification proposed by a prosecutor constitutes just a legal opinion about an act in question,[3] on which a court takes its own independent stand. This is both a court's right and obligation.[4] A trial does not deal with the description of an act presented by a prosecutor in the indictment but a criminal act that actually took place and was indicated in the indictment.[5]

Thus, an indictment as a basic complaint outlines the framework of a trial, however, the description of an act the accused is charged with or the legal classification indicated in the indictment does not determine it.[6] A historical event

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2 See the Supreme Court ruling of 11 December 2006, II KK 304/06, OSNwSK 2006, item 2403.

3 See S. Waltoś, *Akt oskarżenia w procesie karnym*, Warszawa 1963, p. 45 et seq.; S. Stachowiak, *Funkcje zasady skargowości w polskim procesie karnym*, Poznań 1975, p. 208.

4 The Supreme Court judgment of 8 September 2016, III KK 294/16, OSN Prok. i Pr. 2016, No. 11, item 16.

5 Judgment of the Court of Appeal in Łódź of 24 November 1999, II AKa 176/99, Biul. PA w Łodzi 1999, No. 9, p. 15.

6 For more in the legal doctrine see, inter alia: P. Hofmański, S. Zabłocki, *Granice skargi oskarżycielskiej w świetle orzecznictwa*, [in:] A. Gereckia-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008, pp. 133–150; P. Kardas, *O zależnościach między prawem materialnym i procesowym na przykładzie tożsamości czynu w prawie karnym*, [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, Warszawa 2009, pp. 718–746; P. Kardas, *Materialnoprawne i proceduralne ujęcia tożsamości czynu w prawie karnym. Komplementarne czy alternatywne modele tożsamości?* [in:] Z. Jędrzejewski, Z. Wiernikowski, S. Żółtek, M. Królikowski (eds), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego*, Warszawa 2014, pp.153–172; A. Pilch, *Kryteria tożsamości czynu*, Prokuratura i Prawo No. 12, 2010,

on which the indictment is based determines its limits. It concerns an event that constitutes the basis for the specification of an act the accused is charged with,[7] a real act, i.e. an objective event.[8]

A historical event is a concept having a broader meaning than the term "act" committed by the accused consisting in their actual action or omission. Thus, a court may come to different findings in the case and decide on a different legal classification, provided that the actual identity determined by the real framework of the event is maintained.[9] In the legal doctrine and case law, it is assumed that it also occurs when the place of an act subject to accusation, within the same historical event, may be attributed to the accused, even when the description and legal assessment are changed but it matches the same category of human conduct.[10] The requirement for remaining within the limits of the indictment is that the descriptions of the act alleged and at least partially attributed to the accused have a common area; it is necessary that there are at least some common features of the alleged act and the attributed one. The real grounds for liability on which an indictment was developed are not subject to change when at least a part of the criminal action or omission matches the criminal action or omission specified in the indictment.[11] When the issue is assessed from a different perspective, it is raised that the identity of an act is excluded if there are such significant differences in its comparable descriptions that, in accordance with the reasonable practical assessment, they cannot be actually recognised as descriptions of the same event.[12]

In adjudication practice, the change of the description of an act attributed in comparison with the description of an alleged act, also with respect to the determination of the time frame, takes place in many cases. However, it does not indicate adjudication goes beyond the framework of the indictment.[13]

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pp. 48–70; M. Rogalski, *Tożsamość czynu w procesie karnym*, Państwo i Prawo No. 6, 2005, pp. 49–64; M. Rogalski, *Kryteria tożsamości czynu w skargowym procesie karnym*, [in:] A. Gereckia-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008, pp. 307–321; M. Rogalski, *Niezmienność i niepodzielność przedmiotu procesu a tożsamość czynu*, [in:] W. Cieślak, S. Steinborn (eds), *Profesor Marina Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013, pp. 999–1011; M. Rusinek, *Kilka uwag o „tożsamości czynu"*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, pp. 557–563; S. Zabłocki, *Granice skargi oskarżycielskiej przy przestępstwach zbiorowych*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, pp. 551–556.

[7] The Supreme Court judgment of 9 June 2005, V KK 446/04, Biul. PK 2005, No. 3, item 1.2.2.

[8] Judgment of the Court of Appeal in Katowice of 30 September 2008, II AKa 231/08, Biul. SA w Katowicach 2008, No. 4; the Supreme Court ruling of 5 June 2007, II KK 91/07, KZS 2007, No. 10, item 38.

[9] The Supreme Court ruling of 19 October 2010, III KK 97/10, OSNKW 2011, No. 6, item 50.

[10] Ruling of the Court of Appeal in Katowice of 29 October 2008, II AKz 777/08, OSN Prok. i Pr. 2009, No. 7–8, item 43; the Supreme Court ruling of 19 October 2010, III KK 97/10, OSNKW 2011, No. 6, item 50; the Supreme court judgment of 7 April 2009, II KK 329/07, OSNwSK 2009, item 880.

[11] S. Śliwiński, *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1948, p. 447, cited by W. Waltoś, *Zarys systemu*, 7th edn, Warszawa 2003, p. 25.

[12] The Supreme Court judgment of 2 March 2011, III KK 366/10, OSNKW 2011, No. 6, item 51.

[13] See the Supreme Court judgment of 30 October 2012, II KK 9/12, LEX No. 1226693.

Thus, the modification of the description of the alleged act with respect to time, place, mode and circumstances of its commission as well as consequences, in particular the size of damage or the identity of the aggrieved by an offence against property, does not go beyond the limits of an indictment, provided that it concerns the same real event the prosecution of which constitutes the expression of a prosecutor's will.[14] There are also other factual findings in the course of a trial that are different from those described in the indictment, which do not constitute the departure from the indictment, e.g. circumstances that have impact on the stricter legal classification;[15] the value of the object of an offence;[16] the size of damage;[17] the intention;[18] the intentional mode of operation of individual perpetrators;[19] the date,[20] including the seven-day shift in its establishment;[21] the period of the commission of an offence,[22] including the introduction of a new element to a continuous act that has impact on the determination of its commission[23] and consequences[24] as well as: adding of particular features to the description of an act[25] or the description

14 The Supreme Court judgment of 4 January 2006, IV KK 376/05, OSNwSK 2006, item 35; the Supreme Court judgment of 21 September 2006, V KK 10/06, LEX No. 196961; the Supreme Court judgment of 2 March 2001, III KK 366/10, OSNKW 2011, No. 6, item 51; the Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202, the Supreme Court ruling of 19 October 2006, II KK 246/06, LEX No. 202125; the Supreme Court ruling of 5 February 2002, V KKN 473/99, OSNKW 2002, No. 5–6, item 34; the Supreme Court resolution of 15 June 2007, I KZP 15/07, OSNKW 2007, No. 7–8, item 55.

15 See the Supreme Court judgment of 17 July 1973, V KRN 264/73, OSNKW 1973/12, item 163.

16 The Supreme Court judgment of 17 November 1972, II KR 162/72, OSNKW 1973, No. 4, item 46.

17 The Supreme Court judgment of 25 June 2008, IV KK 39/08, OSN Prok. i Pr. 2008, No. 12, item 21.

18 The Supreme Court ruling of 11 March 2010, V KK 344/09, OSN Prok. i Pr. 2010, No. 9, item 4.

19 The Supreme Court judgment of 23 September 1994, II KRN 173/94, OSNKW 1995, No. 1–2, item 9.

20 Judgment of the Court of Appeal in Katowice of 5 September 2001, II AKa 150/01, OSN Prok. i Pr. 2002, No. 11, item 24; judgment of the Court of Appeal in Kraków of 17 March 2015, II AKa 24/15, KZS 2015, No. 4, item 92; the Supreme Court ruling of 21 January 2009, II KK 200/08, Biul. PK 2009, No. 3, item 1.2.11.

21 The Supreme Court ruling of 6 August 2008, V KK 248/08, Biul. PK 2008, No. 12, item 1.2.13.

22 See the Supreme Court judgment of 11 May 1984, Rw 262/84, OSNKW 1985, No. 1–2, item 10; the Supreme Court judgment of 22 April 1986, IV KR 129/86, OSNPG 1986, No. 12, item 167; the Supreme Court judgment of 19 March 1997, IV KKN 4/97, Wokanda No. 9, 1997, p. 15; the Supreme Court ruling of 30 September 2003, III KK 194/02, unpublished; the Supreme Court judgment of 4 January 2006, IV KK 376/05, OSNwSK 2006, No. 1, item 35; the Supreme Court ruling of 21 August 2012, III KK 217/12, Biul. PK 2012, No. 9, item 7; the Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202; the Supreme Court judgment of 25 June 2008, IV KK 39/08, OSN Prok. i Pr. 2008, No. 12, item 21.

23 The Supreme Court ruling of 27 September 2013, II KK 245/13, LEX No. 1391478.

24 The Supreme Court judgment of 25 June 2008, IV KK 39/08, OSN Prok. i Pr. 2008, No. 12, item 21.

25 Ruling of the Court of Appeal in Katowice of 12 October 2005, II AKz 625/05, OSN Prok. i Pr. 2006, No. 4, item 44; however, differently, in the Supreme Court ruling of 24 April 2007, IV KK 58/07, OSNwSK 2007, item 924.

of an act with the use of features properly describing a perpetrator's conduct;[26] recognising that the acts the accused is charged with constitute one offence;[27] recognising that the attributed act is a form of aiding and abetting instead of an attempt;[28] linking the causative act of a consecutive offence committed by omission to another obligation of the accused (Article 2 Criminal Code, henceforth CC) that is different from the one indicated in the alleged act;[29] a different finding by a court concerning the ownership of the object of an executive action,[30] or a perpetrator's modus operandi[31] and his/her role in the event.[32]

Offences with alternatively specified features of an executive action constitute another issue. They occur when a prosecutor formulates a charge of an offence by matching the features of one of the alternatives and a court attributes an offence by matching, apart from the features matching the description of an act provided in the indictment, also the features of the other alternative. It is rightly indicated in case law that it is not possible to make an abstract decision whether the identity of an alleged and attributed act has been maintained. The situation in which, by reference to both alternatively specified features of the executive action in the sentence, the proceeding body determines that a perpetrator embarked on two independent courses of conduct consisting in two separate historical events and infringing two separate, although laid down in the same legal provision, sanctioned norms, should be distinguished from a situation in which matching one executive action is in such an immediate connection with the other executive action mentioned in the sentence that they compose one act that is the object of a prosecutor's complaint.[33]

Attention should be also drawn to the fact that the assessment of the limits of an indictment should be done in the course of the whole proceedings, thus also taking into account appropriate procedural decisions taken at the stage of the preparatory proceedings. Thus, if a body carrying out preparatory proceedings and placing an indictment, by means of an adequate decision, clearly decides to exclude a part of conduct (to be subject to separate proceedings), this limitation of a public complaint is binding for a court.[34] Hence, in a situation in which a prosecutor, having complete knowledge about the courses of conduct of a perpetrator and then the accused, first in preparatory proceedings and then in the indictment, limits the scope of charges, it should be recognised that a court cannot go beyond the limits of this complaint.[35] Such a procedural situation may only be changed by means of another decision taken by a body authorised to combine proceedings (Article 33 CPC) or to

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[26] The Supreme Court ruling of 7 August 2013, II KK 15/13, Biul. SN 2013, No. 8, item 1.2.1.

[27] The Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202.

[28] The Supreme Court ruling of 7 August 2013, II KK 15/13, Biul. SN 2013, No. 8, item 1.2.1.

[29] The Supreme Court ruling of 5 February 2002, V KKN 473/99, OSNKW 2002, No. 5–6, item 34.

[30] The Supreme Court ruling of 2 April 2003, V KK 281/02, OSNKW 2003, No. 5–6, item 59.

[31] The Supreme Court ruling of 30 April 2001, V KKN 111/01, LEX No. 51844.

[32] The Supreme Court ruling of 12 January 2006, II KK 96/05, LEX No. 172202.

[33] The Supreme Court ruling of 21 March 2013, III KK 267/12, OSNKW 2013, No. 3, item 58.

[34] The Supreme Court judgment of 6 April 2017, V KK 330/16, LEX No. 2270908.

[35] The Supreme Court judgment of 14 April 2016, V KK 458/15, LEX No. 2294600.

extend the indictment (Article 398 CPC), provided that the statutory requirements are met.[36]

The modification of the description of an alleged act may result in the necessity of changing the legal classification, which in consequence, determines the obligation to inform the parties to the proceedings about that fact (Article 399 § 1 CPC). *Ratio legis* of the norm expressed in Article 399 § 1 CPC consists in the fact that a court's decisions on the legal assessment of the acts described in the indictment should not catch the parties to the proceedings by surprise, which is also the obligation resulting from the principle of procedural loyalty.[37] This is to ensure the right to defence, regardless of whether *in concreto* the information is really important for the defence.[38] The element of surprise, which as a rule also constitutes the infringement of the right to defence, is most often connected with the fact that a court adopts (within the limits of an indictment) the legal provision matching the features of another offence different from the one specified in the indictment, and with adding of still another provision that is in cumulative concurrence or conjunction with the provisions in the indictment as well as the result of recognition that the act the accused is charged with constitutes an offence that is in real concurrence.[39]

The guaranteed requirement to warn the parties of the possibility of legal subsumption different from that indicated in the indictment (Article 399 § 1 CPC) is met when a court signals such a possibility in whatever form, even if it is not directly addressed or clarified. If it were not sufficient, the parties could request a clearer statement.[40]

What is obvious, the obligation to warn the parties present at a trial prescribed in this provision is updated not only in the proceedings before the first-instance court but also, in conjunction with Article 458 CPC, in the appellate proceedings[41] and not only at the trial but, in case of the adoption of the linguistic interpretation instead of the functional one, also at other stages of the proceedings, e.g. during the seating

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[36] The Supreme Court judgment of 6 April 2017, V KK 330/16, LEX No. 2270908.

[37] For more see, iter alia: M. Cioczek, *Zmiana kwalifikacji prawnej czynu na rozprawie (kwestie wybrane)*, Studia Iuridica Lublinensia Vol. XIV, 2010, pp. 1147–1160; E. Klimowicz-Górowska, *Zmiana kwalifikacji prawnej a niezmienność przedmiotowych granic rozpoznania sprawy*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010, pp. 564–567; T. Kozioł, *O stosowaniu art. 399 k.p.k.*, Przegląd Sądowy No. 4, 2004, pp. 25–48; M. Skwarcow, *Wybrane zagadnienia zmiany kwalifikacji prawnej czynu na tle orzecznictwa Sądu Najwyższego i sądów apelacyjnych*, Przegląd Sądowy No. 4, 2005, pp. 74–97; S. Stachowiak, P. Wiliński, B. Janusz-Pohl, *Zmiana kwalifikacji prawnej w toku postępowania karnego*, [in:] Z. Ćwiąkalski, G. Artymiak (eds), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji zmian*, Warszawa 2009, pp. 108–137.

[38] The Supreme Court judgment of 14 March 2008, IV KK 436/07, Studia Iuridica Lublinensia Vol. XII, 2009, pp. 281–283, with an approving gloss by M. Cioczek, Studia Iuridica Lublinensia Vol. XII, 2009, pp. 281–289; also see the ruling of the Court of Appeal in Łódź of 22 June 2006, II AKa 96/06, OSN Prok. i Pr. 2007, No. 7–8, item 51.

[39] The Supreme Court judgment of 16 March 2004, III KK 353/03, OSN Prok. i Pr. 2004, No. 10, item 11.

[40] Judgment of the Court of Appeal in Kraków of 6 December 2001, II AKa 189/01, KZS 2002, No. 2, item 41.

[41] The Supreme Court judgment of 17 July 2002, III KKN 485/99, OSN Prok. i Pr. 2003, No. 2, item 7.

scheduled pursuant to Article 339 § 3 CPC in conjunction with Article 349 CPC.[42] However, in the face of the fact that, in accordance with Article 442 § 3 CPC, the court adjudicating the case again is bound by legal opinions of the appellate court, including the opinions concerning the legal classification, the court rehearing the case does not have the obligation to warn the parties of the possibility of adopting a different legal classification from the one in the indictment (Article 399 § 1 CPC) if it adopts the legal classification that is in conformity with the appellate court's stance.[43]

It is commonly assumed that failure to warn the parties about the possibility of changing the legal classification of an act examined does not always and in every situation constitute contempt of the procedural provisions, which is essential in appellate adjudication but only in case it might influence the content of the first-instance court sentence;[44] thus it will not always constitute flagrant infringement of the provisions that might influence the content of a sentence within the meaning of Article 523 § 1 CPC.[45]

The obligation to inform pursuant to Article 399 CPC is applicable only to the situation in which there is a possibility of classifying an act in accordance with another legal provision and not in case the description of the act is changed within the same legal classification.[46] The provision of Article 399 CPC is not applicable also in a situation when, based on the circumstances that have been revealed in the course of a trial, it turns out that the accused should be charged with another act apart from the one covered in the indictment (Article 398 CPC). The obligation to inform the parties about the change of the legal classification is absolutely not applicable to another historical section of reality composing a separate act committed by the accused and not originally covered in the prosecutor's complaint. In case law, it is indicated that, as a result, the extension of changes in the description of an act by the court, which actually goes beyond the limits of the indictment, cannot be convalidated within the framework of Article 399 § 1 CPC and constitutes a flagrant infringement of the law resulting in the necessity of quashing the sentence, provided

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[42] The Supreme Court resolution of 16 November 2000, I KZP 35/2000, OSNKW 2000, No. 11–12, item 92; R.A. Stefański (approving), *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2000 r.*, Wojskowy Przegląd Prawniczy No. 2, 2001, p. 102.

[43] The Supreme Court judgment of 7 October 2008, II KK 62/08, OSNKW 2008, No. 12, item 102.

[44] Judgment of the Court of Appeal in Kraków of 28 September 2006, II AKa 135/06, OSN Prok. i Pr. 2007, No. 4, item 30; judgment of the Court of Appeal in Gdańsk of 9 April 2014, II AKa 14/14, OSN Prok. i Pr. 2015, No. 4, item 37.

[45] The Supreme Court ruling of 7 February 2002, V KKN 185/99, OSNKW 2002, No. 5–6, item 45; the Supreme Court ruling of 18 December 2008, II KK 157/08, OSN Prok. i Pr. 2009, No. 5, item 18.

[46] See judgment of the Court of Appeal in Lublin of 21 November 2002, II AKa 232/02, OSN Prok. i Pr. 2004, No. 2, item 26; judgment of the Court of Appeal in Lublin of 30 October 2003, II AKa 100/03, Prz. Orz. PA w Lublinie 2004, No. 26, item 43; the Supreme Court ruling of 8 August 2013, III KK 234/13, LEX No. 1375217; judgments of the Court of Appeal in Szczecin of 12 September 2013, II AKa 151/13, LEX No. 1378838, and of 5 June 2014, II AKa 85/14, LEX No. 1477320; judgment of the Court of Appeal in Łódź of 31 March 2016, II AKa 280/15, OSN Prok. i Pr. 2017, No. 4, item 26.

that at the same time the requirements prescribed in Article 398 § 1 CPC concerning the possibility of recognising another act in the same proceedings if the accused gives his/her consent are met.[47]

In the particular trial-related situation, it is indicated that if the prosecutor had charged the accused with conduct that, as it turned out, was allowed, in particular the action within the statutory justification that excludes unlawfulness of this conduct, a different course of conduct matching the features of a prohibited act is totally beyond the limits established by Article 399 § 1 CPC, i.e. the limits of the indictment. Thus, in case it is recognised that the accused acted in self-defence, i.e. committed the act under Article 162 § 1 CC against a perpetrator of an assault, it is possible to make it exempt in accordance with Article 398 CPC. If the prosecutor had formulated a charge concerning conduct which proved to be lawful, the disclosure of the circumstances confirming that the accused committed a prohibited act later opened two proceeding methods: the one prescribed in Article 398 CPC or that laid down in Article 414 § 1 CPC in conjunction with Article 17 § 1(2) CPC.[48]

In case law, going beyond the limits of the indictment, regardless of the implementation of the directive of Article 399 § 1 CPC, is recognised in case of e.g. the change of the description of an act from that equivalent to the felony of attempting to murder into the one that is adequate to an offence under Article 157 § 2 CC with the simultaneous conviction for two other acts: punishable threat (Article 190 § 1 CC) and insult (Article 216 § 1 CC). In the legal assessment of an act as an attempt to murder, it is not possible to find the objective features, not to speak about the subjective features, of the offence of a punishable threat or insult.[49]

It is also not possible to speak about the identity of acts when the offence of receiving of stolen goods (Article 291 CC) attributed instead of the alleged offence of theft (Article 279 CC) or burglary and theft (Article 279 CC) took place already some time after committing that theft and in circumstances having nothing in common with the description and actual legal basis of the act classification as theft or burglary and theft. In such a case, this is not only the different method of obtaining objects originating from a prohibited act but a completely different factual event during which the possession was taken.[50] However, the attribution of the offence of appropriation instead of the offence of fraud does not constitute going beyond the limits of the indictment when the descriptions of the two courses of conduct have a common area, i.e. are characterised by the subjective identity and the identity of the object of an assault as well as the identity of time and place of the event.[51]

In case law, the attribution of an act committed by omission to the accused and its classification under Article 162 CC in case of the original charges under

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[47] See the Supreme Court judgment of 19 June 2001, II KKN 506/98, GS 2001, No. 12, p. 32 with a gloss by M. Skworcow (approving), Pal. 2005, No. 5–6, pp. 284–290.

[48] The Supreme Court judgment of 9 June 2005, V KK 446/04, Biul. PK 2005, No. 3, item 1.2.2.

[49] Judgment of the Court of Appeal in Lublin of 6 November 2000, II AKa 175/00, OSN Prok. i Pr. 2002, No. 1–2, item 29 and OSN Prok. i Pr. 2002, No. 6, item 26.

[50] The Supreme Court ruling of 14 July 2011, IV KK 139/11, OSNKW 2011, No. 9, item 84.

[51] The Supreme Court judgment of 5 May 2015, IV KK 412/14, OSN Prok. i Pr. 2015, No. 6, item 18.

Article 207 CC and Article 156 CC is also recognised as doubtful.[52] The attribution of the offence of robbery to the accused charged with participation in battery would also infringe the principle of immutability of the subject matter of the trial.[53]

The above analysis proves that a court adjudicating in a criminal case has considerable discretion over the development of subjective-objective description and legal assessment of the conduct of the accused during a historical event that constitutes grounds for adjudication and the subject matter of the trial. Just the change of the date of the act or its time frame does not constitute going beyond the limits of the indictment and does not infringe the principle of accusatorial system.

BIBLIOGRAPHY

Cioczek M., *Zmiana kwalifikacji prawnej czynu na rozprawie (kwestie wybrane)*, Studia Iuridica Lublinensia Vol. XIV, 2010.

Hofmański P., Zabłocki S., *Granice skargi oskarżycielskiej w świetle orzecznictwa*, [in:] A. Gereckia-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008.

Gereckia-Żołyńska A., Górecki P., Paluszkiewicz H., Wiliński P. (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008.

Kardas P., *O zależnościach między prawem materialnym i procesowym na przykładzie tożsamości czynu w prawie karnym*, [in:] J. Skorupka (ed.), *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, Warszawa 2009.

Kardas P., *Materialnoprawne i proceduralne ujęcia tożsamości czynu w prawie karnym. Komplementarne czy alternatywne modele tożsamości?* [in:] Z. Jędrzejewski, Z. Wiernikowski, S. Żółtek, M. Królikowski (eds), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego*, Warszawa 2014.

Klimowicz-Górowska E., *Zmiana kwalifikacji prawnej a niezmienność przedmiotowych granic rozpoznania sprawy*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

Kozioł T., *O stosowaniu art. 399 k.p.k.*, Przegląd Sądowy No. 4, 2004.

Pilch A., *Kryteria tożsamości czynu*, Prokuratura i Prawo No. 12, 2010.

Rogalski M., *Tożsamość czynu w procesie karnym*, Państwo i Prawo No. 6, 2005.

Rogalski M., *Kryteria tożsamości czynu w skargowym procesie karnym*, [in:] A. Gerecka-Żołyńska, P. Górecki, H. Paluszkiewicz, P. Wiliński (eds), *Skargowy model procesu karnego. Księga ofiarowana Profesorowi Stanisławowi Stachowiakowi*, Warszawa 2008.

Rogalski M., *Niezmienność i niepodzielność przedmiotu procesu a tożsamość czynu*, [in:] W. Cieślak, S. Steinborn (ed.), *Profesor Marina Cieślak – osoba, dzieło, kontynuacje*, Warszawa 2013.

Rusinek M., *Kilka uwag o „tożsamości czynu"*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

Skwarcow M., *Wybrane zagadnienia zmiany kwalifikacji prawnej czynu na tle orzecznictwa Sądu Najwyższego i sądów apelacyjnych*, Przegląd Sądowy No. 4, 2005.

Stachowiak S., *Funkcje zasady skargowości w polskim procesie karnym*, Poznań 1975.

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52 Judgment of the Court of Appeal in Katowice of 8 September 2011, II AKa 239/11, OSN Prok. i Pr. 2012, No. 3, item 32.

53 The Supreme Court judgment of 17 December 1999, IV KKN 512/99, OSN Prok. i Pr. 2000, No. 6, item 10.

Stachowiak S., Wiliński P., Janusz-Pohl B., *Zmiana kwalifikacji prawnej w toku postępowania karnego*, [in:] Z. Ćwiąkalski, G. Artymiak (eds), *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji zmian*, Warszawa 2009.
Stefański R.A., *Przegląd uchwał Izby Karnej i Wojskowej Sądu Najwyższego w zakresie prawa karnego procesowego za 2000 r.*, Wojskowy Przegląd Prawniczy No. 2, 2001.
Śliwiński S., *Polski proces karny przed sądem powszechnym. Zasady ogólne*, Warszawa 1948.
Waltoś S., *Akt oskarżenia w procesie karnym*, Warszawa 1963.
Zabłocki S., *Granice skargi oskarżycielskiej przy przestępstwach zbiorowych*, [in:] P. Hofmański (ed.), *Węzłowe problemy procesu karnego*, Warszawa 2010.

GLOSS ON THE SUPREME COURT RULING OF 24 JANUARY 2018, II KK 10/18

Summary

The author of the gloss approves of the thesis expressed in the Supreme Court ruling of 24 January 2018, II KK 10/18, in accordance with which the framework of the jurisdictional proceedings are determined by a historical event described in the indictment and not by particular elements of this description. The time of an act commission is one of the elements of the subjective aspect of an offence. It is subject to determination by a court and may be specified in a different way from that in the description of an act alleged in the indictment, provided that the evidence taken at a trial justifies such a change. The sole finding that the event covered by the indictment took place at the time different from that specified in it is admissible and does not mean going beyond the limits of a prosecutor's complaint. Having analysed the Supreme Court and appellate courts' adjudication practice, the author highlights additional elements of an act description that do not lead to going beyond the limits of an indictment. The gloss also covers the issue of the obligation to inform the parties present at a trial about the possibility of changing the legal classification of an act (Article 399 CPC) and the so-called incidental proceedings in the context of the identity of the act alleged in the indictment and the one attributed in the sentence.

Keywords: limits of the indictment, identity of an act alleged in the indictment and attributed in the sentence, change in the legal classification of an act, incidental proceedings, principle of accusatorial system, immutability of the subject matter of a trial

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z 24 STYCZNIA 2018 R., II KK 10/18

Streszczenie

W glosie autor zaaprobował tezę wyrażoną w postanowieniu SN z dnia 24 stycznia 2018 r., II KK 10/18, zgodnie z którą ramy postępowania jurysdykcyjnego są określone przez zdarzenie historyczne opisane w akcie oskarżenia, a nie przez poszczególne elementy tego opisu. Czas popełnienia czynu jest jednym z elementów strony przedmiotowej przestępstwa. Podlega on ustaleniu przez sąd i może być określony inaczej niż w opisie czynu zarzuconego w akcie oskarżenia, jeśli dowody przeprowadzone na rozprawie taką zmianę uzasadniają. Samo ustale-

nie, że zdarzenia objęte oskarżeniem nastąpiły w innym czasie niż przyjęto w akcie oskarżenia, jest dopuszczalne i nie świadczy wcale o wyjściu poza granice skargi oskarżyciela. Dokonując analizy praktyki orzeczniczej Sądu Najwyższego i sądów apelacyjnych, w glosie wskazano na dodatkowe elementy opisu czynu, które nie stanowią wyjścia poza granice oskarżenia. Poruszono także problematykę obowiązku pouczenia stron obecnych na rozprawie o możliwości zmiany kwalifikacji prawnej czynu (art. 399 k.p.k.) oraz tzw. postepowania wpadkowego w kontekście tożsamości czynu zarzucanego w akcie oskarżenia i przypisanego w wyroku.

Słowa kluczowe: granice oskarżenia, tożsamość czynu zarzucanego w akcie oskarżenia i przypisanego w wyroku, zmiana kwalifikacji prawnej czynu, postępowanie wpadkowe, zasada skargowości, niezmienność przedmiotu procesu

COMENTARIO DEL AUTO DEL TRIBUNAL SUPREMO DE 24 DE ENERO DE 2018, II KK 10/18

Resumen

En el comentario el autor aprueba la tesis expresada en el auto del TS, conforme con la cual los marcos del procedimiento jurisdiccional quedan determinados por el suceso histórico descrito en el escrito de acusación y no por los elementos particulares de dicha descripción. El tiempo de la comisión del hecho constituye uno de los elementos de la parte objetiva de delito. Queda determinado por el tribunal y puede ser fijado de otra forma que en la descripción del hecho imputado en el escrito de acusación, siempre que las pruebas practicadas en la vista oral fundamenten tal modificación. La determinación que los hechos incluidos en la acusación tuvieron lugar en otro momento que descrito en el escrito de acusación es admisible y no excede los límites de la acusación. Analizando la práctica jurisprudencial del Tribunal Supremo y de tribunales de apelación en el comentario se señalan elementos adicionales de la descripción de los hechos que no exceden los límites de acusación. Se menciona también la obligación de advertir a las partes presentes en la vista sobre la posibilidad de modificación de la calificación legal del hecho (art. 399 del código de procedimiento penal) y la llamada ampliación objetiva de la acusación en cuanto a la identidad del hecho imputado en el escrito de acusación y descrito en la sentencia.

Palabras claves: límites de la acusación, identidad del hecho imputado en el escrito de acusación y descrito en la sentencia, modificación de la calificación legal de los hechos, ampliación objetiva de la acusación, principio acusatorio, invariabilidad del objeto del proceso

КОММЕНТАРИЙ К ПОСТАНОВЛЕНИЮ ВЕРХОВНОГО СУДА ОТ 24 ЯНВАРЯ 2018 ГОДА, II KK 10/18

Резюме

В комментарии автор с одобрением отзывается о тезисе, содержащемся в обсуждаемом постановлении Верховного суда, согласно которому рамки юрисдикционного процесса определяются имевшим место событием, описанным в обвинительном заключении, а не отдельными элементами этого описания. Момент совершения деяния является одним из элементов объективной стороны преступления. Он подлежит установлению в суде и может быть

определен иначе, чем в описании деяния, содержащемся в обвинительном заключении, если такое изменение обосновано доказательствами, рассмотренными в суде. Само по себе установление того факта, что события, описанные в обвинительном заключении, произошли в иной момент времени, чем предполагалось обвинителем, вполне допустимо и не свидетельствует о выходе за рамки обвинения. В ходе анализа судебной практики Верховного суда и апелляционных судов в комментарии указываются дополнительные элементы описания деяния, которые не выходят за рамки обвинения. Кроме этого, в статье затронута проблематика, связанная с обязанностью разъяснению сторонам, присутствующим на заседании, возможности изменения юридической квалификации деяния (ст. 399 УПК), а также с так называемым дополнительным производством в контексте тождественности деяния, о котором говорится в обвинительном заключении, и деяния, по которому вынесен приговор.

Ключевые слова: рамки обвинения; тождественность деяния, о котором говорится в обвинительном заключении, и деяния, по которому вынесен приговор; изменение юридической квалификации деяния; дополнительное производство; принцип обвинения; неизменность предмета процесса

GLOSSE ZUR ENTSCHEIDUNG DES OBERSTEN GERICHTSHOFS DER REPUBLIK POLEN VOM 24. JANUAR 2018, II KK 10/18

Zusammenfassung

In seiner Glosse befürwortet der Autor die in der Entscheidung des Obersten Gerichtshofs der Republik Polen, der höchsten Instanz in Zivil- und Strafsachen in der Republik Polen, vom 24. Januar 2018 zum Ausdruck kommende Auffassung, wonach der Rahmen eines gerichtlichen Verfahrens von dem in der Anklage beschriebenen zurückliegenden Ereignis, nicht aber durch einzelne Elemente der Beschreibung dieser Straftat bestimmt wird. Der Zeitpunkt der Begehung der Tat ist einer der objektiven Tatbestände einer strafbaren Handlung. Er wird durch das Gericht ermittelt und kann anders als in der Beschreibung der strafbaren Straftat in der Anklageschrift angegeben werden, wenn die in der Verhandlung erhobenen Beweise eine derartige Änderung rechtfertigen. Die bloße Feststellung, dass die in der Anklage geschilderten, verfolgten Ereignisse zu einem anderen Zeitpunkt stattgefunden haben als in der Anklageschrift angegeben, ist zulässig und bedeutet keineswegs, dass über die Eingrenzung des Klagegegenstands durch den Ankläger hinausgegangen wird. Bei der Analyse der Rechtspraxis des Obersten Gerichtshofs der Republik Polen und der nationalen Berufungsgerichte wird in der Glosse auf zusätzliche Tatbestandsmerkmale zur Bezeichnung einer Straftat hingewiesen, bei denen die Grenzen des Klagegegenstands nicht überschritten werden. Behandelt wird außerdem die Problematik der Pflicht zur Unterrichtung der in der Verhandlung anwesenden Parteien über die Möglichkeit der Änderung der rechtlichen Qualifizierung der strafbaren Handlung (Artikel 399 der polnischen Strafprozessordnung) und des sogenannten Zwischenverfahrens im Kontext der Identifizierung der in der Anklageschrift vorgeworfenen und im Urteil zugerechneten Straftat.

Schlüsselwörter: Grenzen der Anklage, Eingrenzung des Klagegegenstands; Identifizierung der in der Anklageschrift vorgeworfenen und im Urteil zugerechneten strafbaren Handlung; Änderung der rechtlichen Qualifizierung einer Handlung; Zwischenverfahren; Anklagegrundsatz; Unveränderlichkeit des Prozessgegenstands

COMMENTAIRE À LA DÉCISION DE LA COUR SUPRÊME DU 24 JANVIER 2018, II KK 10/18

Résumé

Dans son commentaire, l'auteur a approuvé la thèse exprimée dans la décision de la Cour suprême du 24 janvier 2018 selon laquelle le cadre de la procédure juridictionnelle est déterminé par un événement historique décrit dans l'acte d'accusation et non par des éléments individuels de cette description. Le moment où l'acte est commis est l'un des éléments du crime en question. Il est soumis à la détermination du tribunal et peut être déterminé différemment de la description de l'infraction dans l'acte d'accusation, si les preuves administrées à l'audience justifient un tel changement. La simple détermination que les événements visés par les poursuites ont eu lieu à un moment différent de celui présumé dans l'acte d'accusation est recevable et ne signifie nullement que la plainte du procureur a été dépassée. Lors de l'analyse de la jurisprudence de la Cour suprême et des cours d'appel, l'auteur a souligné d'autres éléments de la description de l'acte, qui ne constituent pas un dépassement des limites de l'accusation. On a également soulevé la question de l'obligation d'informer les parties présentes à l'audience de la possibilité de modifier la qualification juridique d'un acte (article 399 du code de procédure pénale) et de la soit-disant procédure incidente dans le contexte de l'identité de l'acte reproché dans l'acte d'accusation et attribué dans le jugement.

Mots-clés: limites de l'accusation; l'identité de l'acte reproché dans l'acte d'accusation et attribué dans le jugement; changement de qualification juridique de l'acte; procédure incidente; principe de la procédure accusatoire; invariabilité du sujet du procès

GLOSSA ALL'ORDINANZA DELLA CORTE SUPREMA DEL 24 GENNAIO 2018, II KK 10/18

Sintesi

Nella glossa l'autore ha approvato la tesi espressa nell'ordinanza della Corte Suprema del, secondo la quale l'ambito del procedimento giudiziario è determinato dall'evento storico descritto nell'atto di accusa e non dai singoli elementi di tale descrizione. Il momento della commissione del reato è uno degli elementi sostanziali del reato. Viene determinato dal tribunale e può essere definito diversamente da quanto indicato nella descrizione del reato imputato nell'atto di accusa, se i mezzi di prova assunti all'udienza motivano tale variazione. La determinazione stessa che gli eventi inclusi nell'accusa abbiano avuto luogo in un momento diverso da quanto indicato nell'atto di accusa è ammissibile, e non costituisce affatto un superamento dei limiti del ricorso dell'accusa. Effettuando un'analisi della pratica giurisprudenziale della Corte Suprema e delle corti di appello, nella glossa sono stati indicati elementi aggiuntivi di descrizione del reato, che non costituiscono superamento dei limiti dell'atto d'accusa. È stata anche trattata la questione dell'obbligo di informazione delle parti comparse all'udienza circa la possibilità di modifica della qualificazione giuridica del reato (art. 399 del Codice di procedura penale) nonché circa il cosiddetto procedimento incidentale, nel contesto della corrispondenza tra il reato imputato nell'atto d'accusa e quello attribuito nella sentenza.

Parole chiave: limiti dell'atto d'accusa; corrispondenza tra il reato imputato nell'atto d'accusa e quello attribuito nella sentenza; modifica della qualificazione giuridica del reato; procedimento incidentale; principio accusatorio; immutabilità del petitum

Cytuj jako:

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