Curia Cases: Justifiable Defence

Dr. István Kónya, Vice-President of the Curia: Welcome to Curia Cases. Today we will discuss two legal issues. These focus on justifiable defence in a traffic situation and how it may be used to protect personal property. The case which raised these issues happened in the inner city of Budapest in 2012 when the driver of a car waiting at a red traffic light was attacked by thieves on a motorbike. They broke the right-side window with a drill bit and took the woman's bag containing her personal effects, jewellery, money and documents that was on the front passenger seat. The thieves then sped away from the scene. The woman who was attacked pursued them in her car and after a roughly 500 metre chase collided with the motorbike, which fell so unfortunately under a vehicle parked there that one of the attackers on the motorbike died from his injuries shortly thereafter. In the criminal proceedings at first instance and on appeal, the attacked woman was convicted of the felony of dangerous driving, and the felony and misdemeanour of vandalism. This was the final decision which the Curia overturned in its judgment of 7 November 2017 and, in the absence of a crime, all the charges against the accused, the attacked woman, were quashed. Joining me to discuss this are Dr. Johanna Farkas, senior lecturer at the Department of Criminal Psychology of the National University of Public Service, Dr. Zoltán Márki, Judge and Head of Panel at the Criminal Department of the Curia, and Dr. Tamás Lándori, a journalist covering legal affairs, who is well-acquainted with the topic. Judge, could you tell us why the Curia overturned this decision?

It was an important decision – every decision which makes a 180 degree turn is important. Someone who was previously considered guilty is acquitted by the Curia and the presumption of innocence is restored. Criminal law is the sum of rules of conduct and thus we must never lose sight of the type of conduct in question. The case under discussion had three parts or acts. The first act was that a woman waiting for a traffic light to turn green had her passenger-side window broken and her handbag with her valuables snatched. This conduct was theft. The second act, as the conduct to be adjudicated, was what happened next, the conduct of the two drivers. And the third act is the end of the incident when the two vehicles came to a halt. There a person lost his life and other damage was caused. When the Curia came to consider the case, it encountered an adjudicated matter where essentially the first act involving a person attacked in an ultimatum-like manner was not mentioned. The court at first instance took account of justified defence but said that, when the thief took the handbag, the theft finished and thereafter there was no justifiable defence situation. From that moment onwards, the court only examined the road traffic conduct of the two drivers as the basis for judgment and all but put aside the root cause. On this basis, the woman whose handbag was snatched became the first defendant and the man who was riding the motorbike with the thief as his pillion passenger became the second defendant. The fact that the case was presented in this way to the court shows the peculiarity of the matter. So how could the Curia reach a different decision? Well, because we took into account one highly pertinent thing which plays a role in every case – the cognitive

state behind the action of the perpetrator. The Curia made it clear that justifiable defence is not by nature the sole preserve of pedestrians. Justifiable defence may be applied in a situation involving vehicles in road traffic as well. In a road traffic situation when there is an assault on someone's life or property, justifiable defence is equally an optional form of conduct open to anyone under the Fundamental Law and thus the Criminal Code.

The law states that no penalty may be imposed for an action taken by a person in self-defence to prevent an unlawful attack. However, there are differences between forms of conduct aiming to prevent an unlawful attack against a person and property. The Curia also highlighted this in its judgment.

Self-defence has existed for as long as law has. It is a natural form of conduct, and its justification arises from the state understanding that it is unable to protect its citizens in all circumstances. In fact, the Curia returned to the classic extent of justifiable defence in accordance with the Fundamental Law. In the post-war period for 40 or 50 years the practice was that justifiable defence was infused with a restraint rule – "Back off" in certain situations.

I have always felt that, sometime in 1990 at the time of political transition, repudiating necessity and proportionality in justifiable defence met the necessity and proportionality test of constitutionality. However, I would say that this was accidental and may not have been a fortunate encounter. Nevertheless, it inevitably strengthened the necessity and proportionality mentality, and judges became hostage to it. There seemed to be a constitutional problem perceived in this.

The requirement of proportionality does not appear in substantive law either. The law only talks about necessity. And it was the same in the former Criminal Code of 1978. Despite this, case law unfortunately required proportionality. The new Criminal Code of 2012, however, consciously dispensed with this, and consequently the Curia rendered a uniformity decision which spelt this out. Nevertheless, it is difficult to change this attitude.

It needs to be recognised that justifiable defence is not a gentlemanly duel where both sides fight with a chosen weapon. It is precisely the opposite. Defence is justified if I am unexpectedly attacked. It follows from this that in such an instance a measured response as part of a gentlemen's agreement should not be insisted on. Thus, in this case the Curia simply took account of all the rules of conduct that are relevant to this situation and stated that here it was not only the rules concerning drivers of vehicles which applied. We also examined the risks the pursuer took when this chase happened. Was she in fact the perpetrator of a situation endangering traffic or did she control her behaviour? What is the essence of taking part in traffic? The Highway Code says "avoid endangering" but, if we look at the Vienna Convention which is behind the Highway Code, it says that you must keep your vehicle under control. This

is the rule which, in my opinion, should be expected of traffic. This woman kept her car under control. Undoubtedly, she crossed the continuous white line. Did the thieves have options? They did. What should they have done? When they saw that they were being followed, they should have thrown the stolen handbag away. After that moment, if she continued this behaviour, then the court would actually have to decide the extent to which traffic was endangered.

A distinction can be made between justifiable and unlawful conduct, and in this context those sitting on the motorbike from the first moment were on unlawful ground as opposed to the assaulted individual, who was on justifiable ground and did not depart from it because, as the judge said, she had no other option.

The court at first instance sentenced the first defendant, the woman, to 1 year 2 months in prison suspended for 2 years, which was increased to 2 years by the appeal court. The appeal court increased the penalty for the first defendant and reduced the penalty for the second defendant. This shows even to the outside world that something is not right in this situation. In the case of a crime against property, such as theft, the crime is completed when the mastery of the situation changes for the person. However, in the moment that I see that something of mine has been taken by someone who is within a reachable distance, I would act on the authority of the law by giving chase – and so would someone else giving chase in another vehicle. There is a rule in criminal law that anyone may apprehend and restrain a person who has committed a crime until the arrival of the authorities.

It is also in the rules of substantive law that a person has the right of self-defence to protect other people's property as well.

That's right.

The error of the acting courts was in deeming that the justifiable defence situation ceased when the bag was taken.

In any event there was an error at first instance and on appeal, particularly on appeal, when the court said that the crime against property finished at the moment the object was taken. At the same time, the appeal court ignored two circumstances: leaving the radius of action while the stolen article can still be recovered. One reason for this may have been that the case came before a panel that usually heard traffic matters. The whole case was treated as a traffic offence when in fact a property crime was the crux of these events.

You are absolutely right. As a matter of fact, when the prosecution began, the wrong chapter of the Criminal Code was applied. This was not a traffic case, but a property crime and the application of justifiable defence should have been examined.

Also, it seemed to me that the problem on appeal was not only that the theft was misjudged, but that there is an attitude on the part of the courts that justifiable defence is a measure of last resort, especially when a person loses their life. The courts are very reluctant to say that a series of events which ends with a person's death is lawful.

I agree with you, all the more so because the Curia also stated that in any event this act should have been judged in the same way according to the rules concerning justifiable defence under both Act number VI of 1978, that is the former Criminal Code, and the effective Criminal Code.

Obviously, psychology works with different concepts from those in law, yet these concepts meet in this case. Focusing specifically on the case and its injured party, I would like to describe roughly what might have gone through the mind of the woman. It is even possible that she cannot fully interpret this because the functions of her memory were on a level where they were unable to store information about the events that happened in those few moments and markedly affected her life. In my understanding, a car is a territory. The item of property is a personal possession which I must keep. What happens here is that when someone experiences a similar attack, they slip back a level. From then on, the higher mental functions which work on a day-to-day basis are impeded. This ancient structure is responsible for staying alive, for the vital functions. This is what functions unconsciously, or more precisely not consciously. It is not possible to exercise control over this. In a very tense situation this automatically kicks in and does what people have done for many thousands of years: when attacked, I defend myself. As a psychologist, I would say that it is obvious that she did that because this is coded in the human brain. If someone maltreats us, we either take action to attack or we escape. Thus, in different stress situations people react similarly, yet there are individual differences. Not everyone would have gone after their attacker. This is now a question of criminal psychology because the response given by people to the same stressful situation is not necessarily the same. Not everyone would have taken up the fight as she did. From this point of view, and this is my personal opinion, she can be proud of herself because she confronted the situation at a very high level. People can be classified into different types according to how they tackle a situation. There are those who can recall traumatic events that happen to them in a film-like manner. Such people are good at confronting things. I only suppose that she is good at confronting problems. I believe that it is an extremely important message for society that, if we do things for ourselves and we take responsibility for our decisions and they are correct – because the Curia's decision legitimised this –, then this is a good thing.

The woman mentioned repeatedly in court that she had gone into a state of shock, a limited state of consciousness, and this, in my view, is very important because in criminal law people frequently do something in a limited state of consciousness, for instance under the influence of alcohol or drugs. However, in those cases it is the perpetrator who induces the limited state of consciousness, while in this case it was induced by someone else. Decisions made in a limited

state of consciousness that are induced by someone else are the responsibility of that other person.

That's right. The law acknowledges this because within the scope of justifiable defence the law provides that the act of a person who exceeds the necessary degree in preventing an act out of fright or excusable emotion may not be penalised. Here, however, this did not happen. The woman was in control of her actions throughout the act – there was no rampage. She followed the attackers, but chased them for 500 metres in an area free from traffic where this collision occurred. She in no way behaved in a deliberate, deviant manner, thus cannot be held liable for negligence. It should be added that there was another legal error. Vandalism can only be committed deliberately, and obviously there was no question of this here.

It should be noted that the perpetrator always chooses the place, time, method and object of the perpetration. This is a huge advantage, thus it is like an ultimatum. The perpetrator does not say that he will attack in 5 minutes time. Criminal law is a moral-based branch of the law. Behind this there are two basic situations. One is that criminal law is the law of the will of the public and the other is that it affords the opportunity for public courage.

We should not distinguish between a crime committed against me on foot or by motorbike because, if the attacker is on a motorbike and I am not allowed to go after him by car, this sends the message to attackers that they should use a motorbike as this gives them protection. Conversely, the Curia correctly pointed out that being on a motorbike offers no protection to an attacker and I have the same right of self-defence.

As a journalist, you saw readers' opinions about this. What were their views?

Most readers held the view finally taken by the Curia, but several commented that a third person, an innocent driver, was also lightly injured in the incident. Many raised the question of "what if", say, what if a young mother with a buggy had been hit. I think that these are very important questions, but it must be stated that, should anything more serious have happened, then the woman who was in a state of shock and made a decision of some sort in a few thousandths of a second is not liable but the person who forced her into making that decision is.

When you said "what if", I am happy to say that such a thing did not happen. When she collided with the rear of the motorbike, in that moment she came to a halt, thus no situation evolved that could be considered dangerous to the outside world from a traffic viewpoint. She did not drive on the pavement or into a crowd.

The other thing that stuck in readers' minds was the question of proportionality. The approach that if someone attacks me with a knife then I can only defend myself with a knife is very much

alive in society still today. Many people contrasted the loss of a handbag to the loss of a life. But it is not about that because the woman did not intend to kill anyone. It is very important for the public to understand – and perhaps the Curia's decision will help this – that necessity should replace proportionality in the public mindset, which means that defence is permissible to the extent that is necessary to prevent the attack against me.

There is one other important thing: that it was "direct" or there was the "direct imminent risk" of attack, thus an ultimatum-like attack, and this opens the way for the defender to defend.

We have constitutional criminal law and fortunately what is regulated as a fundamental right is provided for in the statute almost verbatim. Nevertheless, erroneous court decisions may be rendered in consequence of which a person can be cast in the role of the perpetrator instead of the injured party for 5 years, and the victim of the attack sits together with the assailant in the dock. To my mind, the lesson of this case is that such an error should never happen again and the Curia should strive to rectify such errors through its decisions. I would like to ask all of you what lesson you think should be drawn from this case.

Human nature cannot be changed. It is conceivable that self-defence has been part of the law since ancient times because it is part of being human. There are unexpected situations, stress situations which cannot be prepared for and we do not know how we will react. Some people rise well to a challenge and others do not. They tend to become victims even more.

Justifiable defence is not a behavioural command but a last resort. If someone is unlawfully attacked, they can choose from 3 ways of behaving in response. The first is to give in and surrender at the scene. The second is to abandon everything and run. And the third is to confront the attacker. There is no compulsion for confrontation, but it is an option that is open to everyone as a last resort. A person who has not committed a crime either consciously or behaviourally cannot be called guilty and must be acquitted.

I would emphasise three social messages addressing three different groups. The first message is for the public saying that they should not be afraid to defend themselves. The second is for the perpetrators of crimes, who have reason to be afraid even if they attack a vulnerable person. The third is for the judges that they should not be afraid to rule that, if something is done in self-defence, it is justifiable defence.

Thank you for coming and your constructive thoughts. Goodbye.