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ENTIRE DECISION

**Order of the**

**Kúria**

**Case Number:**Bfv.III.999/2016/14.

**Instance of the decision:** review

**Members of the Chamber:** Dr. Zoltán Márki, President of the Chamber

Dr. Gábor Somogyi, Judge Rapporteur

Dr. Zoltán Varga, Judge

**Place of the proceedings:** Budapest

**Form of the proceedings:** public hearing

**Date of the hearing:** 13th December 2016

**Subject-matter of the case:** crime of vandalism

**Person subject to the proceedings:**

**First instance:**Pesti Központi Kerületi Bíróság (Central Court of the District of Pest),  
7.B.VIII.32.965/2015/2., order, panel meeting, 13<sup>th</sup> November 2015

**Second instance:** Fővárosi Törvényszék (Budapest High Court), 20.Beüf.VIII.13.053/2015/2.,  
order, panel meeting, 26th January 2016

**Motion submitted by:** Fővárosi Főügyészség (Budapest Public Prosecutor's Office)

**Direction of the motion:** to the detriment of the person subject to the proceedings

**Operative part**

The Kúria, deciding upon the motion for review submitted by the Budapest Public Prosecutor's Office in the criminal procedure for the crime of vandalism, sets aside the order No.7.B.VIII.32.965/2015/2. of the Central Court of the District of Pest and No.20.Beüf.VIII.13.053/2015/2 of the Budapest High Court and orders the court of first instance to initiate new proceedings.

The costs of criminal proceedings, HUF 10,880 (ten thousand eight hundred and eighty forint) incurred in the review procedure shall be paid by the State.

No appeal or review shall lie against this order.

## S t a t e m e n t   o f   r e a s o n s

### I.

- [1] The Central Court of the District of Pest, by its order No.7.B.VIII.32.965/2015/2, terminated the criminal proceedings against S. A. I. for committing the crime of vandalism as a joint offender [Act IV of 1978, previous Criminal Code – section 271 (1) and (2) a)].
- [2] On the basis of the appeal submitted by the Prosecutor to the detriment of the person subject to the proceedings, the Budapest High Court, by its order No.20.Beüf.VIII.13.053/2015/2, upheld the decision of first instance – rectifying only the statement of reasons.
- [3] According to the substantive legal standpoint of the court of first instance, the indictment did not contain all the necessary information, and the prosecutor did not fulfil the request to complete the insufficient indictment. In the statement of reasons of the order, it referred to the fact that the personal data of the person subject to the proceedings, written down by the Office for Immigration and Citizenship – according to the declaration of the accused, in the absence of documents – and the data shown in two previous judgements and in the present indictment, differ as far as the place of birth is concerned, plus his nationality and the mother's name appear in two different versions in the papers. In view of this, the court found that the person of the person subject to the proceedings is not clearly identified in the indictment. For this reason it suspended the procedure and requested the prosecutor to complete the indictment in order to clarify the personal data of the person subject to the proceedings established on credible evidence.
- [4] In doing so, the prosecutor could only establish that the person subject to the proceedings is not a national of Sierra Leone, but supposedly (as indicated in the present indictment) of Nigeria. Interpol's partner agency in Nigeria and the Embassy of the Federal Republic of Nigeria in Budapest did not act on the request addressed to them by the prosecutor. The personal data of the person subject to the proceedings therefore still remained unclarified. For this reason, the court of first instance – on the basis of section 309 (1) and section 267 (1) k) of the Code of Criminal Procedure – terminated the proceedings.
- [5] The court of second instance modified the legal basis for terminating the proceedings to section 267 (1) j) of the Code of Criminal Procedure, but upheld the order of first instance in its substantive part. With reference to Decisions Nos. 14/2002 (III. 20.) and 33/2013

(XI. 13.) of the Constitutional Court, it concluded that in the event of re-opening the proceedings after suspension, the lawfulness of the indictment must be re-examined. In that scope, the court of first instance correctly found that the person subject to the proceedings had been identified by differing data in the different procedures initiated against him in Hungary; it could not be established which were the correct ones. His person therefore could not be identified and so the indictment did not comply with the requirements of a lawful indictment, since it must contain the name and personal data of the person subject to the proceedings in an identifiable and verifiable manner. For this reason, the indictment is not insufficient but unlawful; the lawfully submitted indictment – in the view of the court of second instance – became unlawful in the light of the gathered data.

- [6] The court of second instance also held that although the incorrect indication of the personal data of the person subject to the proceedings can be remedied in a retrial procedure, the procedure shall not be conducted against a person with dubious identity, but – as it is not remedied by the termination of a procedure in the absence of a legitimate indictment - the indictment may be submitted eventually after clarifying the personal data of the suspect.

## II.

- [7] The Budapest Public Prosecutor's Office submitted a motion for review under No. BF.6722/2015/1-I. on the basis of section 416 (1) c) of the Code of Criminal Procedure against the final decision of the court, and requested setting the order of second instance aside and ordering the court of second instance to conduct a new procedure.
- [8] Pursuant to his reasoning, that court incorrectly established in its final judgment the absence of a lawful indictment and therefore terminated the procedure by misapplying section 373 (1) (I) c) of the Code of Criminal Procedure, which constitutes a procedural error under point (II) e) of the same provision.
- [9] The prosecutor pointed out that, for the lawfulness of an indictment, it is indispensable for it to be directed towards a specific individual; pursuant to section 2 (2) of the Code of Criminal Procedure, the person subject to the proceedings shall be identified clearly and verifiably in the indictment, which, as a general rule, presupposes the presence of the information according to section 217 (3) a) of the Code of Criminal Procedure. Nevertheless, directing the indictment towards a specific individual shall not be affected by the fact that it does not contain all the personal data of the person subject to the proceedings as specified in section 117 (1) of the Code of Criminal Procedure. If the

charges are brought beyond doubt against the individual who – according to the accusation – committed the offence prescribed in the indictment, the indictment is still lawful, even if the related personal data are ambiguous and the means of clarifying them are exhausted.

- [10] According to the prosecutor, the ‘identification’ of the person subject to the proceedings in the present case is without concern, since the biometric data and photos of the person subject to the proceedings stored in official records make it possible to identify him beyond doubt and in a verifiable manner. He referred to the fact that, according to section 179 (1) of the Code of Criminal Procedure, only a person who is reasonably suspected of having committed the given offence shall be interrogated as a suspect; eventual doubts as to the personal data of that person does not render it illegitimate to enter that person in the procedure as a suspect subject to the proceedings; moreover, if the person subject to the proceedings is in detention, he shall be interrogated within 24 hours even in the event of unclarified personal data. Section 6 (2) of the Code of Criminal Procedure – according to which criminal proceedings may only be initiated against a person reasonably suspected of having committed a criminal offence – is applicable even if the personal data of the person are doubtful. From the position of the court, it would follow that no police or administrative decisions could be adopted against such a person.
- [11] In the view of the prosecutor, the person subject to the proceedings was identifiable throughout the procedure; there were no doubts concerning his name and place of birth. The prosecution brings charges against a given person for a specific offence; that person made declarations in relation to the alleged criminal offence, and supported the personal data declared during the investigation for the temporary authorisation to stay. His Hungarian address is also known; as such, his person is beyond doubt specific and identifiable. This is not affected by the fact that his personal data differ from those – also declared – in other cases. After all means of proof are exhausted, the procedure shall be conducted on the basis of the available personal data likely to be authentic and, if it proves to be the case that the person subject to the proceedings was not sentenced under his own name, this may be remedied with regard to section 408 (1) b) of the Code of Criminal Procedure.
- [12] The motion also notes that the court of second instance – when referring to the fact that the person subject to the proceedings has been sentenced in other cases under other personal data – confirmed that it was the same person, specifically identifiable; the accused in this case is not a person whose name and other personal data are identical to

that of the person subject to the proceedings in other cases, but it is the same person.

- [13] The prosecutor observed that although a review procedure cannot be initiated against the order of first instance terminating the procedure because of the failure to complete an insufficient indictment, the unidentifiable nature of some personal data shall not raise an obstacle to conducting the procedure. The enforcement of the sanctioning power of a state shall not be barred by the fact that some personal data of the person subject to the proceedings are eventually unclear; Opinion 1/2007. BK provides that missing personal data may be submitted subsequently, but it does not lay down an obligation to submit it.
- [14] Finally, the prosecutor pointed out that the person subject to the proceedings has already been sentenced - albeit under his partially differing personal data - by other courts.
- [15] The General Prosecutor's Office, in its transcript No. BF.912/2016/3, upheld the motion of the County Prosecutor's Office - referring to its appropriate reasoning- and requested the orders adopted by the courts of first and second instance to be set aside, and ordered the court of first instance to conduct a new procedure.
- [16] The General Prosecutor's Office completed the reasoning of the motion by observing that the legal interpretation of the final order is contrary to Article 28 of the Fundamental Law. According to that interpretation, no criminal procedure could be conducted against a specific and identifiable person who committed a crime (even serious crimes or crimes against human life), if the authenticity of some of his personal data is doubtful; this would be contrary to both common sense and the common good.
- [17] As to the motion, no observations were made by the person subject to the proceedings or his defence counsel.

### III.

- [18] The Kúria decided upon the motion for review in public session according to section 424 (2) of the Code of Criminal Procedure.
- [19] The prosecutor representing the General Prosecutor's Office upheld the motion for review – as completed by the transcript referred to – without changes.
- [20] The defence counsel took the view in his speech that the contested decisions appropriately pinpointed that the personal data of the person subject to the proceedings proved to be unclarifiable and therefore his person is not precisely identified. For this reason, he requested upholding the final decision.

### IV.

- [21] The motion for review is well founded for the following reasons.
- [22] The procedural error under section 373 (1) (II) e) of the Code of Criminal Procedure

constitutes a reason for review pursuant to section 416 (1) c) of the Code of Criminal Procedure; that is, when the ruling court terminated the procedure for reasons specified in section 373 (1) (I) of the Code of Criminal Procedure – such as proceeding in the absence of a lawful indictment under point (I)(c) – that were established by violating the law. This procedural error shall give rise to setting the order aside in the review procedure according to section 428 (2) of the Code of Criminal Procedure.

- [23] The Kúria states that whenever the termination of a procedure is due to the absence of lawful indictment, this decision is considered to be a final decision [therefore it can be subject to review under section 416 (1) of the Code of Criminal Procedure], but it has no effect of *res iudicata*. *Res iudicata* can be reached – obviously – through exhausted charges with regard to the sentenced offence. However, a decision was adopted on the criminal claim due to a procedural obstacle; a ruling on the merits concerning the alleged offence did not take place [1/2007. Bkv A/II/4/c)].
- [24] In the present case, the court was in breach of the law by terminating the procedure due to the absence of a lawful indictment.
- [25] Initiating criminal proceedings does not depend on whether the offender is identified or not. According to section 6 (2) of the Code of Criminal Procedure, criminal proceedings may only be initiated upon the suspicion of a criminal offence and only against the person reasonably suspected of having committed a criminal offence. The legal difference between suspicion and reasonable suspicion means that, for initiating criminal proceedings, it is sufficient to suspect a criminal offence. According to section 164 (1) of the Code of Criminal Procedure, unless otherwise provided for in this Code, criminal proceedings shall commence with an investigation, and according to (2), one aim of the investigation is to identify the offender.
- [26] However, pursuant to section 2 (1) of the Code of Criminal Procedure, the court proceeds on the basis of a lawful indictment.
- [27] According to section 2 (2) of the Code of Criminal Procedure, the indictment is legitimate if
- the person entitled to file the charges
  - initiates judicial proceedings
  - on account of a precisely circumscribed act
  - which is defined in the Criminal Code,
  - and committed by an individual who is described in the motion
  - addressed to the court.

- [28] The provisions on lawful indictment – under the existing Code – thus define the concept of indictment, but on the other hand provide for pressing charges as a procedural act. There is no doubt that the conceptual frame of indictment, the concept of charges is given even without legal provisions; nor it is doubted that pressing charges or submitting the indictment as a procedural act may be understood in the light of other provisions of the Code of Criminal Procedure. However, this does not mean that the normative requirements of a lawful indictment may be waived by other rules of the Code of Criminal Procedure.
- [29] According to section 28 (7) of the Code of Criminal Procedure, if the conditions set forth in this Code prevail, the prosecutor shall file an indictment, and according to section 216 (1) e) of the Code of Criminal Procedure, the prosecutor may file the indictment after having performed the procedural action specified in section 193 (1) (arraignment after the conclusion of the investigation). These provisions, and others concerning the detailed rules on investigation, such as section 28 (3), section 164 (1) and (2), section 191 (3) and section 217 (2) of the Code of Criminal Procedure, are however irrelevant as far as the lawfulness of the indictment is concerned.
- [30] The conditions – under section 28 (7) of the Code of Criminal Procedure – of pressing charges are logically determined by the requirements of lawful indictment pursuant to section 2 (2) of the Code of Criminal Procedure, i.e., these conditions are met by fulfilling the requirements. It is for this reason that the prosecutor orders or performs an investigation [section 28 (3) of the Code of Criminal Procedure], and that the facts are investigated [section 164 (1) and (2) of the Code of Criminal Procedure]. The other provisions serve as a guarantee, but – just like the failure to meet the deadlines under section 216 (1) and (3) of the Code of Criminal Procedure – have no influence on the lawfulness of the indictment that constitutes the basis for and limits the scope of the court proceedings [see: Statement of Reasons III/B/3 of the Decision of the Constitutional Court No. 62/2006 (XI. 23.) AB].
- [31] On the other hand, the normative conditions are conjunctive; omission of any of them renders the indictment unlawful. Hence, a basic element for the lawfulness of the indictment is that it shall be directed against a specific person, meaning that the person suspected of having committed a criminal offence shall be clearly identified; as a general rule, this presupposes the existence of the information under section 217 (3) of the Code of Criminal Procedure, that is, the knowledge of the identity of the suspect/accused [1/2007. Bkv, A/I/2/a)].

[32] This is linked to the fact that

- due to the substantive criminal law principle of responsibility based on guilt [section 4 (1) of the Criminal Code], personal guilt (intentional or negligent conduct) is a necessary characteristic of all criminal offences;
- according to section 3 (2) of the Code of Criminal Procedure, it is the exclusive right of the court to ascertain the liability of a person for committing a criminal offence and to impose punishment;
- according to section 2 (3) of the Code of Criminal Procedure, the court may only ascertain the criminal liability of the person against whom an indictment was filed;
- pursuant to section 257 (1) of the Code of Criminal Procedure, in the decision on the merits of the case, the court shall make a statement on the charges, and
- according to section 258 (2) b), the operative part of the judgment and of the final order shall contain the name and personal data of the accused.

[33] Opinion No.1/2007. BKv of the Kúria interpreted in its Point A/I/2/a the legal requirements with regard to the identification of the person in the indictment. According to this opinion, an indispensable element of its content for the indictment to be lawful is that it is directed against a specific person; an indictment against an unknown person is not lawful, since section 2 (2) of the Code of Criminal Procedure provides for the clear and verifiable identification of the person subject to the proceedings and its indication in the indictment.

[34] Thus, as a general rule (pointed out by the Kúria), it presupposes, at the same time, the existence of the information pursuant to section 217 (3) a) of the Code of Criminal Procedure; however, in the correct meaning of the law, the criteria for a “specific person” under section 2 (2) of the Code of Criminal Procedure is clearly met, if the indictment does not contain all personal data as provided for in section 117 (1) of the Code of Criminal Procedure; eventual missing data may be submitted in the court proceedings.

[35] Therefore, the notion of lawful indictment or the effects of its unlawfulness are clearly procedural matters. At the same time, according to section 416 (1) c) of the Code of Criminal Procedure, it gives a ground for review if the conviction was not based on a lawful indictment, or if the procedure was terminated due to the unlawful finding concerning the absence of a lawful indictment. In the first case, the procedure was conducted without a lawful indictment, and in the second, the procedure was terminated in spite of a lawful indictment. In the present case, this latter constitutes a ground for review.

- [36] The absence of a lawful indictment – although section 6 (3) of the Code of Criminal Procedure does not mention it – constitutes an obstacle to proceedings on the basis of section 2 (1) and section 6 (1) of the Code of Criminal Procedure, but it is a purely procedural obstacle [section 267 (1) (j) and section 332 (1) d) of the Code of Criminal Procedure]; it does not mean that the indictment is unfounded; it means that it is not suitable for court proceedings. The indictment serves, for the purposes of procedural law, to guarantee the possibility (chance) for the court to examine the merits concerning criminal liability and to make a decision, and thus serves as a basis for the substantive law assessment and for the taking of evidence.
- [37] The lawfulness or unlawfulness of the indictment – that is, whether the conditions under section 2 (2) of the Code of Criminal Procedure are met – shall therefore be examined on the basis of the content of the indictment.
- [38] If the content is so deficient that it cannot serve as a basis for the substantive law assessment, the court cannot make such an assessment. In such cases, the court has no possibility to examine the merits (take evidence) or to adopt a decision on the merits. Such an indictment, although it shows the need to convict the accused, is not suitable for the examination on the merits due to its contentual deficiency.
- [39] Concerning the lawfulness of the indictment, the question is whether it is capable of having legal effect, whether it is suitable for a court procedure, rather than whether it can be effective (from the point of view of substantive law). No doubt, the absence of a lawful indictment is involved, whenever the perpetrator of the conduct imputed is not known or the identity of the accused is not identifiable, or whenever the indictment does not detail the criminal behaviour or conduct.
- [40] It follows that charges pressed (an indictment submitted) against an unknown person is unlawful, incapable of having legal effect and not suitable to serve as the basis for the court proceedings.
- [41] In the present case the ruling court, although on the basis of section 2 (2) of the Code of Criminal Procedure and founded on an interpretation exceeding the remits of this provision, determined that the indictment was unlawful in terms of its content. The court terminated the procedure on the grounds of section 267 (1) j) of the Code of Criminal Procedure with regard to section 2 (2). However, its position is incorrect.
- [42] As is clear from the file, the indictment meets the requirements of form, and its content complies with the legal requirements concerning the determination of the specific person, subject-matter and criminal law classification. The indictment describes, relating to the

legal definition of the committed crime, the conduct of the person subject to the proceedings and the time, nature and subject-matter of the offence.

[43] No doubt, the absence of a lawful indictment is involved whenever the perpetrator of the conduct imputed is not known, or the identity of the accused is not identifiable, or is indicated as a generality (e.g. someone, those present). As it cannot guarantee the possibility to take evidence, it does not aim at the clarification of the charges, but rather at gathering them, which does not belong to the legitimate function of a court. It makes an essential difference if the identity of the person accused of having committed a crime is unknown, or if the biographical data of the accused are unknown or uncertain.

[44] According to section 4 (4) of Act XX of 1996 on the means of identification and the use of an identification code replacing the identity number, the biographical data of a citizen are the following:

- family and given name, family and given name at birth,
- place of birth,
- date of birth, and
- family and given name (at birth) of the mother.

[45] In criminal proceedings, pursuant to section 117 (1) of the Code of Criminal Procedure, and in the indictment, according to section 217 (3) a) of the Code of Criminal Procedure, further personal data of the person subject to the proceedings are:

- place of residence and place of stay,
- personal identification document number, and
- citizenship.

The suspect/accused shall be requested to state all these, and is obliged to respond to these questions even if he otherwise refuses to testify.

[46] As an element of the definition of lawful indictment, the identification of the accused is certainly provided by these identification data, however as to the lawfulness of the indictment, it means that the facts detailed in the indictment are specified relating to that person, which presupposes that the prosecutor requests that proceedings are conducted for the taking of evidence in relation to a specific – identified – person. Having this in mind, the name and personal data of the person, their existence or their dubious or mistaken nature, are not connected to the lawfulness of the indictment, and do not constitute an obstacle to taking evidence. What is relevant is that the procedure of taking of evidence shall have a specific subject and an object of proof.

[47] Everything else depends on the result of taking of evidence (and on the enforcement of

the criminal claim, or on the assessment of conduct that constitutes a criminal offence);

- in section 6 (3) a) and the second part of b) of the Code of Criminal Procedure, when the offence was not committed by the accused or it cannot be ascertained that it has been committed by the accused,
- or again, in the second part of section 408 (1) b) of the Code of Criminal Procedure, when the person subject to the proceedings was not sentenced under his own name.

[48] That means also that section 6 (3) a) and b) of the Code of Criminal Procedure do not provide for an alternative to the lawful indictment; in other words, taking of evidence cannot be set aside. Determination means that the indictment is specific to the individual, but it does not mean the specification of personal data.

[49] In the present case, the courts of first and of second instance did not conclude that the identity of the person subject to the proceedings was uncertain, that there could be another person with the same name and same date of birth, but with a different place of birth and nationality, and it could not be ascertained which one of them is the subject of the indictment. It can be derived from the two orders that the courts assumed that the person who was registered at the Office for Immigration and Citizenship as S. A. I., and sentenced by the abovementioned judgments, is the same person named in the indictment as the person subject to the proceedings; this alone confirms the determined nature of his identity. The uncertain nature of personal data – as discussed above – does not fall within the scope of the lawfulness of the indictment or its deficiency (constituting a procedural obstacle).

[50] The Kúria hence set the contested decisions aside on the grounds of section 428 (2) of the Code of Criminal Procedure, for the reason given in section 416 (1) c) and section 373 (1) (II) e) of the Code of Criminal Procedure, due to the unlawful finding of a circumstance under (I) c) of the latter provision, and ordered the court of first instance to conduct a new procedure.

[51] As to the costs of the review proceedings, the Kúria decided according to the closing part of section 429 (1) of the Code of Criminal Procedure.

## V.

[52] An appeal against the decision of the Kúria is excluded under section 3 (4) of the Code of Criminal Procedure, and review is excluded under section 416 (4) b).

Budapest, 13th December 2016

Dr. Zoltán Márki (signed), President of the Chamber, Dr. Gábor Somogyi (signed), Judge  
Rapporteur, Dr. Zoltán Varga (signed), Judge  
(Kúria Bfv. III. 999/2016.)