

Exemption from Criminal Liability in Connection with the Settlement with the Injured Party: Issues of Theory and Practice

Podroikina I.A

Criminal Law of Rostov Branch of Russian Customs Academ, Rostov-on-Don, Russia
Email: 919820@mail.ru

ABSTRACT

The article deals with theoretical and practical aspects of the exemption from criminal liability in connection with the settlement with the injured party. The author notes that in the context of the exemption from criminal liability in connection with the settlement with the injured party, the considerable number of issues exists, but he raises only some of them in his article, such as the possibility of the exemption under multi-object offences, when the personality interest is protected by the Article of the Special Part of the Criminal Code of the Russian Federation along with other goods, under one-object offences, trenching on public and state interest, and in case of death of the injured party. The attention is paid to the fact that, despite the well-established theoretically grounded positions on the impermissibility of the exemption in connection with the settlement with the injured party in the cases listed above, judicial practice followed the way of permissibility of this exemption, in this connection author advances the arguments, why such way is inadmissible, and offers specific recommendations on resolving the issues specified.

Keywords: *exemption from criminal liability, settlement with the injured party, judicial practice, multi-object offences, death of the injured party, judicial practice*

1. INTRODUCTION

Today, the law-making body's aspiration to humanize the criminal law in the maximum possible way is noted in the literature. With that, at thorough investigation of amendments to the criminal law, the conclusion does not appear so obvious, because for the period of the CC validity, several tens of new bodies of evidence were included into it, and only a few were decriminalized. Consequently, a conclusion can be made that the criminalization process prevails over the decriminalization process. But it will be fair to admit that our the law-making body actually paid rather considerable volume of attention to the issues of criminal law humanization. For example, provisions regulating the possibility of non-custodial sentencing (e.g., the circle of persons to whom corrective work can be assigned, was changed, the number of ways of penalty assessment was increased, the punishment in the form of freedom restriction obtained new content, compulsory labour was included into the system of punishment and implemented), were improved, limitations on the confinement application (Part 1, Art. 56 of the CC RF) were introduced, the possibility of paying the penalty for minor-aged persons by parents or the other legal representatives (Part 2, Art. 88 of the CC RF) is admitted, earlier unknown types of the exemption from criminal liability and punishment (e.g., exemption from criminal liability in connection with damage compensation

(Art. 76.1 of the CC RF) appeared, deferred sentence for patients with drug dependence (Art. 82.1 of the CC RF)) appeared, the list of persons to whom deferred sentence can be applied under Art. 82 of the CC RF, widened, terms of the exemption from criminal liability in connection with the complete and voluntary abandonment of the criminal purpose and reconciliation with the injured party due to the admissibility of the exemption under crimes classified as crimes of medium gravity, widened, the repeatedly introduced P. 6, Art. 15 of the CC RF now allows the courts to change the crime category, causing the considerable number of consequences connected with the improvement of the convict's condition, including exemption from criminal liability. It should be mentioned that during the validity of the CC RF 1996, the judicial practice was considerably changed. In the context of the study matter, this refers to the change of approach concerning the permissibility of the exemption from criminal liability in connection with the settlement with the injured party under multi-object offences, under offences in which such consequence as the death of the injured party occurred (including that caused by actions of the injured party), on the expansion of the first offence notion.

With that, not all the authors give the positive estimation to new statutes of the criminal law (e.g., M.M. Babayev,

A.V. Brilliantov, N.A. Lopashenko, G. Yu. Lesnikov, Yu. Ye. Pudovochkin, etc.), including those related to the issues of the exemption from criminal liability (e.g., Ye. V. Blagov, V.N. Vinokurov, P.A. Filippov, etc.). Therefore, further investigation of issues related to the exemption from criminal liability, and search for the ways to resolve them seems topical enough, especially contrasted with the increasing number of appeals to the adoption of a new criminal code (theoreticians can already consider several models of a new criminal law, including the scientific project developed by the research team headed by N.A. Lopashenko, the separate components of which are given as publications [1]).

2. STUDY DESIGN

The study is based on such a method as system analysis. Beside, with the purpose of more detailed and comprehensive studying of the topic set, the author also based on technical, comparative legal, statistical, and specifically sociological methods.

3. STUDY RESULTS

In educational and scientific literature for criminal law, the exemption from criminal liability traditionally means the "refusal to apply the measures of criminal and legal nature to a person, who committed a crime, by the state, based on the criminal law and expressed in the certificate of a competent state authority" [2].

The initial current CC RF described four types of the exemption from criminal liability. In 2003, such type as the exemption in connection with the change of conditions (now it is the type of release from punishment) was excluded from their list. Then, in the period from 2011 to 2016, Chapter 11 of the CC RF was supplemented by two Articles, Art. 76.1 and Art. 76.2, that, respectively, regulate the possibility of the exemption from criminal liability in connection with compensation of damage and in connection with the court fine infliction.

Among the exemption types, the exemption from criminal liability in connection with the settlement with the injured party has the special importance; with that, the law-making body made an attempt to take into account the injured party's interest in a maximum possible way, because the reconciliation procedure is the expression of will of two subjects, with the guilty party on the one part, and the injured party on the other part. The fact of reconciliation is fixed and is carried out under the control of state represented by the respective authorized bodies and officials, allowing to implement the procedure of reconciliation only in case if all the conditions set in Article 76 of the CC are met, so this type of exemption belongs to optional. The settlement with the injured party assumes the deconflict, so it important to establish the fact of voluntary expression of will of both parties regardless of the fact what party initiated the reconciliation.

According to the investigators, "first, reconciliation gives a possibility to resolve a conflict situation between the injured party and a person who committed a crime, with the minimal amount of conditions, with less procedural and moral expense. Second, conciliation contributes to the resolution of social contradictions by non-repressive means, and moderate it. Third, implementation of the reconciliation between the guilty party and the injured party guarantees the recovery of the right violated, reimbursement of expenses related to the fact of causing damage to the injured party. Finally, it can be stated that in its essence, it is a fair compromise between all the participants of the law governing conflict in interest" [3].

With regard of the provisions of Art. 76 of the CC, for the exemption from criminal liability in connection with the settlement with the injured party, the following is required: establishment of the fact that the crime was the first offence; the fact of the offence belonging to the certain category, of little or medium gravity; executed certificate of reconciliation between the guilty party and the injured party; smoothing of the offence consequences in the form of expiation of the damage caused to the injured party.

In June 2013, the Supreme Court of the Russian Federation adopted the Resolution, with the large number of recommendations provided concerning the correct application of the provisions of Chapter 11 of the CC [4], including Art. 76 of the CC RF. Namely (in the context of the investigation subject): compared to theoretical positions developed earlier, the notion of the first offence (cl. 2) was considerably extended; definitions of damage and expiation of the damage caused, and approximate ways of such compensation and expiation (cl. 2.1) were given; the aspects required to be taken into account when making a decision of the exemption in connection with the settlement with the injured party (cl. 9) was specified; measures to be taken by the court for the protection of rights and interests of underage injured parties (cl.11) were specified; the possibility of the application of Art. 76 of the CC in case of death of the injured party (cl. 12) was specified; rules of application of Art. 76 of the CC at committing the joint crime (cl. 13) are specified.

The settlement with the injured party should have the obligatory procedural execution, in particular, for the implementation of this type of exemption, a statement from the injured party or from its legal representative (Art. 25 of the Russian Federation Code of Criminal Procedure) is required. The final decision on the exemption, based on the application submitted, is made by the court, but always upon the agreement with the head of the investigating body, or by the junior detective, but also upon the agreement with the procurator, provided that all the requirements set in Art. 76 of the CC RF, are met. In accordance with cl.10 of the Resolution of Plenum of the Supreme Court of the Russian Federation No. 10 of 15.05.2018 "On the practice of application by courts of provisions of Part 6, Article 15 of the Criminal Code of the Russian Federation", "the judgement on the crime category change for the crime of medium gravity allows the court, at the presence of grounds stipulated by articles 75, 76, 78, 80.1, 84, 92, 94 of the CC RF, exempt the convict from

the service of given sentence. In this cases, the court passes judgment, the substantive provisions of which should, in particular, contain decisions on condemnation, on assignment of punishment to the criminal defendant, on the crime category change for less severe with the specification of the changed crime category, and on the exemption from the service of given sentence (clause 2, Part 5, Article 302 of the Russian Federation Code of Criminal Procedure)" [5]. On the basis of the provision above, on the one part, it is hard to escape a conclusion that the exemption from criminal liability in connection with the settlement with the injured party is possible at the stage of conviction by the court, and on the other part, the Supreme Court speaks of the exemption from punishment with the specification of provisions that determine the terms of the exemption from criminal liability, i.e., it actually speaks on the types of exemption from punishment under Art. 75,76,78 of the CC RF, taht are absent in the law.

4. DISCUSSION OF RESULTS

The theory of criminal law pays attention to the entire line of issues connected with the exemption from criminal liability in connection with the settlement with the injured party. The paper submitted, due to the volume limitation, deals only with several of them, namely, the issue of the exemption under Art. 76 of the CC RF under multi-object offences and offences in which the principal direct object is represented by public or state interest, and under the possibility of applying Art. 76 in case of death of the injured party.

Therefore, with regard of the explanations provided by the Supreme Court of the Russian Federation, the resolution on the exemption from criminal liability in connection with the settlement with the injured party, should be accompanied by the clarification of numerous issues, namely: "courts should take into account the specific facts of the criminal case, including peculiarities and number of objects of the criminal offence, their priority, the presence of the free expression of will of the injured party, change of the level of danger to the public from the side of a person who committed the crime, after the expiation of damage and reconciliation with the injured party, the identity of a person who committed a crime, circumstances, extenuating and aggravating punishment " [4].

As it is found, neither the text of Art. 76 of the CC RF, nor the explanations submitted contain any information on those offences under which the exemption in connection with the settlement with the injured party depending on the importance of public relations protected by the criminal law (depending on the object of the offence) is possible, or the information whether such exemption is possible under multi-object offences, especially in cases when the personality interest act as an additional direct object (e.g., at committing the crime stipulated by Art. 264 of the CC RF). Formally, it is possible because neither the law nor

the aforementioned Resolution of Plenum of the Supreme Court contain such a prohibition.

At the same time, not all investigators agree with such position of the law-making body and the Supreme Court. For example, some authors submit the relevant arguments in support of the position on the impermissibility of using P. 1 Art. 76 of the CC by the executor of law in cases when at the crime commitment, social relations providing public or state interest, act as one of the objects being defended. "A carrier of interest, private in its nature, can be a person (physical entity) or a legal entity in cases when an interest protected by law is included exclusively into the legal sphere of the certain entity, without affecting public or state interest. And only in the case when the criminal offence is caused to interests belonging exclusively to the private field, the reconciliation is possible, and the conflict of interest caused by the fact of the commission of a crime, can be considered closed after its achievement. If the crime trenches on public interest, the settlement with the injured party does not remove the conflict situation" [6]. The similar point of view can be seen in other sources: «...Art. 76 of the CC RF cannot also be applied in cases when damage is caused to public or state interest because in such cases, a person entitled to reconcile with the injured party is not enshrined in law" [7].

V.N. Vinokurov, Ye.A. Fedorov mention several groups of crimes trenching on two objects under which the exemption in connection with the reconciliation is inadmissible; they include intentional crimes trenching persons who execute justice, or management activity, and intentional crimes against public safety. At the same time, they admit the exemption under Art. 76 of the CC RF at the violation of rules that caused negligent damage to a person [8].

It should be emphasized that for the long time, judicial practice has also been following the way of impermissibility of the exemption from criminal liability under Art. 76 of the CC RF under tow-object offences, where the personality interest acted as an additional direct object, and under offences, where damage was caused to social relations providing public or state interest [9, 10]. However, recently, the reverse trend has been observed [11, 12], including that in the decisions of the highest judicial institution of Russia [13].

In distinction from well-established, theoretically substantiated positions of penal law scholars, the possibility of application of the provisions of Art. 76 of the CC RF to persons who committed the crime, the consequence of which was the death of the injured party, is entrenched in resolution No. 19 of 27.06.2013. In particular, he specified, "courts should take into account the provisions of P. 8, Art. 42 of the Russian Federation Code of Criminal Procedure on the transfer of the injured party's rights in such cases to one of the closest relatives of the person who died... As the criminally-remedial law contains no limitations of procedural remedies of persons recognized as the injured parties according to the procedure established by P. 8, Art. 42 of the Russian Federation Code of Criminal Procedure, reconciliation of a

person who committed a crime, with such injured parties can be a ground for his/her exemption from criminal liability" [4]. At such solution of the issue, a question suggests itself: how is it possible to admit the conflict exhausted, if the injured party died? Won't such use of Art. 76 of the CC cause the ungrounded exemption from criminal liability? To which degree is such use of criminally-remedial notion of the injured party with such meaning, and the inclusion of criminal and legal institutions into it are justified? As the theory of criminal

5. CONCLUSIONS

Summarizing the above, it should be noted that today, despite the accepted practice, well-established theoretical opinions, modern judicial practice followed the way of expanding the use of Art. 76 of the CC RF through permissibility of the exemption from criminal liability in connection with the settlement with the injured party in case of committing multi-object offences, in which the personality, its rights and freedoms act as an additional direct object, single-object offences, in which the direct object is represented by public or state interest, and in cases when the death of the injured party occurred. At this, in the first two situations, such course change took place due to making decisions on the specific cases, and their non-cancellation by courts of superior jurisdiction, and in the second case, the respective recommendations were provided by the Supreme Court of the Russian Federation in one of its resolutions. However, we cannot agree with the accepted practice and explanations given by the Supreme Court. In our opinion, the application of Art. 76 of the CC RF under multi-object offences does not allow to achieve reconciliation because in such cases, the peculiarities of such socially-dangerous acts, where the personality and public (state) interest are defended cumulatively, and their higher danger to the public, are not taken into account. Besides, in our opinion, the reconciliation with public and state, and other social interest is impossible (of course, if we don't mean the reimbursement of material damage exclusively), but then a question arises, with regard of the provisions of Art. 42 of the Russian Federation Code of Criminal Procedure, who will be considered the injured party in such actions, because, according to the article name, only a physical or a legal entity can act in this quality. The same argument can serve as a basis for conforming the conclusion on the impermissibility of reconciliation under one-object offences where the interest not affecting the personality is defended.

Concerning the possibility of reconciliation with relatives, in case of causing death to the injured party, it should be noted that the process of maintaining balance between the victim's rights and the public interest is discussed in the theory of law from different positions, including the position of implementation of criminally-remedial mechanisms [14]. Certainly, penal and criminal procedure legislation closely interact. However, this interaction cannot lead to the mechanical transfer of terms from one

law considers an entity (physical or legal), to whom/which the direct property, physical, moral, or goodwill damage was caused, as the injured party. The thesis stating that, from the from the perspective of the criminal law and the criminal procedure, the injured parties may not coincide, in particular, in cases of causing death, is universally recognized.

field of law to another. We would like to emphasize repeatedly that the notions of the injured party do not always coincide in the criminal law and the criminal procedure. In the criminal law, from the perspective of the body of evidence theory, at the injured party identification, it is crucial to identify a person who was damaged directly; this person is the injured party, and, consequently, according to the law-making body's plan, reconciliation should be reached with him/her, and he/she should obtain satisfaction from damage compensated. For other situations, including those at the death of the injured party, the criminal law provides other mechanisms of the exemption from criminal liability, e.g., complete and voluntary abandonment of the criminal purpose.

With regard of the aforementioned, in order to stabilize the judicial practice, in order to implement the concept of justice (it stands to reason why the researchers mention in their studies the importance of the definition which idea of justice will underly the law [15]), and taking into account the interest of the injured party, the following can be recommended:

1. in the Resolution of Plenum of the Supreme Court of the Russian Federation No. 19 of 27.03.2013, entrench the provision, limiting the possibility of the exemption under Art. 76 of the CC RF in those cases, when, alongside with the interests of the of the injured party (physical or legal entity), offence against public interest and (or) state interest is made;
2. exclude clause 12 from the aforementioned Resolution;
3. enshrine at the statutory level the prohibition to apply the provision on the exemption from criminal liability in connection with the settlement with the injured party in case when the crime commitment led to the person's death (in this view, a successful provision structure was offered by authors of the scientific project of the criminal code headed by N.A. Lopashenko [16]).

REFERENCES

- [1] N.A. Lopashenko, Ye.V. Kobzeva, K.M. Khutov, R.O. Dolotov, *Theoretical Model of the Special Part of the Criminal Code of the Russian Federation: main provisions of structure and contents,*

All-Russian Journal of Criminology, 11(1) (2017), 109-118.

[2] Criminal law: textbook for Bachelors: in 2 v. V. 1. General part / Resp. ed. I.A. Podroykina, Ye.V.. Seryogina, S.I. Ulezko. 2 ed., revised and enlarged M.: Urite Publishing House, 2013, p. 587.

[3] V.V. Sverchkov, Exemption from criminal liability, dismissal of a criminal case (prosecution), refusal to institute a criminal case: issues of theory and practice. SPb. : Press Legal Center, 2008, p. 592.

[4] The Resolution of Plenum of the Supreme Court of the Russian Federation No. 19 of 27.03.2013 "On the application by courts of legislation regulating the reasons and the procedure of the exemption from criminal liability», Bulletin of the Supreme Court of the Russian Federation, 8 (2013).

[5] Resolution of Plenum of the Supreme Court of the Russian Federation No. 10 of 15.05.2018 "On the practice of application by courts of provisions of Part 6, Article 15 of the Criminal Code of the Russian Federation", Bulletin of the Supreme Court of the Russian Federation, 7 (2018).

[6] N.V. Artemenko, A.M. Minkova, Controversial issues of application of rules of the exemption from criminal liability in connection with the settlement with the injured party, Rossiysky Sudiya, 6(2007), 43-46.

[7] A.V. Brilliantov, Exemption from criminal responsibility: with regard of the judicial practice generalization: research and practice textbook, M., 2013, p. 112.

[8] V.N. Vinokurov, Ye.A. Fyodorova, Object of crime and exemption from criminal liability in connection with the settlement with the injured party , Ugolovnoye Pravo, 6 (2018), 16 - 21.

[9] Definition by the Supreme Court No. 10-O07-22 of 20.12.2007, Bulletin of the Supreme Court of the Russian Federation, 7 (2008).

[10] Overview of the judicial practice of the Supreme Court of the Russian Federation of 01.06.2005 "Overview of the judicial practice of cessation by military courts of criminal cases in connection with the settlement with the injured party and complete and voluntary abandonment of the criminal purpose", Access mode: SPS ConsultantPlus. Date of referral: 28.01.2020.

[11] Resolution of Ust-Donietsk District Court No.1-195/2017 of 03.11.2017. Available at: <https://rospravosudie.com/court-ust-doneckij-rajonnyj-sud-rostovskaya-oblast-s/act-560690462/>

[12] Resolution of Justice of Peace Safin N.A. No.1-7/2018 of 12.01.2018. Available at: <https://rospravosudie.com/court-sudebnyj-uchastok-11-samarskoj-oblasti-s/act-240981003/>

[13] Cassational ruling of the Supreme Court of the Russian Federation under the case No. 19-O13-8СП of 26.02.2013. Available at: https://dogovor-urist.ru//судебная_практика/дело/19-о13-8сп/

[14] Natalya Mosunova Disclosure of evidence in cartel litigations in the EU: is balance of victims rights and public interests possible? BRICS Low Journal, 2(2015), 122-155.

[15] Zorkin V. Justice – the imperative of a law-based civilization, Social Sciences, 50(1) (2019), pp. 68-78.

[16] Criminal Code of the Russian Federation (scientific project) / N.A. Lopashenko, R.O. Dolotov. Ye.V. Kobzeva Ye.V., Khutov; ed. by Doctor of Laws, Professor N.A. Lopashenko. M.: Yurlitinform, 2019, p. 320.