

ADMISSIBILITY OF REOPENING CASSATION AND REOPENING PROCEEDINGS CONCLUDED WITH A DECISION DISMISSING THE EXTRAORDINARY APPEAL MEASURE

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DOI: 10.2478/in-2023-0022

ABSTRACT

The article is aimed at examining the admissibility of reopening cassation and reopening proceedings concluded with a decision to dismiss the extraordinary appeal measure.

To this end, the article explores provisions on proceedings reopening (Articles 540 and 542 § 3 CCP), with particular focus on the term ‘court proceedings concluded with a final decision’ used by the legislator, and juxtaposes this with provisions on cassation appeal (concerning terms used in Article 521 of the Code of Criminal Procedure – ‘a final decision concluding court proceedings’ and ‘a final court decision concluding the proceedings’, and on prohibition of the so-called super-cassation, which has not been transferred to the institution of reopening of the proceedings). The author also analyses Supreme Court practice over the last twenty-odd years and reflects on historical changes to criminal procedure at the turn of the 21st century with regard to the institutions of annulment of court decisions and reopening of the proceedings.

Keywords: cassation appeal, reopening of the proceedings, annulment of a court decision

Chapter 56 of the Code of Criminal Procedure (‘CCP’) stipulates the possibility of reopening (at a party’s request, and in legally specified cases – also *ex officio*)¹ court proceedings concluded with a final decision. This article aims to investigate whether both cassation proceedings and reopening proceedings concluded with a decision

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¹ Cf. Article 542 § 3 CCP.



to remand the case to a lower court for further proceedings can be deemed court proceedings concluded with a final decision.

Before proceeding into the main part of the analysis related to the interpretation of Article 540 and Article 542 § 3 CCP concerning proceedings that can be reopened and, at the same time, decisions that can be challenged by a motion to reopen the proceedings, it is necessary to recall historical changes that the institution of reopening underwent both when the new CCP entered into force in 1998 and throughout the subsequent quarter century. Nevertheless, the study's purpose is not to conduct a comprehensive analysis of determining the class of judgements that can be challenged with this type of extraordinary appeal measure, but rather to ascertain whether a Supreme Court decision dismissing a cassation appeal (including manifestly ill-founded appeals), dismissing a motion for reopening of the proceedings, and refusing to admit such a motion on the grounds it is manifestly ill-founded, can constitute a final decision concluding court proceedings.

The 1969 Code of Criminal Procedure provided that reopening is possible when court proceedings were concluded with a final decision, and the current CCP echoed this provision (Article 540 § 1). Initially, three grounds for reopening proceedings existed: *propter falsa* (Article 474 § 1 (1) of the 1969 CCP), *propter nova* (Article 474 § 1 (2) (a) (b) of the 1969 CCP) and absolute grounds for reversing a judgement (Article 474 § 2 in conjunction with Article 388 of the 1969 CCP). On 17 October 1997 (less than a year before the 1997 Code of Criminal Procedure entered into force) additional grounds for reopening were adopted – *propter decreta*. However, at that time *propter decreta* referred solely to final decisions based on a legal act that was deemed unconstitutional by the Constitutional Tribunal (Article 474 § 1 (3) of the 1969 CCP).

The 1997 Code of Criminal Procedure preserved the institution of reopening proceedings, but made significant changes to the grounds for this extraordinary appeal measure. Initially, the 1997 CCP offered three grounds for reopening proceedings: *propter falsa* (Article 540 § 1 (1) of the 1997 CCP), *propter nova* (Article 540 § 1 (2) (a) (b) (c) of the 1997 CCP) and *propter decreta* (Article 540 § 2 and § 3 of the 1997 CCP). Compared to the previous legal status, the first listed ground remained unchanged, while the other two saw modifications. However, these modifications do not significantly impact the fundamental issue of the admissibility of reopening of cassation or reopening proceedings. It is noteworthy, that the scope of *propter decreta* was expanded – apart from certain Constitutional Tribunal judgements that could form grounds for reopening proceedings, *propter decreta* now also covers decisions issued by an international body (court) acting under an international agreement ratified by the Republic of Poland (Article 540 § 3 of the 1997 CCP).

Under the new Code of Criminal Procedure, the absolute grounds for reversing a judgement no longer constitute grounds for reopening. This change results from introducing an institution for annulment of court decisions in that legal act, covering some of the former absolute grounds for reversing a judgement (cf. Article 101 § 1 (1–7) of the 1997 CCP²).

² These grounds corresponded to the absolute grounds for reversing a judgement which are now included in Article 439 § 1 of CCP: point 1 (in part), point 2 (in part), points 5–8, point 9

In the subsequent years the institution of reopening the proceedings underwent transformations, sometimes significant, linked, on the one hand, to the abolishment of the institution for annulment of court decisions (in 2003),³ and on the other hand, to the introduction of entirely new grounds for reopening (Articles 540a and 540b CCP, in force since 1 July 2003);⁴ modifications were also made to *propter decreta* grounds as defined in Article 540 § 2 CCP.⁵

From the perspective of the issue analysed, the most consequential changes were brought about by the abolishment of the institution of annulment. This abolishment led to an expansion of the catalogue of absolute grounds for reversing a judgement,⁶ with a corresponding extension of the grounds for reopening the proceedings, as an additional premise, based explicitly on the defects denoted in Article 439 § 1 CCP,⁷ was added to the catalogue. Unlike the provisions of the 1969 Code of Criminal Procedure, the absolute grounds for reversing a judgement can now only be invoked as the grounds for reopening *ex officio*.⁸ Nonetheless, Article 9 § 2 CCP gives grounds for highlighting the issue, enabling a party to request that the court take action *ex officio*. By introducing an expanded catalogue of absolute grounds for reversing a judgement in place of the repealed institution of annulment, and concurrently making them grounds for reopening of the proceedings, the legislator sought to maintain the eliminating function performed by the institution of annulment, allowing – *ex officio* – the removal from legal circulation of a decision afflicted by severe defects, without the need for a cassation appeal (including an extraordinary cassation appeal), the lodging of which – in accordance with the principle of complaint – relies on the appellant's willingness and awareness.

Due to the transformation of the grounds for annulment of court decisions into considered only *ex officio* grounds for reopening proceedings related to absolute grounds for reversing a judgement (although not all of them), it is crucial to emphasise that within the institution of annulment it was permissible to annul a decision dismissing a cassation appeal, even though initially in Article 101 § 1 CCP the legislator used a vague term, causing difficulties in unequivocally determining

(in part – only in the scope of Article 17 § 1 (8) of the CCP). It also involved narrowing the catalogue of absolute grounds for reversing a judgement (cf. Article 439 § 1 of the CCP as enacted).

³ See: Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness, and the Act on the protection of classified information (Journal of Laws No. 17, item 155).

⁴ See: Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness, and the Act on the protection of classified information (Journal of Laws No. 17, item 155).

⁵ Act of 16 July 2009 amending the Act – Code of Criminal Procedure (Journal of Laws No. 144, item 1178), amending the Code of Criminal Procedure as of 19 September 2009.

⁶ Cf. Article 439 § 1 CCP. in the version in force from 1 July 2003.

⁷ Cf. Article 542 § 3 CCP. in the version amended by the Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness, and the Act on the protection of classified information (Journal of Laws No. 17, item 155).

⁸ Cf. The resolution of the panel of seven judges of the Supreme Court of 24 May 2005, I KZP 5/05.

to which decisions it pertained⁹ (in earlier literature, before the resolution of the entire Criminal Chamber of the Supreme Court of 9 October 2000, I KZP 37/00, it was pointed out that the term related to judgements dismissing the cassation appeal¹⁰), and it was permissible to annul a decision dismissing a motion to reopen proceedings.¹¹ The decision of 22 September 1999, II KZ 68/99, is all the more significant because it was based on the legal status which did not explicitly provide for the possibility of annulment of a court decision dismissing a cassation appeal or a motion to reopen proceedings. In that case, it was the essence of the institution of annulment and the characteristics of the cassation and reopening proceedings that were decisive in permitting the institution of annulment to be applied to the reopening of cassation and reopening proceedings. The decision's rationale noted that *the institution of annulment does not apply to court decisions which, though not incidental by nature, do not rule on the merits of the case, but only obstruct the admissibility of the hearing. This assertion is based on the premise that in the discussed context, the term 'merits of the case' should be interpreted strictly – as an issue concerning the accused's criminal liability, or another issue to be resolved by separate proceedings (e.g. proceedings regarding compensation for wrongful conviction, reopening proceedings, cassation proceedings). Of course, one can reasonably argue that each proceeding has its own merits. For instance, the merits of proceedings initiated by a complaint against the prosecutor's decision not to initiate an investigation (Article 306 CCP) pertain to the legitimacy of the refusal, the merits of proceedings initiated by the prosecutor's motion to extend pre-trial detention (Article 263 § 2 CCP) concern the legitimacy of this motion, and the merits of the hearing scheduled before the trial (Article 339 CCP) may concern the admissibility determination of court proceedings. However, all these issues are incidental (ancillary) to the fundamental issue, which in all these cases is the criminal liability of the accused.*

Furthermore, it was even allowed (although this view was expressed before the amendment of Article 101 § 1 CCP, introduced on 1 September 2000) to declare the annulment of a decision concerning the invalidation of a judgement.¹² In the approving commentary on this judgement, it was explicitly stated that *the annulment*

⁹ See: Gostyński, Z., in: Bratoszewski, J. et al., *Kodeks postępowania karnego. Komentarz*, Warszawa, 1998, theses 7–10 to article 101.

¹⁰ See: Zabłocki, S., *Nowela k.p.k. z dnia 20 lipca 2000 r. Komentarz*, Warszawa, 2000, LEX/el., 2022, theses 12–13 to article 101 – the author excluded, however, the possibility to declare invalidity of a decision to leave the motion for reopening unconsidered – this resulted from the modifications made to Article 101 § 1 of the CCP, in which the legislator explicitly indicated which types of judgements this special institution applies to, in order to remove doubts regarding the overly broad scope of decisions that could be declared invalid.

¹¹ See: Supreme Court decisions of 22 September 1999, II KZ 68/99, and of 4 November 2002, III KO 51/00.

¹² Cf. Supreme Court decision of 8 June 1999, IV KO 39/99 (cf. Supreme Court decision of 13 June 2001, IV KO 73/99; different standpoint – Supreme Court decision of 4 November 2002, III KO 51/00). As of that date, the content of Article 101 § 1 of the CCP was modified; until then it provided that a decision (without further specification of the type of decisions it concerned) was void by operation of law; as of that date, the content of Article 101 § 1 of the CCP was modified; until then it provided that a decision (without further specification of the type of decisions it concerned) was void by operation of law; from that date judgements, summary judgements, as well as decisions closing the way to issuing a judgement, judgements on conditional discontinuance of the proceedings or precautionary measures, decisions dismissing a motion for reopening

*judgement may be invalid regardless of the accuracy of the substantive ruling on the annulment of the contested judgement. For this reason, a motion for annulment of a decision of both the Court of Appeal and the Supreme Court, issued following the consideration of a motion for annulment, should be considered admissible. However, such a motion must be based on the grounds for annulment referring to the decision on the annulment issued by the Court of Appeal or the Supreme Court.*¹³

The aforementioned considerations, made solely as a reminder of the historical conditions that underlie the introduction of Article 542 § 3 CCP, allow us to surmise that the historical interpretation of this provision not only does not hinder the adoption of a thesis on the admissibility of reopening of cassation and reopening proceedings (including proceedings concluded with a dismissal of the extraordinary appeal), but it also seems to strongly confirm such a presumption. (Changes to the criminal procedural law in this regard will be discussed in the further part of this analysis).

Most of the commentaries on the Code of Criminal Procedure present a convergent view in support of the opinion that it is inadmissible to reopen cassation or reopening proceedings that concluded with a decision dismissing a cassation appeal or a motion to reopen respectively. It has been emphasised that it is impossible, either at the request of a party or *ex officio*, to reopen the reopening proceedings that were previously concluded with a final court decision dismissing a party's motion, or with a final court decision stating there are no grounds for reopening *ex officio*. This is because the **merits** of such proceedings are not criminal liability or other incidental issue unrelated to the proceedings concerning that liability, but the existence of grounds for reopening the proceedings, in a situation where the issue of criminal liability has already been resolved by a final court decision.¹⁴ Only J. Matras highlights that the issue of reopening the reopening proceedings concluded with a decision dismissing the motion for reopening on the grounds of absolute grounds for reversing a judgement is debatable.¹⁵

of the proceedings and issued pursuant to Article 420 § 1 or 2 of the CCP, could be invalid by operation of law.

¹³ Wędrychowska, E., *OSP*, 1999, No. 11 (following the amendment to Article 101 § 1, the Supreme Court ruled out the possibility of declaring invalidity of a decision on annulment of a court decision – Decision of 4 November 2002, III KO 51/00).

¹⁴ Grajewski, J., Steinborn, S., in: Paprzycki, L.K. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2015, LEX/el., 2022, thesis 2 to article 54. – with reference to the decision of the Supreme Court of 20 May 2010., V KO 47/10. Such a standpoint, with reference to this decision, was also taken by W. Grzeszczyk (*Kodeks postępowania karnego. Komentarz*, Warszawa, 2014, LEX/el., 2022, thesis 1 to Article 540). See also: Sakowicz, A., in: Sakowicz, A. (ed.), *Kodeks postępowania karnego. Komentarz*, Legalis, 2020, thesis 9 to Article 540 and the Supreme Court decision of 8 February 2011, cited therein, III KO 99/10 and Zabłocki, S., in: Bratoszewski, J., Gardocki, L., Gostyński, Z., Przyjemski, S., Stefański, R., Zabłocki, S., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2004, Vol. III, p. 648, and Hofmański, P., Sadzik, E., Zgryzek, K., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2012, Vol. III, Legalis, 2022, thesis 3 to Article 540.

¹⁵ Matras, J., in: Dudka, K. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX/el., 2022, thesis 4 to Article 540 CCP; similarly – the Supreme Court in the decision of 18 December 2019, II KZ 50/19.

Monographs and scientific articles, on the other hand, entertain the possibility of reopening of cassation or reopening proceedings.¹⁶ Authors point out that the linguistic interpretation of Articles 540 § 1 and 542 § 3 CCP does not yield unambiguous and conclusive results – the legislator in particular did not specify what type of court proceedings the articles refer to. However, the absence of such restriction, specifically, the lack of a formula that would confine the range of court proceedings only to those in which criminal liability is decided, strongly suggests that the material scope of proceedings in this regard is broader. Indeed, the legislator did not employ a formula that could indicate that the articles pertain solely to the main court proceedings (e.g. court proceedings in a criminal offence). Therefore, since the legislator has not made any reservations leading to the exclusion of ancillary proceedings, it cannot be inferred. The doctrine of criminal procedure has developed several classifications of court proceedings.¹⁷ The most fitting views seem to be those which suggest that reopening of proceedings is admissible in those cases which have been concluded with a final decision on criminal liability, or those in which the trial's **merits** have been decided, even if they do not pertain to the issue of criminal liability, and even the incidental ones, i.e. those occurring outside the main course of the trial, provided they have an autonomous nature relative to the main proceedings, and are therefore not connected with them. The scope of the reopening will also cover certain ancillary proceedings, on the assumption, however, that they are autonomous from the main course of the trial and may, therefore, be the subject of a separate motion for reopening. However, this will not apply to proceedings which are not autonomous and are closely tied to the **merits** of the proceedings.¹⁸ S. Śliwiński pointed out – based on the provisions of the 1928 Code of Criminal Procedure in its version in force in the 1950s – that the provisions on the reopening of proceedings refer primarily to proceedings concluded with a final decision, regardless of whether it was issued in ordinary or special proceedings. Concurrently, he advocated that the reopening of proceedings should apply to any judgement, order or decree that conclusively ended the proceedings in general, or at least concluded a certain stage of the proceedings.¹⁹

¹⁶ See: Samochowiec, J., 'Przedmiot wznowienia postępowania z mocy art. 474 k.p.k.', *Problemy Prawa Karnego*, 1978, No. 4, p. 69; Biłuj, M., Murzynowski, A., *Wznowienie postępowania karnego w PRL w świetle prawa i praktyki*, Warszawa, 1980, p. 61; Szumiło-Kulczycka, D., 'Prawne warunki dopuszczalności wznowienia postępowania sądowego', in: Gaberle, A., Waltoś, S. (eds), *Środki zaskarżenia w procesie karnym. Księga pamiątkowa ku czci prof. Zbigniewa Dody*, Warszawa, 2000, p. 224; Kalinowski, P., 'Derogacja przez Trybunał Konstytucyjny podstawy normatywnej orzeczenia sądu karnego jako przesłanka wznowienia postępowania – uwagi na tle orzecznictwa Sądu Najwyższego', in: Hofmański, P. (ed.), *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej*, Warszawa, 2014, p. 245.

¹⁷ Cf. Szumiło-Kulczycka, D., op. cit., pp. 215–221; Kosonoga, J., 'Prawomocne orzeczenie kończące postępowanie sądowe w rozumieniu art. 540 § 1 k.p.k.', in: Kosonoga, J. (ed.), *Studia i Analizy Sądu Najwyższego. Przegląd Orzecznictwa za rok 2017*, Warszawa, 2018, pp. 521–524 and the sources cited in both works.

¹⁸ See Kosonoga, J., op. cit., p. 522; Biłuj, M., Murzynowski, A., op. cit., p. 59; Szumiło-Kulczycka, D., op. cit., pp. 219–220.

¹⁹ Śliwiński, S., *Wznowienie postępowania karnego w prawie Polski na tle porównawczym*, Warszawa, 1957, p. 230.

The type of court proceedings to be finally concluded by a court decision can also be inferred from the grounds for reopening. However, it should be clearly emphasised that due to the diversity of the premises (Article 540 § 1 (1) (2), § 2 and § 3, Article 540a, Article 540b and Article 542 § 3 CCP), this cannot be done in a general way encompassing all the premises simultaneously, since each of them pertains to a distinct procedural situation or a different defect in the decision. Particularly, **the subject matter of court proceedings** to which the *propter nova* premise (the second premise listed in § 1 of Article 540 CCP) applies, cannot be extended to the subject matter of court proceedings to which other premises may apply.²⁰ This is due not only to the different nature of the grounds for reopening (in factual and legal terms), but above all to the content of the first part of Article 540 § 1 and Article 542 § 3 CCP. In none of these editorial units did the legislator use any term that would narrow the subject matter of court proceedings only to the main course of criminal proceedings, i.e. to the issue of criminal liability (criminal court proceedings, court proceedings in a criminal offence, etc.). Instead, the legislator used phrases indifferent from this point of view: 'court proceedings' and 'proceedings'.

When interpreting Articles 540 § (1–3) and 542 § 3 CCP as to the scope of proceedings that may be reopened, we cannot overlook the provision on the extraordinary cassation appeal: Article 521 § 1 CCP. Cassation appeal, although an extraordinary appeal measure, performs different functions (except perhaps in the scope of the absolute grounds for reversing a judgement that form the grounds for the appeal: Article 523 § 1 CCP, and adjudication by the cassation court: Article 536 CCP) than reopening of proceedings, this distinction is most clear in the separate grounds for appeal (aside from the defects specified in Article 439 § 1 CCP). While the cassation appeal serves only a controlling purpose, reopening of proceedings, in principle, aims to serve a rehabilitative and corrective purpose. The cassation appeal is strictly historical in nature (it can only be based on defects that transpired during the proceedings), whereas reopening of proceedings has a mixed nature – it is both historical and prospective (on the one hand, it is based on new elements – reopening based on *propter nova*, *propter decreta*, Article 540a CCP and uncovering of past events that could have influenced the decision – *propter falsa*, and on the other hand, it can be based on defects that arose during the proceedings: Article 542 § 3 CCP).

Nevertheless, despite the differences in the functions of these extraordinary appeal measures and the objectives of the proceedings initiated by them, it is important to remember, when interpreting Article 540 and Article 542 § 3 CCP, that both institutions are located in the same section of the Code of Criminal Procedure (Section XI), which should further solidify the rule prohibiting homonymous interpretation. This prohibition, rooted in the presumption of the legislator's rationality, disallows the attribution of divergent meanings to phrases within a particular act or branch of law. Bearing this in mind, it is noteworthy that Article 521 CCP allows for an extraordinary cassation appeal against any

²⁰ Cf. also Kosonoga, J., *op. cit.*, pp. 523–524.

final decision concluding court proceedings.²¹ In relation to the cassation appeal, and formerly the extraordinary review, it was and still is recognised that a final decision concluding court proceedings (within the meaning of Article 521 CCP in its original version, as well as Article 463 § 1 of the 1969 CCP) is such a decision which legally precludes the possibility of further ordinary instances, and not any proceedings at all,²² whereby the concept of court proceedings encompasses not only the proceedings pertaining to the principal subject matter of the trial (namely the criminal liability), but also other proceedings that are not directly linked to the main course of the proceedings, and do not decide on the subject matter or on the main proceedings outcome. Exceptionally, only S. Kalinowski assumed that the term 'court proceedings' included only proceedings in which the court either issued a judgement of acquittal or decided that a criminal act had been committed.²³ The Supreme Court, in its jurisprudence, regarded numerous types of rulings as decisions concluding court proceedings/court decisions concluding proceedings.²⁴ Importantly, the list also includes judgements issued within the scope of cassation and reopening proceedings: decisions to leave the cassation appeal unconsidered,²⁵ decisions upholding the order refusing cassation appeal,²⁶ decisions dismissing the motion to reopen the proceedings.²⁷

An additional supporting argument is provided by the prohibition that functions within the cassation proceedings, concerning the so-called super-cassation, as outlined in Article 539 CCP. This argument provides a threefold support. Firstly, the fact that the legislator has decided it is inadmissible to lodge a cassation appeal against a decision of the Supreme Court (and therefore – *lege non distinguente* – a judgement as well as an order, including an order dismissing a cassation appeal) which followed the review of the cassation appeal must lead to the conclusion that such a decision, in the absence of such a prohibition, would constitute a decision

²¹ Both in the original wording of this provision and after its 2003 amendment replacing this phrase with: 'final court decision concluding the proceedings' – this change did not (and did not intend to) narrow or expand the scope of court proceedings in which lodging of such a cassation appeal is admissible. Instead it broadened the subject matter of this extraordinary appeal measure by including court decisions upholding decisions on the discontinuance of preparatory proceedings, which were not covered by the original formula of Article 521 CCP.

²² Doda, Z., *Rewizja nadzwyczajna w polskim procesie karnym (węzłowe zagadnienia)*, Warszawa, 1972, pp. 120–121, 123.

²³ Kalinowski, S., *Rewizja nadzwyczajna w polskim procesie karnym*, Warszawa, 1954, p. 36.

²⁴ Final judgements issued in other areas of the trial, including ancillary matters, also conclude the proceedings, if they definitively close the examination of the issue in question and have lasting effects: final court decision on restoration of case files (decision of 29 May 2012, III KK 88/12), forfeiture of the bail bond (decision of 21 January 1998, II KKN 416/97), upholding the order refusing appeal or cassation appeal, leaving appeal or cassation appeal unconsidered; declaring admissibility or inadmissibility of extradition (resolution of 17 October 1999, I KZP 27/96), as well as decisions to take charge of or transfer a convict (Article 608) and decisions specifying the legal classification of an act according to Polish law and the penalty or measure to be enforced (Article 611c) – see also: Świecki, D., in: Świecki, D. (ed.), *Kodeks postępowania karnego. Komentarz*, LEX/el., 2023, thesis 2 to Article 521.

²⁵ Decisions of 19 December 2006, II KK 156/06 and of 28 October 2021, III KK 237/21.

²⁶ Decision of 3 December 2010, II KK 140/10.

²⁷ Decisions of 25 September 2013, III KK 231/13 and of 22 January 2020, III KK 640/19.

that could be subject to an appeal – otherwise, such a provision would essentially be redundant. Clearly, this pertains to judgments that can be challenged through an extraordinary cassation (Article 521 CCP), and must thus constitute a court decision concluding the proceedings. This is due to the simple fact that in such a situation where there is no decision from the appellate court, which would form the basis for an appeal, a party is entirely barred from lodging a cassation appeal. Secondly, the prohibition only excludes the possibility of lodging a cassation appeal – the act is silent as to the possibility of reopening proceedings before the Supreme Court, where the proceedings were concluded by a decision following the cassation appeal. Assuming the legislator's rationality, we must presume that if it was the legislator's intention to exclude – in addition to preventing the lodging of the so-called super-cassation – the possibility for reopening of cassation proceedings, an additional prohibition would have been inserted in the provisions of the Code of Criminal Procedure. The lack of such a prohibition, while the prohibition of the so-called super-cassation is in effect, must mean that the legislator has not ruled out the possibility of reopening cassation proceedings. Thirdly and finally, the legislator did not adopt the prohibition of the so-called super-cassation for the purposes of reopening proceedings – neither explicitly, nor even by appropriate application – since Article 545 § 1 CCP does not reference Article 539 CCP. This implies that a decision of the Supreme Court issued following reopening proceedings can be challenged by an extraordinary cassation (Article 521 CCP), and it can also be the subject of reopening proceedings (although, primarily, on the grounds indicated in Article 540 § 1 (1), § 2 and § 3, and Article 542 § 3 CCP).

The Supreme Court also acknowledges that decisions made in cassation or reopening proceedings, in essence – decisions that conclude these proceedings, represent decisions concluding (court) proceedings, which can be the subject of a cassation appeal (in the case of cassation – excluding those covered by the prohibition of the so-called super-cassation).²⁸ The opinions expressed in these judgements are partially derived from the stance adopted in the decision of 26 September 1996, II KKN 87/96. In that decision, the Supreme Court assumed that the prohibition on lodging a so-called super-cassation appeal, as set out in Article 467a § 2 of the 1969 CCP, does not apply in a situation where the previous cassation appeal has been disregarded by the cassation court. The cassation court's decision to leave the cassation unconsidered does not then constitute a decision 'following the hearing of the cassation appeal', which can be challenged by a cassation appeal.

The aforementioned decisions endorse the view that decisions, which in those instances were challenged by an extraordinary cassation appeal, were decisions concluding court proceedings (or, using the current terminology, they were court decisions concluding the proceedings) – otherwise the extraordinary cassation

²⁸ See: already referred to above – decisions of 19 December 2006, II KK 156/06 and of 28 October 2021, III KK 237/21 (cassation against a decision of the Supreme Court to leave the cassation appeal unconsidered), decision of 3 December 2010, II KK 140/10 (cassation against a decision of the Supreme Court to uphold the order refusing cassation appeal), decisions of 25 September 2013, III KK 231/13 and of 22 January 2020, III KK 640/19 (cassations against decisions of the Supreme Court dismissing the motion to reopen the proceedings).

against these decisions would not be permissible. In this light, it is difficult to rationally surmise that, in the context of a cassation appeal (especially if it is based on absolute grounds for reversing the judgement) such decisions conclude court proceedings, and they lose this attribute when it comes to reopening of proceedings – and all this while the legal act uses virtually identical phrases.

Moreover, the interpretative exclusion of cassation and reopening proceedings from the scope of proceedings in which court proceedings may be reopened, would imply that the legislator tolerated the situation where decisions rendered within these extraordinary appeal procedures, and impacted by absolute grounds for reversing the judgement, continued to persist in the legal system (at least until one of the listed entities decided to lodge an extraordinary cassation appeal). Such an interpretative distinction concerning Article 542 § 3 CCP, and excluding proceedings concluded with a decision dismissing a cassation appeal or a motion for reopening proceedings, is not justified by a purposive interpretation.

Additionally, in case No. II KK 231/13, it was aptly highlighted *that undoubtedly Article 547 § 1 CCP explicitly stipulates the prohibition of appealing against decisions dismissing a motion for reopening of the proceedings, which were issued by the above-mentioned courts. However, this prohibition only applies to reopening proceedings, i.e. to appeals against decisions dismissing motions for reopening by way of appeal proceedings. Hence, this prohibition does not extend to the possibility of challenging such a decision by another extraordinary appeal measure such as a cassation appeal. This measure, evidently, given the content of Article 519 CCP (indicating that cassation appeals can only be derived from judgements) is not available to the parties, but Article 521 CCP permits entities listed in its disposition to derive a cassation appeal 'from any final court decision concluding the proceedings'*. Simultaneously, it should be underlined that the prohibition of appealing against subsequent decisions issued by the Supreme Court after the reopening of the proceedings (Article 547 § 3 CCP), apparent from the later part of the quoted statement, covers only the prohibition of certain appeals (appeals and complaints), not all appeals (i.e. cassation appeals or motions for reopening of the proceedings). Similarly, while the Code of Criminal Procedure precludes the possibility to lodge a complaint against a decision of an appellate court dismissing a motion for reopening of proceedings (Article 547 § 1 *in fine* CCP), a cassation against such a decision is permissible (though it refers only, due to the decision's form, to an extraordinary cassation – Article 521 CCP).²⁹

In its practice to date, the Supreme Court has ruled out, in a number of decisions, the possibility of reopening cassation proceedings. This stance traces back to two fundamental decisions: the decision of 12 April 2001, III KO 53/99 and the decision of 27 June 2001, III KO 115/00, which are referred to in later rulings (either directly or indirectly – by referring to subsequent rulings which refer to at least one of these two decisions). It is noteworthy that both decisions were made two years before

²⁹ Cf. decisions of the Supreme Court of 14 June 2018, III KK 235/18 and of 22 January 2020, III KK 640/19 which, following a cassation appeal lodged by the Commissioner for The Human Rights, reversed the decisions of the appellate courts dismissing the motion for reopening due to one of the absolute grounds for reversing a judgement – Article 439 § 1(1) and (2) CCP, respectively.

the institution of invalidity was abolished and its prerequisites were transferred to the absolute grounds for reversing a judgement of and recognised as grounds for reopening of the proceedings.

In the case which resulted in the first of the aforementioned decisions, a motion was submitted to the Supreme Court to reopen the proceedings, in which a district court had ruled in the first instance, and a voivodeship court in the second instance. A cassation appeal was earlier lodged in this case, which the Supreme Court dismissed with a decision of 8 April 1999, as manifestly ill-founded. Subsequently, a motion for reopening of the proceedings was lodged by the defence counsel; however, that motion did not pertain to the reopening of the cassation proceedings, but the criminal proceedings on the decision on the defendant's criminal liability, which were ongoing before the common courts.

When ruling on the admissibility of the Supreme Court adjudicating in this case, it was emphasised that Article 544 § 2 CCP, which defines the reopening jurisdiction of the Supreme Court, suggests that the law uses in this context the phrase 'proceedings concluded by a decision', not 'proceedings, in which it has issued a decision'. Therefore, it was decided that, since when dismissing the cassation appeal, the Supreme Court only determines the ill-foundedness of this appeal measure, and thus it does not venture into the sphere in which the decision challenged by the motion for reopening of the proceedings enjoys *res judicata*, it is this decision, not the decision of the Supreme Court, that concludes the criminal proceedings. As a result of these considerations, the Supreme Court took the position that: *A decision of the Supreme Court with which it dismissed a cassation appeal does not constitute a decision concluding criminal proceedings, as referred to in Article 544 § 1 and § 2 of the Code of Criminal Procedure.*³⁰

This ruling is valid and it is backed by the current legislation, and by the nature of the cassation proceedings and the nature of the decision dismissing cassation appeal; this view should thus be wholly endorsed. Unfortunately, though, it has been invoked several times, contrary to its actual merits and related analysis (e.g. in cases: SDI 10/06, V KO 64/06, V KO 15/07, IV KZ 59/08, IV KO 108/08, II KO 57/12, II KO 67/12, II KO 17/13), as a justification for the assumption that reopening of cassation proceedings which were concluded with a dismissal of a cassation appeal is supposed to be inadmissible, whereas no such claim was made in that ruling.³¹ This might result either from the fact that the very thesis of the ruling may (though in the author's opinion it should not) raise doubts about whether it decides on the type of proceedings that may be reopened, or whether it refers only to the relation of the decision dismissing the cassation appeal and the main proceedings, in the context of functional jurisdiction, or from the fact that the content of Article 544 § 2 CCP itself was considered to obstruct reopening of cassation proceedings.

³⁰ This decision, with exactly this thesis, was published in the OSNKW 2001, Issue 7–8, item 67.

³¹ Cf. also Świecki, D., op. cit., thesis 4 item 9 to Article 540 CCP. – Although the author cited the decision of 5 July 2007, V KO 15/07, this decision contained a reference to the decision on case no. KO 53/99.

The argument (and also the decisions based solely or mainly on it) referring to the content of Article 544 § 2 CCP, which would determine the inadmissibility of reopening of cassation or reopening proceedings, should be rejected *a limine*, as this provision addresses and resolves only the matter of jurisdiction. It does not specify what type of proceedings may be reopened or what type of decisions the extraordinary appeal measure in the form of a motion for a reopening of proceedings can be applied. This provision merely points out the relationship between reopening jurisdiction and the proceedings to be reopened, indicating that if the proceedings to be reopened concluded with a Supreme Court decision, it is that Court that has jurisdiction to rule on the reopening. In the event of a request to reopen a criminal case in which the Supreme Court dismissed the cassation appeal, such a decision does not conclude the proceedings, as that Court did not interfere in any respect with the determination of criminal liability, and the decision concluding the proceedings would belong to a common or a military court (either at the first or second instance – depending on when the proceedings ended). Conversely, if there is a request to reopen cassation or reopening proceedings, it is the Supreme Court's decision that concludes these proceedings, even if it dismisses the cassation appeal or motion for reopening of proceedings. In this case, it would not be the decision of the common court that the cassation appeal or motion for reopening of the proceedings referred to initially.

Article 544 § 2 CCP neither specifies the scope of proceedings that may be reopened (what type of decision may be challenged by this type of extraordinary appeal measure) nor the prerequisites for reopening the proceedings. This provision is of a purely jurisdictional nature, determining solely and exclusively which court within the judiciary structure is competent to rule on the reopening. Hence, assessing the admissibility of reopening proceedings based on this provision is groundless.

The flaw in the argumentation referencing Article 544 § 2 CCP is evident in decisions that interpret the content of Article 540 § 1 CCP regarding the scope of decisions against which this extraordinary appeal measure can be lodged, through the content of Article 544 § 2 CCP, which only regulates the issues of functional jurisdiction to hear the motion, and in particular – from the negative side – the jurisdiction of the Supreme Court. An example of this type of mistake are the reasons specified, for example, in the decision of 5 July 2007, V KO 15/07 (also repeatedly echoed later), where it was stated: *The application for reopening of the proceedings has proven legally inadmissible. Proceedings concluded by a decision of the Supreme Court, as referred to in Article 544 § 2 of the Code of Criminal Procedure, should be interpreted only as proceedings which, as to their merits, were concluded before the Supreme Court. Hence, the legal view, proposing that a decision with which the Supreme Court dismisses a cassation appeal does not constitute a decision concluding the proceedings within the meaning of the indicated provision, is accurate. This is because, in such a procedural setting, the validity of the decision that has been appealed against by a cassation is not infringed (see Supreme Court decision of 12 April 2001, III KO 53/99, OSNKW 2001, z 7–8, item 87; Supreme Court decision of 27 June 2001, III KO 115/00, OSNKW 2001, z 9–10, item 83). Therefore, since the decision dismissing the cassation appeal cannot be the subject of the reopening proceedings, the Supreme Court left the motion for reopening of the proceedings lodged by the counsel for Krzysztof Nowak unconsidered (Article 430 § 1 of the Code of Criminal*

Procedure in conjunction with Article 545 § 1 of the Code of Criminal Procedure) and charged the convict with the court costs for the reopening proceedings (Article 639 CCP).

Only in one decision did the Supreme Court acknowledge the defectiveness of this type of argumentative process. In its decision of 13 January 2017, SDI 70/16, it pointed out that the fact that in the jurisprudence of the Supreme Court there is already a well-established view that the issuance of a decision with which the Supreme Court dismissed the cassation appeal is not relevant in the context of the jurisdiction of the court on the subject of the motion for reopening of the proceedings, does not inhibit the reopening of the proceedings (cf. e.g. decisions: of 12 April 2001, III KO 53/99; of 27 June 2001, III KO 115/00). In fact, this standpoint demonstrates that the mere fact that the cassation appeal was decided to be ill-founded only concludes that this extraordinary appeal measure was unsuitable, and does not alter the fact that the court proceedings concluded with a final decision of the regional or appellate court. It was also emphasised that in this case, the motion for reopening did not involve disciplinary proceedings, but the court proceedings which concluded with the refusal to admit the cassation appeal.

The second ruling which, in addition to the decision in case III KO 53/99, underpins the view that cassation or reopening proceedings are inadmissible is the decision of the Supreme Court of 27 June 2001, III KO 115/00, which, incidentally, in its argumentation also refers to the decision issued 2 months earlier in case III KO 53/99. This time, the Supreme Court pointed out that “in a situation where the Supreme Court dismissed a cassation brought against a final decision concluding the proceedings, regardless of whether the grounds for the motion to reopen the proceedings are *de novis* or *ex delicto* – indicating committing an offence in connection with the proceedings conducted both before their final conclusion and in the cassation proceedings – the jurisdiction of the court to decide on the motion is determined solely by determining which court’s decision has validly concluded the proceedings covered by the motion (Article 544 § 1 and 2 of the Code of Criminal Procedure), and it is not the decision dismissing the cassation appeal indicated at the beginning.” The thesis of this published decision³² once again revolves around the issue of jurisdiction of the reopening court, and in the decision, the Supreme Court asserted its jurisdiction, referring the case to the Court of Appeal for deciding on the reopening motion.

To the extent that this decision refers to the issue of Article 544 § 2 CCP, the author directs readers to the arguments already presented above. What is novel in this decision, however, is that besides analysing the issue of functional jurisdiction related to deciding on the motion for reopening proceedings, the Supreme Court touched on the possibility of examining, for reopening purposes, circumstances occurring after the final judgement, within the scope of cassation proceedings, including pre-cassation proceedings (in this case the defence counsel in the motion for reopening of the proceedings referred, among other things, to the fact that it was in the pre-cassation proceedings that the case file documents submitted to the Supreme Court for examination of the cassation were concealed or forged).

³² *Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa*, 2001, Issue 9–10, item 83.

The Supreme Court stressed that though the decision of the Supreme Court issued as a result of cassation is final and concludes cassation proceedings, it is not sufficient to consider that in every case such a decision simultaneously concludes proceedings within the meaning of Articles 540 § 1 and 544 § 1 and 2 of the Code of Criminal Procedure. As a cassation appeal is lodged against a final decision concluding court proceedings (Articles 519, 521 CCP), it is exactly this decision to which Article 540 § 1 CCP refers, unless the Supreme Court, after reversing the appealed decision, issues a subsequent decision in the form of acquittal or discontinuance of proceedings (Article 537 § 2 CCP). Conversely, if the Supreme Court dismisses the cassation appeal, then the common court decision retains the value of a final decision concluding proceedings, as it has not been effectively challenged.³³

In the written statement of reasons for the decision a reference was made to the work of M. Biłyj and A. Murzynowski³⁴ highlighting that the authors drew attention to the necessity of distinguishing between types of decisions rendered as a result of lodging an extraordinary review from the point of view of the grounds for reopening proceedings.

In the decision under discussion, particularly interesting with regard to grounds for reopening proceedings (the main proceedings on criminal liability merits, even if there were cassation proceedings, which concluded with a decision to dismiss the cassation appeal), is the statement, assuming that committing an offence in connection with cassation proceedings, even if it affected the content of the decision dismissing the cassation appeal, does not impact the possibility of reopening court proceedings concluded with common court's final decision, unless it is demonstrated that this fact could have also affected the content of the final decision concluding the proceedings. If such an influence was discovered, it would necessitate reversing precisely the common court's decision, and not the decision dismissing the cassation appeal, even if the latter was flawed. This is because, in any case, the cassation decision loses its significance as soon as the final decision, to which it referred, no longer enjoys *res judicata*.

Such a stance from the Supreme Court, presented in this decision, cannot be accepted for several reasons. Aside from the inadequacy of the argument referring to Article 544 § 2 CCP, for the determination of the scope of court proceedings where reopening is admissible, the Supreme Court did not so much fail to notice but trivialised an extremely important aspect concerning *propter falsa* grounds. Specifically, it highlighted that *the fact an offence was committed post-final decision, and that this fact, in that case, has only an indirect effect on it (by virtue of the fact that the cassation dismissal was incorrectly decided because of it), is of secondary importance. It should be noted, after all, that the law provision does not value the extent of the impact of the reason for reopening in question on the content of the decision; and the connection between the relevant fact and the proceedings during which the final decision was issued,*

³³ In this regard, reference was made to the resolution of the entire Criminal Chamber of the Supreme Court of 9 October 2000, I KZP 37/00.

³⁴ Biłyj, M., Murzynowski, A., op. cit., pp. 34–35.

is, in any case, unquestionable. Article 540 § 1 (1) CCP, by mentioning as grounds for reopening court proceedings concluded by a final decision (and thus, as the Supreme Court wishes – criminal liability proceedings before the common court, not cassation proceedings) committing an offence in connection with the proceedings, with a justified fear that this could have affected the decision content, refers in its content to the proceedings and the decision, which cannot be interpreted differently than the concepts listed in the ‘head’ of § 1 (the part of the sentence that begins the enumeration). Thus, it can only refer to an offence committed in connection with proceedings set to be reopened and its effect on the content of the final judgement to be reversed, not to an act committed after the conclusion of these proceedings and rendering this decision. In this regard, there is no rational basis for questioning that *propter falsa* grounds for reopening are historical in nature and thus relate only to acts committed before or during concluded legal proceedings, and not to acts committed after the conclusion of those proceedings. We would deal with such an act, on the other hand, if an offence were committed in connection with cassation proceedings.

Regardless of non-acceptance of this type of argumentation, it must be pointed out that the Supreme Court’s standpoint leads to results that are unacceptable from a systemic perspective. The existence of grounds for reopening criminal proceedings, which would occur in cassation proceedings, and which could lead to a decision on criminal liability being overturned, would have to be decided by a common court (usually an appellate court, though in a particular set-up also by a regional court). It would not only have to establish the existence of grounds for reopening (in this respect, this is the ordinary competence of the reopening court) but would have to determine and assess whether these grounds caused the defective dismissal of the cassation. Precisely in this respect (the need to assess the defectiveness of the decision dismissing the cassation issued by the Supreme Court) would the reopening court, in fact, have to assume the role of the cassation court, albeit not to the full extent, and assess whether, in the absence of a circumstance constituting grounds for reopening, the cassation would have been upheld.

The Supreme Court also failed to recognise that the position taken in the decision is precluded by Article 539 CCP which prohibits the filing of so-called super-cassation. If we were to accept the assumption, on which the main part of the argument is based, that a final court decision concluding proceedings, against which a cassation is lodged, can only be the final decision of a common court concluding the proceedings, and the decision of the Supreme Court dismissing such a cassation, since it does not interfere with the content of such a decision, does not conclude court proceedings, then the introduction of the prohibition of super-cassation (at least in a substantial part) would be without reason, as such a decision of the Supreme Court would not conclude court proceedings.

The content of Article 539 CCP, however, suggests the opposite legislative intent. It prohibits the lodging of a cassation appeal against a Supreme Court’s decision made after the cassation was heard, and thus – *lege non distinguente* – also against a decision dismissing an extraordinary appeal. Hence, the legislator must have regarded final decisions of the Supreme Court, concluding the cassation proceedings on the merits,

after which no further proceedings are pending, as judgements concluding court proceedings. Furthermore, the concept of a court decision concluding proceedings, understood in such a way, as adopted by the Supreme Court, would obstruct the admissibility of cassation appeals at least against decisions of the Supreme Court to leave the cassation appeal unconsidered – such a decision, like a decision dismissing a cassation appeal, does not in any way interfere with a final decision of a common court. In this respect, the jurisprudential practice of the Supreme Court in the last quarter of a century is uniform and allows for such a possibility explicitly (cf. the decision of the Supreme Court of 26 September 1996, II KKN 87/96, which initiated this trend).

The work of M. Biłyj and A. Murzynowski cited by the Supreme Court in the discussed decision also does not support the view adopted by the Supreme Court. On the contrary, these authors explicitly allowed for the possibility of reopening the reopening proceedings. They pointed out *that a court decision refusing the reopening of proceedings concludes court proceedings related to the consideration of the motion lodged in this case. It should be stated that under certain conditions (failure to appeal against it in due time, or exhaustion of the course of proceedings), this decision acquires the value of being final and may be appealed against only by means of an extraordinary review or by reopening proceedings. Such a decision, being final, creates a state of res judicata for the determination of the lack of grounds for reopening of proceedings, indicated in the negative decision of the motion lodged by a party.*³⁵

Although the position on the inadmissibility of reopening cassation and reopening proceedings concluded by a decision dismissing the extraordinary appeal measure is prevailing, it is not a view expressed uniformly or dominantly with only few exceptional dissenting voices. In the last 15 years, two groups (the first one is more numerous) of decisions can be distinguished, in which the Supreme Court allowed the possibility of reopening cassation or reopening proceedings (in some of them, if the prerequisites are met, it reopened proceedings, annulled the judgements and referred the cases for retrial).

The first group of such decisions comprises those of the Supreme Court issued pursuant to Article 540 § 2 CCP in connection with decisions of the Constitutional Tribunal declaring unconstitutionality. For the purposes of the present analysis, it is irrelevant what the substantive outcome of the reopening proceedings was – the reversal of the contested decision or the dismissal of the motion for evidence; what remains relevant is that the Supreme Court considered the motions on their merits:

1) **Article 535 § 2 CCP** (as enacted) – following the decision of the Constitutional Court of 12 January 2006, SK 30/05;³⁶

³⁵ Biłyj, M., Murzynowski, A., op. cit., p. 61.

³⁶ Decisions of: 12 April 2006, IV KO 24/06; 11 December 2006, SDI 27/06; 26 February 2007, IV KO 68/06; 17 March 2007, IV KO 31/07; 30 August 2007, IV KO 43/07; 18 June 2009, IV KO 89/09.) (it should be noted, however, that in the decisions of: 25 October 2006, V KO 64/06; 14 July 2009, IV KO 75/09 and 25 November 2010, V KO 87/10, the Supreme Court left the motions for reopening unconsidered, deeming the reopening inadmissible – in each of these cases, however, the argument of jurisdiction was used, which was incorrect and impossible to apply (Article 544 § 2 CCP, in case V KO 64/06 also with reference to the decision in case III KO 53/99, and in case V K87/10 also a reference was made to Article 544 § 2 of CCP,

- 2) **Article 526 § 2 CCP** (as it stood prior to 16 August 2016 because on that day the decision of the Constitutional Tribunal was published in the Journal of Laws – Journal of Laws 2016, item. 1243) providing for a qualified form of compulsory legal representation in the proceedings, presupposing the necessity of drawing up and signing the cassation appeal not only by an advocate or an attorney-at-law, but also by a person who is at the same time a defence counsel or an authorised representative (which excluded the possibility of drawing up and signing the cassation appeal by a party who has appropriate professional qualifications) – judgement of the Constitutional Tribunal of 21 June 2016, SK 2/15;
- 3) **Article 50 § 3 Act** – law on common courts – the decision of the Constitutional Court of 5 July 2005 SK 26/04.³⁷

It must be admitted, of course, that in most of these decisions (excluding two) the Supreme Court did not address the issue of the admissibility of reopening the proceedings pending before the Supreme Court in its written reasons, even if the issue was considered and decided prior to ruling on the merits of the motion to reopen the proceedings.

In its decision in SDI 70/16, the Supreme Court clarified that the applicability of Article 540 § 2 CCP is also not limited exclusively to the main subject of the proceedings. The content of the provision does not support such a limitation, and since the regulation specifying the grounds for reopening of proceedings – as well as the grounds for cassation – constitutes a limitation in access to this extraordinary appeal measure for the parties, it would be illegitimate to further narrow – through interpretation – the scope within which proceedings may be reopened (*exceptiones non sunt extendendae*). The fact that there was a standpoint in the Supreme Court case law (characterised by the Supreme Court as established) that a decision of the Supreme Court dismissing a cassation appeal is not relevant in the context of jurisdiction over a motion to reopen proceedings did not hinder the reopening of proceedings in this case. This standpoint means that determination of the cassation appeal as ill-founded only affects the wrongfulness of this extraordinary appeal measure and does not change the fact that the court proceedings concluded with a final decision of the regional or appellate court. In the present case there was no substantive decision on the merits of the cassation appeal, but this is irrelevant, as the motion for reopening does not concern the disciplinary proceedings, but those court proceedings that concluded with the refusal to accept the cassation appeal.

In point 3 of the statement of reasons for the decision, the Supreme Court not only acknowledged the issue of admissibility of reopening the proceedings, but also conducted a broader analysis. It pointed out that decisions concluding proceedings

although by using the formula ‘in conjunction with Article 540 § 1 in principio of the Code of Criminal Procedure’, and the judgements in cases III KO 53/99, III KO 115/00 and V KO 15/07.

³⁷ Orders of the Supreme Court of: 13 January 2017, SDI 70/16; 17 January 2017, II KO 27/16; 24 April 2017, SDI 5/17; 8 June 2017, SDI 45/17 – in these cases there was not only a reopening of the cassation proceedings, which were already in place as a result of the cassation appeal admitted by the Supreme Court, but in some of them there was a reopening of the cassation proceedings concluded by a Supreme Court decision upholding the order refusing cassation appeal, and thus of the cassation proceedings in their inter-institutional phase.

do not necessarily preclude the rendering of a judgement, and that these decisions should be understood not only in relation to the criminal liability of the perpetrator but also to other subject matters. In the latter case, they pertain to rulings on specific autonomous issues that arise in various ancillary matters during and in connection with the course of the relevant criminal proceedings. The reopening proceedings were considered as such proceedings, including the appeal proceedings conducted within their framework (complaint against the order refusing to accept the complaint against the decision of the court of appeal dismissing the motion for reopening). The decision referred to the views of academic scholars and jurisprudence of the Supreme Court on the grounds of cassation, which consider, among other things, that decisions of the court of appeal implying the inadmissibility of the complaint against the decision of the court of first instance are considered 'decisions concluding court proceedings'.³⁸

The second group of decisions includes cases in which the Supreme Court allowed the possibility of reopening the reopening proceedings due to the occurrence of absolute grounds for reversing a judgement specified in Article 439 § 1 CCP, i.e. pursuant to Article 542 § 3 CCP (although *in concreto* the reopening proceedings took place before the appellate court, this does not affect the assessment of the admissibility of the reopening proceedings).

In the chronologically first decision of this kind (decision of the Supreme Court of 18 March 2010, III KO 96/09) it was indicated that "although the institution of reopening proceedings generally applies to proceedings concluded with a final decision on criminal liability (see grounds for reopening indicated in Article 540–540a CCP), it is indisputable that when the reasons giving grounds for reopening proceedings *ex officio* (Article 542 § 3 CCP) are present, this institution also applies to proceedings conducted after the decision determining the main fact has become final (e.g. enforcement proceedings). Therefore, there is no doubt that Article 542 § 3 CCP is also applicable to reopening proceedings, which are subject to examination *ex officio* for the legal defects listed in Article 439 § 1 CCP, including – those specified specifically for these proceedings – Article 439 § 1 (1) in conjunction with Article 40 § 3 CCP." In this case, the Supreme Court reopened the reopening proceedings, reversed the appealed decision dismissing the motion to reopen the proceedings and referred the case to the Court of Appeal as the reopening court for retrial. The reason for this decision was that the decision dismissing the application for reopening the proceedings suffered from one of the absolute grounds for reversing a judgement.

And in its decision of 27 March 2013, II KO 13/13, the Supreme Court reopened the reopening proceedings concluded by the decision of the court of appeal dismissing the motion for reopening, reversed the decision of that court, and referred the motion for reopening for reconsideration in the reopening proceedings. The grounds for this decision was Article 439 § 1 (1) in conjunction with Article 40 § 1 (7) CCP (Article 542 § 3 CCP). In the statement of reasons for its decision, the Supreme Court indicated that *although the institution of reopening proceedings generally applies to proceedings concluded with a final decision on criminal liability (see grounds for reopening*

³⁸ Decision of the Supreme Court of 9 August 2007, V KO 35/07.

indicated in Article 540–540a CCP), it is indisputable that when the reasons giving grounds for reopening of the proceedings ex officio (Article 542 § 3 CCP) are present, this institution also applies to proceedings conducted after the decision determining the main fact has become final (e.g. enforcement proceedings). There is no doubt that Article 542 § 3 CCP is also applicable to reopening proceedings, which are subject to examination ex officio for the legal defects listed in Article 439 § 1 CCP, including – those specified specifically for these proceedings – Article 439 § 1 (1) in conjunction with Article 40 § 3 CCP.

In its decision of 24 February 2021, II KO 4/21, the Supreme Court reopened the reopening proceedings concluded by the decision of the court of appeal dismissing the motion for reopening. It reversed that decision, and referred the motion for reopening to the Supreme Court as the competent court to consider it in connection with the substance of Article 544 § 2 CCP. The grounds for reopening in that case were provided for in Article 542 § 3 in conjunction with Article 439 § 1 (4) CCP.

Although in the first two cases indicated above (III KO 96/09 and II KO 13/13), the Supreme Court adopted (albeit only regarding grounds for reopening specified in Article 542 § 3 CCP) a position converging with the standpoint presented in this study, it should be noted, that no argumentation was presented to support this view, apart from the assertion that there is no doubt that Article 542 § 3 CCP is applicable. *Nota bene*, it was also not indicated, despite the clear position taken in this respect, why reopening of the reopening proceedings based on the grounds specified in Article 542 § 3 CCP is at all admissible, while it is not admissible based on the grounds specified in Articles 540–540a CCP.

The first of the cited rulings requires special attention for another reason. The rapporteur in this case was a judge who also participated in the panel adjudicating case III KO 115/00 (also as the rapporteur), in which the opinion on the inadmissibility of reopening proceedings was voiced, even before the introduction – together with the liquidation of the judgement invalidation – of grounds for reopening proceedings ex officio (Article 542 § 3 CCP). This opinion has been repeated many times in the subsequent judicial decisions and literature on the subject. This circumstance is significant for assessing the legitimacy of, as it were, automatic transposition of the view pronounced in 2001 onto the grounds of the currently binding legal state without acknowledging the normative changes that occurred with the repeal of the institution of invalidity from the legal system. Unfortunately, except for a few isolated cases, this ruling has largely gone unnoticed in jurisprudence and literature on the subject.

From this perspective, the composition of court in the cited case II KO 13/13 is also worth noting. The panel included a judge (although he was not the rapporteur) who, in principle, argued against the admissibility of reopening the cassation or reopening proceedings.³⁹ In case V KO 47/10, a firm view was expressed that *reopening proceedings as such cannot be reopened, either at the request of a party or*

³⁹ Decision of 15 April 1998, III KKN 420/97, Orzecznictwo Sądu Najwyższego Izba Karna i Wojskowa, 1998, Issue 5–6, item 29; Hofmański, P., op. cit., p. 119; decisions of the Supreme Court to uphold an order refusing to admit a cassation (see Grzegorzczuk, T., *Kodeks postępowania karnego. Komentarz*, Warszawa, 2003, p. 1284)

ex officio, if they were previously concluded by a final court decision dismissing a party's motion or on the grounds that there are no grounds for reopening the proceedings ex officio.

In order to justify this view, it has been pointed out that reopening of the proceedings relates exclusively to 'court proceedings concluded with a final decision,' and all grounds for reopening (including those specified in Article 542 § 3 CCP) pertain only to such proceedings. The provisions on reopening are placed within the framework of the norms on extraordinary appeal measures, after the entire court proceedings have been regulated. These court proceedings, as regulated in the earlier provisions, are proceedings on the merits of the trial and thus pertain to the legal liability of a certain person, including the issue of admissibility of conducting proceedings on this matter. From this it was deduced that the reopening of finally concluded proceedings is valid precisely with regard to court proceedings concerning such subject matter. Apart from criminal liability, the statement of reasons also indicated other subject matters of the main proceedings. The Supreme Court also pointed out that the doctrine allows for the possibility of reopening ancillary proceedings, which concern a scope different from the main course of the trial. However, this applies only to proceedings that are autonomous in relation to the main proceedings. In the case of reopening proceedings, their subject is not legal liability or any other ancillary issue unrelated to the proceedings concerning this liability, but rather the issue of the existence of grounds for reopening as such, where the issue of legal liability is already resolved by a final court decision. Therefore, it is not an ancillary proceeding as referred to above. A different understanding of this construction, as indicated in the statement of reasons, would lead to the assumption that reopening of cassation proceedings concluded with a dismissal of the cassation appeal, is also possible, as they are concluded with a final court decision, even in a situation where the cassation against the decision made as a result of previous cassation hearing is already inadmissible (Article 539 CCP).

However, the reference to the work of M. Biłyj and A. Murzynowski, made in the written statement of reasons for the decision in case V KO 47/10 (as it was made with regard to the decision in case III KO 115/00) was imprecise. While the authors express a general view of the kinds of proceedings that may be the subject of the proceedings cited in the decision, when specifically referring to the issue of reopening the proceedings and to the final decision dismissing the motion for reopening, they explicitly indicate that the decision dismissing the motion for reopening, once it has become final, may subsequently be the subject of an extraordinary review or reopening of proceedings. It should be remembered that in the 1969 Criminal Procedure Code absolute grounds for reversing a judgement constituted grounds for reopening proceedings not only *ex officio*, but also at the request of a party (cf. Article 474 § 2 in conjunction with 476 § 2 and Article 388 of the 1969 CCP).

A comment should also be made with reference to the order of 23 March 2022, III KO 22/22, which *prima vista* could suggest that the signalling by a party to the proceedings, made under Article 9 § 2 CCP, led to an examination of the occurrence, in the cassation proceedings concluded by a decision dismissing the cassation as manifestly ill-founded, of absolute grounds for reversing a judgement to which the signalling referred, and which, according to the party, was to affect the decision of

the Supreme Court issued under Article 535 § 3 CCP.⁴⁰ This is directly indicated by the content of the ruling, which refers to the lack of grounds (strongly suggesting a prior examination of the merits of the issue with a negative result regarding the reopening of the proceedings ex officio, as referred to in Article 542 § 3 CCP). On the other hand, the statement of reasons clearly proves that the grounds for issuing such an order were the lack of possibility (inadmissibility) of reopening the cassation proceedings ex officio. Hence, when applying Article 118 CCP, the decision should be perceived as a decision on the inadmissibility of reopening, and not on the lack of grounds for reopening.⁴¹

In conclusion, it should be pointed out that the provisions of the Code of Criminal Procedure allow for the possibility of reopening the cassation or reopening proceedings concluded with a decision dismissing the lodged appeal measure, and the only limitations to reopening will be formed by the grounds for appeal. The grounds indicated in Article 540 § 1 (2) and Article 540a CCP will not apply here. While advocating such an interpretation of Article 540 and Article 542 § 3 CCP, one should remember that in the jurisprudence of the Supreme Court over the last 24 years, although not uniform, the opposite view was adopted, albeit in a dominant (especially in quantitative terms). The legal norm, which has developed in the process of interpretation and application of the law (even if this interpretation has been incorrect) and has functioned in legal circulation for many years, is indeed important for the stability of the law and legal relations. However, this aspect of the issue under consideration here requires a separate analysis, and therefore does not constitute the subject of this paper.

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⁴⁰ Article 439 § 1 (2) of CCP in view of the fact that the single-member panel of the Supreme Court that heard the cassation was composed of a judge appointed in 2018.

⁴¹ It should be noted that the lack of admissibility of reopening the proceedings, adopted in the order, cannot be offset by the possibility, indicated in the final part of the statement of reasons, to file an extraordinary cassation appeal by one of the entities specified in Article 521 of the CCP. The lodging of such a cassation conflicts with the prohibition against filing the so-called super-cassation (Article 539 CCP), i.e. a cassation against a ruling resulting from the hearing of this type of extraordinary appeal. While it is legitimate, as previously mentioned, for case law to allow a cassation appeal against a decision that leaves a cassation appeal unconsidered, such a possibility does not extend to decisions dismissing a cassation, as these decisions adjudicate on the merits of the lodged cassation.

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Cite as:

Hudzik M. (2023) 'Admissibility of reopening cassation and reopening proceedings concluded with a decision dismissing the extraordinary appeal measure', *Ius Novum* (Vol. 17) 3, 57–78. DOI 10.2478/in-2023-0022