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GLOSS ON THE JUDGMENT OF THE COURT OF APPEAL IN LUBLIN OF 22 NOVEMBER 2022 (REF. NO. II AKA 231/22)

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Abstract
The commented ruling refers to the issue of the relationship between the provisions of Article 161 § 3 of the Penal Code and Article 165 § 1(1) of the Penal Code. The interpretative difficulties arose upon the introduction of Article 161 § 3 into the legal system as a consequence of the COVID-19 pandemic. The judicial authorities were faced with the choice of the correct legal classification of behaviours aimed at the spread of infectious diseases. The problem constituting the crux of the title judgment is therefore important both dogmatically and in the practice of applying the law. The significance of the subject matter is also visible in the special nature of the prohibited acts in question, the implementation of which is related to the occurrence of biological pathogens invisible to the human eye that cause infectious diseases and which did not disappear once the SARS-CoV-2 pandemic had been brought under control.

Keywords: infectious disease, exposure to infection, bringing danger, apparent coincidence, health of many people

JURISPRUDENCE THESIS

There is an apparent coincidence between the provisions of Article 161 § 3 of the Penal Code and Article 165 § 1(1) of the Penal Code, because Article 161 § 3 of the Penal Code penalises direct, i.e. close in time and highly probable, exposure to infection of many individualised persons, while Article 165 § 1(1) of the Penal Code penalises the

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introduction of a real (and therefore not necessarily direct, i.e. neither temporally close nor highly probable) danger to the life and health of unspecified persons, causing an epidemiological threat.

GLOSS

The SARS-CoV-2 pandemic, more widely known as COVID-19, has been one of the greatest challenges for all elements of the structure of the state's functioning in this century. The unpredictability of the development of epidemic outbreaks has reminded many of the need for a quick and determined response from national and supranational systems. These experiences have brought many new solutions, including legal ones, but regulations that have been in place for years have also been verified in practice. Such examples include Article 165 § 1(1) of the Penal Code (hereinafter referred to as 'the PC'), which has been in force since its introduction of the Penal Code of 1997,[1] and Article 161 § 3 PC, newly introduced as a result of the pandemic experience.

The choice of the correct legal classification of criminal conduct is one of the most important elements of a subsequent conviction, and thus of the legal basis for criminal liability and the amount of punishment. However, in the course of the analysis of a criminally relevant action that meets the characteristics of a type of prohibited act, certain disturbances may occur due to the concurrence of provisions of the Act. This situation takes place when the scopes of penalisation of at least two provisions coincide at some level of interpretation of specific elements. Such a case arises if we take into account the already mentioned Article 161 § 3 and Article 165 § 1(1) PC.[2] Interpretative ambiguities as to the choice of the most appropriate provision of criminal law became the basis for an appeal filed with the Court of Appeal in Lublin. It should be noted that the basis of the case is not at all obvious. Elements describing perpetrating acts ('direct exposure to infection of many people with the virus' and 'endangering the life or health of many people by causing an epidemiological threat or the spread of an infectious disease') belong to the category of evaluative elements, depending on the type of disease, as well as its virulence and aetiology.[3] It is not possible to simply compare the initial stages of influenza with the plague and to state unequivocally that, in the same circumstances in both cases, the elements of a prohibited act will be met. Issues related to the development of infectious diseases in the human body and the possibilities of transmission, as well as the phases of the disease in which a biological pathogen invisible to the

[1] Act of 6 June 1997 – Penal Code (Journal of Laws of 2024, item 17, as amended). Hereinafter referred to as 'the Penal Code'.

[2] Similar remarks are made by J. Karnat, who emphasises that the scopes of these acts partially overlap (J. Karnat, in: Gadecki B. (ed.), *Kodeks karny. Art. 1–316. Komentarz*, Warszawa, 2023, pp. 483–484).

[3] Similar positions can be found in the doctrine. This aspect is discussed extensively by B. Michalski on the example of Article 161 of the Penal Code (see B. Michalski, in: Warylewski J. (ed.), *Przestępstwa przeciwko dobrom indywidualnym. System Prawa Karnego. Tom 10*, 2nd ed., Warszawa, 2016, p. 321).

human eye is capable of causing infection in other people, mean that in some cases the boundaries between the above-mentioned elements relating to the perpetrator's conduct in the provisions of Article 161 § 3 and Article 165 § 1(1) PC may become blurred.

Therefore, three variants of criminal liability should be allowed:

1. under Article 161 § 3 PC, in the implementation of all elements described therein,
2. under Article 165 § 1(1) PC, in the implementation of one of the alternative elements: 'causing a danger to the life or health of many people causing an epidemiological threat',
3. under Article 165 § 1(1) PC, in the implementation of one of the alternative elements: 'causing a danger to the life or health of many people by causing the spread of an infectious disease'.

The evidence of the indicated doubts in practice is the judgment under commentary, which was issued in the following factual circumstances. The defendant, knowing that he was infected with the SARS-CoV-2 virus, while present in shops touched the counter and goods and paid for his purchases with banknotes. Importantly, he was in the initial phase of the illness,[4] which justifies the claim that he could have infected other persons. The events occurred during the COVID-19 pandemic, that is, at a time when special epidemiological legal regimes were in force, including the isolation of persons suffering from this disease. The Regional Court found him guilty of committing the act described in Article 165 § 1(1) PC. As a result of the appeal lodged, the case was examined by the Court of Appeal in Lublin, which considered, among other things, the correctness of the legal classification adopted.

In the first place, the relationship between the perpetrator's conduct and the place where it was committed should be considered. This is important from the perspective of the proper attribution of criminal liability. Since he knew that he was infected with the SARS-CoV-2 virus and nevertheless went to a public place where at least one person (a shop assistant) was present, he exposed at least that person to the possibility of infection with the virus transmitted, *inter alia*, by droplets. However, more persons could have been present in the shop at that time. It must also be borne in mind that infectious diseases spread in a specific manner. Biological pathogens left in the environment under normal conditions are capable of surviving and replicating for some time and therefore may pose a threat to humans even after the perpetrator has left the shop. Therefore, the perpetrator's conduct should be assessed in a holistic manner, particularly when dealing with endangerment offences. Moreover, the defendant did not use any personal protective equipment (gloves, mask). Furthermore, he did not comply with the home isolation imposed on him. The Court of Appeal therefore correctly concluded that in the established factual circumstances 'it is irrelevant which of the shop assistants had direct contact with him and which did not, who served him, or whether there were other people

[4] According to the established facts, on 25 March 2021, he developed symptoms, which were confirmed the following day by a COVID-19 test. This resulted in his being placed in home isolation from 27 March 2021 to 5 April 2021. However, the described conduct took place on 29 and 30 March 2021.

in the shop – because his conduct caused an epidemiological threat to many persons'. As a result, the Court of Appeal endorsed the second variant of the legal classification of the act described above. It thus approved the legal classification adopted by the Regional Court. The adoption of this variant was justified by the finding that the defendant, on three occasions, caused a danger to the life and health of many persons in the form of an epidemiological threat, including shop assistants and an unspecified group of customers.

The Court of Appeal in Lublin undertook to consider whether the appropriate legal classification of the act had been applied. For this purpose, it compared Article 161 § 3 and Article 165 § 1(1) PC. In conclusion, it indicated that:

> 'There appears to be an apparent concurrence of provisions between these regulations, as Article 161 § 3 Penal Code penalises direct exposure, i.e. exposure that is short-term and highly probable, to infection of many individualised persons, whereas Article 165 § 1(1) Penal Code penalises a real danger (which therefore does not have to be direct, i.e. neither immediate in time nor highly probable) to the life and health of unspecified persons by creating an epidemiological threat. The court of first instance found that the defendant's act exhausted the disposition Article 165 § 1(1). This classification appears to be correct.'

When assessing the conclusion of the Court of Appeal, it should be noted that there are differences in meaning between the elements 'epidemiological threat' and 'the spread of an infectious disease', which are alternatively included in Article 165 § 1(1) PC. An epidemiological threat may be caused by conduct whose effect is the possibility of the occurrence of a significant number of illnesses within a given area.[5] It is therefore a phenomenon preceding the 'spread of an infectious disease', as it signals the possibility of the dissemination of biological pathogens which may, but do not necessarily have to, cause specific infections. It should therefore be agreed that, for the realisation of the third variant described earlier, consisting in the spread of an infectious disease, it is necessary for an infectious disease to arise that will actually spread, and thus for at least several cases of infection to occur.[6] Consequently, it must be unequivocally assumed that the perpetrator's conduct fulfilled the element of an 'epidemiological threat'. Hence, the third variant proposed earlier should be excluded.

The first and second proposals therefore require further consideration. This configuration of the adopted variants necessitates determining whether the perpetrator caused a danger or direct exposure. It follows that the elimination of the element of directness makes it possible to determine the correctness of one of the two remaining variants. On the basis of Article 161 PC, it is rightly assumed that direct exposure is exposure from which, in the light of current medical knowledge, the possibility of infection follows directly.[7] Directly, that is, once the perpetrator

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[5] Cf. W. Gutekunst, in: Świda W. (ed.), *Prawo karne. Część szczególna*, Wrocław–Warszawa, 1980, p. 81

[6] See R.A. Stefański, in: Filar M. (ed.), *Kodeks karny. Komentarz*, 3rd ed., Warszawa, 2013, p. 770.

[7] Cf. J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, 3rd ed., Warszawa, 2002, p. 303.

has created a dangerous situation, without any further activity on his part there is a high probability that a further effect (infection) will occur in the near future.[8] With regard to threats associated with biological pathogens, it should be stated that this type of threat, due to its unpredictability and depending on the virulence of specific pathogens, constitutes an independent threat and does not require any additional intervention by the perpetrator in order to fulfil the element of 'directness' of exposure. In legal doctrine one may encounter the view that the mere presence of the perpetrator in a particular place cannot in itself determine that the danger is direct. It is necessary, among other things, to determine the distance at which the perpetrator was from other persons and whether he used measures intended to prevent infection.[9] It is also rightly assumed that the fulfilment of the elements of an act under Article 161 § 3 PC may result from being present in a public place while simultaneously remaining in close proximity to other persons.[10] From this perspective, two situations may be distinguished. The first would be one in which the defendant was present in a shop in which many people were located and which, for example, had a relatively small area, meaning that he could have exposed many persons to direct infection through droplets. The second situation is the one described in the case at hand, namely entering the shop and touching the counter and goods, thereby creating the possibility of leaving biological pathogens that may pose a real, but not necessarily direct, threat. In the absence of the possibility of additional verification of the directness of exposure, it cannot be assumed beyond reasonable doubt that the defendant's conduct constituted direct exposure. Biological pathogens are invisible to the human eye. It is therefore objectively impossible to establish their significant multiplication on a specific surface and to unequivocally demonstrate a causal link between the defendant's previous presence and an increase in pathogens in a particular shop capable of infecting many persons at a given time. Therefore, in the established factual circumstances, the first variant, referring to the fulfilment of the elements of Article 161 § 3 PC, had to be excluded.

The solution adopted by the Regional Court and subsequently approved by the Court of Appeal, consisting in attributing liability under Article 165 § 1(1) PC on the basis of the fulfilment of the element of an 'epidemiological threat', requires further consideration. In earlier case law of the Supreme Court it was rightly assumed that a common danger is one characterised by the extensive scope of the threat in relation to a larger, defined or undefined human community,[11] which undoubtedly reflects the factual circumstances described in the judgment under commentary. It should also be added that the acts typified in Article 165 § 1 of the Penal Code are characterised by the escalation of danger over time.[12] This is an inherent feature of

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[8] Cf. M. Królikowski, in: Królikowski M., Zawłocki R. (eds), *Kodeks karny. Komentarz. Tom II. Część szczególna. Art. 117–221*, Warszawa, 2023, p. 381; J. Karnat, in: Gadecki B. (ed.), *Kodeks karny…*, op. cit., p. 483.

[9] Cf. A. Błachnio, in: Majewski J. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2024, pp. 863–864.

[10] Cf. K. Wiak, in: Grześkowiak A., Wiak K. (eds), *Kodeks karny. Komentarz*, 8th ed., Warszawa, 2024, p. 1199.

[11] See judgment of the Supreme Court of 20 May 1998, file no. II KKN 37/98, LEX no. 33542.

[12] Cf. A. Marek, *Prawo karne*, 2nd ed., Warszawa, 2000, p. 464.

the development of both infectious and non-infectious diseases. At the moment of the defendant's presence in the shop it could not be determined whether he was spreading an infectious disease, since from the moment other persons come into contact with a biological pathogen causing a given infectious disease to the moment when the first symptoms of infection appear, even several days or more may pass. Consequently, the perpetrator's conduct described above cannot fulfil the element of 'the spread of an infectious disease'. No infection was established. At least none that could be causally linked to the earlier conduct of the perpetrator.

Attention should also be drawn to the somewhat cautious approach adopted by the court, as it stated that:

> 'Even if it were theoretically assumed that the defendant's conduct resulted in direct exposure of many individualised persons to infection with the SARS-CoV-2 virus, thus fulfilling the elements of the offence under Article 161 § 3 of the Penal Code, the judgment could not be amended in that direction due to the principle of *reformatio in peius* contained in Article 434 § 1 of the Code of Criminal Procedure, since the judgment had been appealed only in favour of the defendant and Article 161 § 3 of the Penal Code provides for a more severe penalty than Article 165 § 1(1) of the Penal Code.'

The Court of Appeal therefore recognised the interpretative difficulties associated with the provisions under analysis, which may be regarded as further evidence of the significance of the identified problem. Naturally, the court was correct with regard to the prohibition of ruling to the detriment of the defendant. However, if the case were to be examined again by a court of first instance as a result of a decision ordering a retrial, that court could encounter interpretative doubts analogous to those identified above concerning the respective scopes of penalisation under Article 161 § 3 and Article 165 § 1(1) PC. Of course, the indirect prohibition resulting from the principle of *reformatio in peius* cannot become a procedural privilege amounting in practice to a clause of impunity in situations where the elements of an offence have been incorrectly attributed. Issues related to the application of this indirect prohibition remain debatable and constitute a broad field of interest in the doctrine of criminal procedure.[13] It therefore appears that the situational context may significantly influence the interpretative approach adopted with respect to both provisions, particularly when account is taken of the two factual situations described earlier.

The Court of Appeal also stated that there is an apparent concurrence of provisions between Article 161 § 3 and Article 165 § 1(1) PC. The literature similarly indicates that there is an apparent concurrence between these provisions, since Article 161 § 3 PC protects the health of many individualised persons, whereas Article 165 § 1(1) PC protects many persons who are not specified individually. Moreover, in the latter case the

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[13] See, e.g. M.J. Szewczyk, *Zakaz* reformationis in peius *w polskim procesie karnym*, Warszawa, 2015; P. Pratkowiecki, 'O możliwości pociągnięcia sprawcy do odpowiedzialności karnej pomimo wadliwego opisania czynu w wyroku skazującym', *Przegląd Sądowy*, 2020, No. 11–12, pp. 111–120; J. Duży, 'Pośredni zakaz *reformationis in peius* a prawo sądu do modyfikacji opisu znamion czynu przypisanego wyrokiem w postępowaniu ponownym – uwagi na tle wykładni art. 443 k.p.k.', *Prokuratura i Prawo*, 2021, No. 5, pp. 5–16.

directness of the threat is not required, but only its real nature.[14] However, one may also encounter the view that a cumulative legal classification of the act is possible where the perpetrator's conduct fulfils the elements of both Article 161 § 3 PC and Article 165 § 1(1) PC.[15] It seems, however, that in the judgment under commentary it would be unnecessary to invoke cumulative classification, as the factual circumstances are sufficiently clear to allow the scopes of the two provisions penalising, albeit closely related, types of prohibited acts to be separated, even if only by a thin line. For this reason, the position adopted by the Court of Appeal should be approved, although it required broader commentary, which has been provided in this gloss.

The above findings allow the conclusion that the judgment of the Court of Appeal, which was entirely consistent with the legal classification and the legal basis of criminal liability adopted in the judgment of the Regional Court, deserves approval. The Court of Appeal, however, justified its reasoning somewhat briefly, referring to the findings made by the Regional Court. It seems that when addressing such important issues as the relationship between Article 161 § 3 and Article 165 § 1(1) PC, as well as the specific nature and practical difficulties involved in establishing facts related to the spread of pathogenic agents, the court should have elaborated its observations in the reasoning of the judgment under review. It should also be mentioned once again that the court adopted a somewhat cautious approach with respect to the principle of *reformatio in peius*, which may be perceived by readers of the judgment – and rightly so – as a statement made 'just in case', in order to add an argument that is beyond doubt. The purely numerical comparison of the differences in the severity of the penalties remains undisputed, which cannot be stated with the same certainty when assessing *in abstracto* the relationship between the provisions under analysis (Article 161 § 3 and Article 165 § 1(1) PC).

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[14] See V. Konarska-Wrzosek, in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, 4th ed., Warszawa, 2023, p. 928.

[15] J. Karnat, in: Gadecki B. (ed.), *Kodeks karny…*, op. cit., p. 484.

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