

Communication concerning the decision of the Curia of Hungary  
in criminal case n° Bhar.I.1857/2017

The military panel of the competent high court found the first accused, a former police sergeant and the second accused, a former police staff sergeant guilty of the crime of passive corruption of public officials [section 294, subsection (1) of Act no. C of 2012 on the Criminal Code (hereinafter referred to as the Criminal Code)], and sentenced each of them to a one year and six months imprisonment the implementation of which was suspended for a two-year long probation period, imposed a fine representing fifty days on each of them and degraded them.

The first instance judgement became final in respect of the first accused. Proceeding upon the appeal of the defence attorney of the second accused, the military panel of the regional appellate court reversed the first instance judgement and acquitted the accused persons, the acquittal came into effect in respect of the first accused on the basis of the provisions of section 349, subsection (2) of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure).

The prosecution services submitted a third-instance appeal against the second instance judgement and requested the Curia to establish the guilt of the second accused, sentence him to suspended imprisonment, impose a fine on him and degrade him.

The prosecution services were of the opinion that the second instance military panel erred in finding that, during the reliability examination, the undercover officer had no real intention of corrupting, therefore his acts had no harmful effect and had not posed any danger to society. They referred to sections 7/A-C of Act no. XXXIV of 1994 on the Police (hereinafter referred to as the Police Act) and section 12, subsection (1) of Government Decree no. 293/2010 (of 22 December 2010), and stressed that it was not disputed that, within the framework of the reliability examination, a corruption offense had been committed, the security officer had not exerted any pressure on the accused persons, hence, the criminal complaint and the establishment of criminal liability by the court of first instance had been completely lawful. They argued that the court of second instance erred in referring to Curia decision no. Bhar.I.520/2017/3 and finding that the impugned acts had not constituted any threat to society and, based on section 4 of the Criminal Code, could not be qualified as a criminal offense.

The prosecution services therefore requested the Curia to reverse the judgement of the military panel of the regional appellate court, establish the guilt of the second accused in the crime of passive corruption of public officials [section 294, subsection (1) of the Criminal Code], sentence him to suspended imprisonment, impose a fine on him and degrade him. In their viewpoint, the establishment of the criminal liability of the second accused excludes the application of the provisions of section 349, subsection (2) of the Code of Criminal Procedure in the case of the first accused, thus, the acquitting decision should be disapplied.

The Curia considered the third-instance appeal to be well-founded.

The military panel of the regional appellate court essentially based its acquitting judgement on Curia decision no. Bhar.I.520/2017/3 – that had also been published as a court decision of principle (decision no. EBH 2018.B.1) –, but failed to take into account the fact that there had been a number of significant differences between the criminal acts judged by the Curia and those adjudicated in the present case.

It was clear in the present case that the security officer had intentionally provoked the accused persons to check whether they had been involved in street corruption. The reliability examination was carried out in accordance with the plan previously authorised by the competent prosecutor. In its decision of principle no. EBH 2018.B.1, the Curia pointed out that the State was entitled and obliged to verify to what extent the members of its law enforcement bodies were suited to perform their duties. By the adoption of the Police Act's provisions on reliability examination, the legislator decided to provide, on the basis of section 24 of the Criminal Code, an exemption from criminal responsibility for security officers who carry out reliability examinations and incite other persons to commit criminal offenses. There is no legal obstacle for the launch of criminal proceedings for crimes detected within a reliability examination, moreover, section 7/C, subsection (1) of the Police Act stipulates that if, based on the findings of a reliability examination, there is a suspicion of the commission of a criminal offense, then the competent police internal affairs unit shall immediately report the impugned acts to the competent police department [the reporting of such crimes is compulsory also on the basis of section 171, subsection (2) of the Code of Criminal Procedure].

With regard to the above and pursuant to section 398, subsection (1) of the Code of Criminal Procedure, the Curia accepted the prosecution services' third-instance appeal and found the second accused guilty of the crime of passive corruption of public officials [section 294, subsection (1), subparagraph II and subsection (3), subparagraph I, point a), subpoint aa) of the Criminal Code].

Based on the case's factual background, the security officer briefly bargained with and then handed over an amount of 50 000,- HUF to the accused persons in a file pocket with the aim of getting them to breach their duties. The security officer's behaviour aroused the accused persons' suspicion, therefore they gave him the money back and told him that they would file no police report against him and they would not check the relevant register, subsequently, they sent him away and did not report the incident. The above facts, however, show that the accused persons accepted the cash bribe in exchange for breaching their duty to take official action. They also failed to comply with their duty to file a police report and check the relevant register of vehicles, in addition, they sent the security officer away from the site of the roadside check. Their acts constituted passive corruption of public officials despite the fact that they returned the bribe to the bribe-giving security officer within a short period of time, elapsed between the acceptance of the bribe and the breach of their duty. They committed the aggravated form of passive corruption, because their conduct resulted in the breach of their duty.

The first instance judgement became final in respect of the first accused on the day of its delivery. Based on section 349, subsection (2) of the Code of Criminal Procedure, the court of second instance, however, wrongfully acquitted the first accused who was originally not affected by the other accused person's appeal. Despite the regional appellate court's proper provision of information, the High Prosecution Services of Budapest omitted to submit a third-instance appeal against the acquittal of the first accused.

Having regard to the above, there is no legal ground to accept the third-instance appeal in respect of the first accused. The procedural provisions on third instance court proceedings contain no rule to follow by the court of third instance in the event that the court of second instance erred in acquitting, on the basis of section 349, subsection (2) of the Code of

Criminal Procedure, an accused person who had originally not been affected by another accused person's appeal. In the absence of such rule and by virtue of section 385 of the Code of Criminal Procedure, the provisions on second instance court proceedings are to be applied to third instance proceedings accordingly, as a consequence, section 346, subsection (4) of the Code of Criminal Procedure – which stipulates that an appeal suspends the part of the judgement to become final which is to be reviewed by the court of second instance (in the present case, by the court of third instance) owing to the appeal – should apply.

With regard to the fact that the second instance prosecution services incorrectly failed to submit an appeal to the detriment of the first accused who had been unlawfully acquitted based on section 349, subsection (2) of the Code of Criminal Procedure, the court of third instance was not entitled to review the impugned judgement in his respect. As there is no legal ground to disapply the second instance acquitting decision in the third instance court's proceedings, the acceptance of the prosecution services' appeal would result in the violation of the principle of the prohibition of *reformatio in peius*. Consequently, the Curia avoided reviewing the impugned court decision in respect of the first accused.

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Criminal Department of the Curia of Hungary