

On some issues of applying by courts of the legislation on liability for implication in a crime and complicity in a criminal offense

Unofficial translation

Normative decision of the Supreme Court of the Republic of Kazakhstan dated December 22, 2016 № 14.

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In order to establish a uniform judicial practice and correct application of the legislation on liability for implication in a crime and complicity in a criminal offense, the plenary session of the Supreme Court of the Republic of Kazakhstan

resolves:

1. To clarify that implication in a crime shall be understood as a special form of involvement in a crime, which is not a complicity in a perpetrated crime and is not causally connected with it, but is a deliberate socially dangerous act preventing detection of the crime and exposure of the person who committed it.

The principal offences for which the Criminal Code of the Republic of Kazakhstan (hereinafter the CC) provides liability shall be the premeditated concealment of a corruption offence, a grave or particularly grave crime, or a crime against the sexual inviolability of a minor (Article 432 of the Criminal Code) and failure to report a known grave crime against the sexual inviolability of a minor, a particularly grave crime or a known act of terrorism, which is being prepared or committed (Article 434 of the Criminal Code). Moreover, under the Constitution of the Republic of Kazakhstan and the criminal law, the spouse or a close relative of the perpetrator shall not be criminally liable for failure to report an offence, nor shall clergymen be liable for failure to report an offence committed by persons who have confided in them in the confessional. A person shall not be criminally liable under Article 432 of the Criminal Code for the advance concealment of an offence committed by his/her spouse or a close relative.

In criminal proceedings in accordance with paragraph 11 of Article 7 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter - the CPC), close relatives are parents, children, adoptive parents, adopted persons, full and half brothers and sisters, grandparents, grandchildren. This list of close relatives is exhaustive and shall not be subject to extensive interpretation.

Footnote. Paragraph 1 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall become effective on the date of its first official publication).

2. Failure to report an offence shall consist in deliberate omission to fulfil the legal obligation, stipulated by law, of every person to report to the appropriate public authorities the known grave offence against the sexual inviolability of a minor, a particularly grave offence or a known act of terrorism that is being prepared or is being committed.

Failure to report other, not specified in article 434 of the PC, reliably known planned or committed offenses shall not entail criminal liability. At the same time, when revealing such facts, in pursuance of the legal policy of the state and the principle of zero tolerance for offenses, the courts shall be entitled to inform the relevant organizations of the fact of non-fulfillment by a person of his/her civil and moral duty by issuing a private ruling. For the same purposes, in all the instances of assistance to justice by a person by timely reporting the conclusive knowledge of planned or committed criminal offenses, the courts should, by a private decree, advise the relevant organizations to encourage this person.

Footnote. Paragraph 2 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall come into force from the date of its first official publication).

3. If there is evidence of a threat of violence or any other act prohibited by law with respect to a person who reports a planned or committed crime, or members of his family and close relatives, pre-trial investigation bodies shall be required by article 97 of the CPC to apply security measures to this person, including restriction of access to information about this person, storing it separately from the information on the main case, use of an alias by a person.

4. A person shall not be prosecuted for failure to report a crime committed by another person if they are both accomplices of another criminal offense committed by them in the same period of time, if the person can expose himself by reporting the crime.

5. Under part five of Article 70 of the Code of Criminal Procedure, a lawyer providing legal assistance may not act against the interests of his or her client, prevent the client from exercising his or her rights or admit that he or she was involved in a criminal offence or that he or she was guilty of it, contrary to the client's position. Pursuant to sub-paragraph 9) of paragraph 3 of Article 33 of Law of the Republic of Kazakhstan No. 176-VI of July 5, 2018 “On Advocacy and Legal Aid”, a lawyer must keep secret the data that he/she becomes aware of in relation to rendering legal aid and not disclose them without the consent of the person who applied for assistance. Therefore, a lawyer may not be held criminally liable for failing to report another crime committed by his or her client that has come to the lawyer's attention in the course of providing legal assistance.

An attorney, as a subject of financial monitoring, shall take measures in accordance with the Law of the Republic of Kazakhstan dated August 28, 2009 No. 191-IV On Counteraction of Legitimization (Laundering) of Incomes Received by Illegal Means, and Financing of Terrorism (hereinafter - the Law). It shall be assumed that, in accordance with the requirements of subparagraph 1) of paragraph 3 of Article 10 of the Law, an attorney has the

right not to provide information and data on a transaction subject to financial monitoring only in cases where this information and data were obtained in connection with the provision of legal assistance on the issue of representation and protection of individuals and legal entities in the bodies of inquiry, preliminary investigation, courts, as well as in the provision of legal assistance in the form of legal counseling, clarifications, advice and written conclusions on issues the resolution of which requires professional legal knowledge, drawing up of statements of claim, complaints and other documents of legal nature. In all other cases stipulated by the Law, the attorney shall be obliged to provide information and data to the authorized financial monitoring body on suspicious transactions of his client, which can pursue legalization (laundering) of proceeds from crime, or financing of terrorism or other criminal activities.

When harboring the person who committed a crime, the means and tools of the crime, traces of the crime and other evidence, the attorney shall be held liable for previously unpledged or previously pledged concealment on general grounds.

In cases when the attorney, having learned about a new planned criminal offense of his client, gives him advice or provides other legal assistance in the planned crime, he (the attorney) shall be held liable as an accomplice (aider) of the act committed by his client.

Footnote. Paragraph 5 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall be promulgated from the date of its first official publication).

6. Concealment of a crime consists in harboring (cover-up) of the person who committed a crime, the means and tools of the crime, traces of the crime and other evidence.

Harboring of the person who committed a crime also consists in providing him with a hiding-place, transport, fake documents, changing his appearance and other actions by which he can hide.

Concealment of funds and instruments of crime may consist in their destruction, change in their appearance, hiding them in a place inaccessible to detection.

The actions to conceal the traces of a crime and other evidence may include destruction (washing, cleaning) of clothes and objects that have traces of the crime (for example, blood, fingerprints and other traces), destruction of letters and other documents, destruction of e-mails, electronic-digital documents, correspondence, files, carriers of electronic digital information, removing dents or replacing glass of headlights on vehicles after a committed run over, collision, etc.

7. Liability of a person for previously unpledged concealment of a grievous or especially grave crime committed by another person (perpetrator) shall be imposed only if the perpetrator's guilt of committing a grievous or especially grave crime is proved by the court with passing a procedural judgment on this criminal case in one proceeding, or established by a resolution of the body conducting the criminal procedure, on termination of the criminal case for reasons other than exoneration, or enforced conviction verdict of the court.

8. The concealment in advance of a corruption offence, a grave or particularly grave crime, or a crime against the sexual inviolability of a minor, through conduct not covered by the elements of concealment, shall entail liability under the combination of Article 432 of the Criminal Code and the relevant article of the Criminal Code stipulating liability for the specific criminal offence. Such a combination of criminal offences may occur under concealment committed through: intentional destruction or damage to property (Article 202 of the Criminal Code); abuse of power (Article 361 of the Criminal Code); exceeding power or official authority (Article 362 of the Criminal Code); forgery (Article 369 of the Criminal Code); etc.

In the cases when all the constituent elements of the committed acts are covered by one regulation of the PC, which provides for a more stringent penalty, there is no aggregate element, and the deed shall be subject to qualification only under this provision of the penal law (for example, harboring illicit trafficking in narcotic drugs in an especially large amount by storing them).

Footnote. Paragraph 8 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall be enacted from the date of its first official publication).

9. Intentional concealment by an authorized official of a criminal offense by not registering a report or an application of a person on conclusive knowledge of a planned or committed crime or offence, or destruction or concealment of this person's application by any means shall entail liability under the relevant part of Article 433 of the PC, i.e. under a special rule of the penal law.

10. The previously unpledged concealment of a crime should be distinguished from the previously pledged concealment of a criminal offense, which in accordance with the penal law is recognized as complicity in the criminal offense in the form of aiding and qualifies under the relevant article of the PC, providing liability for a specific criminal offense, with reference to part 5 of article 28 of the PC.

When a spouse or a close relative commits complicity by means of a previously pledged concealment of a criminal offense, the provisions of the Notes to Article 432 of the PC shall not apply to him/her. This person shall be held criminally liable on general grounds as an accomplice (aider) in a criminal offense.

11. Qualification of aiding in a criminal offense as a whole shall correspond to part 5 of Article 28 of the PC, in which an accomplice is qualified as a person who assisted in the perpetration of a criminal offense by advising, instructing, providing information, tools or means to commit this act or removing obstacles to committing it, also a person who promised in advance to hide the perpetrator, the tools or other means of committing a criminal offense, traces of this act or unlawfully obtained objects, as well as a person who promised in advance to purchase or sell such items.

12. Advice and guidance relating to aiding shall be understood as oral or written recommendations and explanations on planning and on committing a criminal offense, on a more expedient way to commit it, time that is best for it, accomplices to be involved, etc.

By removal of obstacles to the perpetration of a criminal offense the court shall understand any actions of an accomplice to create the necessary conditions for a successful perpetration of a criminal offense (for example, power outage, damage to an alarm, distraction of a guard, poisoning of a guard dog, a fake call, destruction of reporting documents, etc.).

13. Concealment of a criminal offense may be recognized as complicity in the form of aiding, if the acts committed by the culprit were promised to the perpetrator before or during the commission of the criminal offense, or for other reasons gave grounds to the perpetrator to knowingly and fully count on such assistance (for example, due to the following circumstances: repeated concealment or acquisition or sale of property knowingly obtained by criminal means; commission of another criminal offense earlier in complicity with the perpetrator, undoubted approval or acceptance of the ideas and goals of the criminal group, including criminal organization, terrorist group, extremist group, gang and illegal paramilitary formation, etc.).

14. The person who committed a pre-pledged concealment shall be regarded as an accomplice of a compound complicity, in connection with which his actions are subject to qualification under the relevant article of the Special Part of the PC as a criminal offense committed by a group of persons by prior conspiracy or by a criminal group, with reference to part 5 of Article 28 of the PC.

15. Previously unpledged concealment or withholding of information by a person who is an aider or other accomplice of a crime shall not require additional qualifications under article 432 or article 434 of the PC, since failure to report or previously unpledged concealment in this case is part of a more serious crime and is covered by the PC article, which provides liability for a crime committed in complicity.

16. Previously unpledged acquisition or sale of property knowingly obtained by criminal means shall be an independent corpus delicti, entailing liability under article 196 of the PC, i.e. under the special rule of the penal law.

Pre-promised acquisition or sale of property obtained by criminal means, as well as pre-promised concealment, shall be recognized as complicity in a criminal offense in the form of aiding.

17. Promise in advance to acquire or sell property, knowingly obtained by criminal means, in cases when it incites criminal intent of the perpetrator and thereby leads him to perpetration of a criminal offense, shall not be recognized as aiding, but as an incitement with qualification of the actions of the culprit according to the relevant PC article, providing for liability for a specific criminal offense, with reference to part 4 of article 28 of the PC.

18. The penal law does not establish a lesser degree of danger of aiding compared to other types of complicity. The public danger of the actions of an accomplice is that, although he does not take a direct part in the commission of the criminal offense, by his actions he strengthens the perpetrator's determination to commit the criminal offense and substantially facilitates its commission. In this regard, an accomplice shall be held liable and penalized on equal grounds with other participants of the criminal offense, taking account of the provisions of article 52 of the PC. Nevertheless, taking account of the circumstances of the case, the court may impose both a less stringent and a more stringent penalty than to other crime participants.

19. In accordance with Article 4 of the Constitution, this regulatory resolution is included in the law in force, is generally binding and shall be enforced from the day of its first official publication.

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K. MAMI

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