File no. II DO 52/20

DECISION

23 September 2020

The Supreme Court in the following composition:

Supreme Court Judge Jan Majchrowski (Chairperson)

Supreme Court Judge Paweł Zubert

Supreme Court Judge Konrad Wytrykowski (Rapporteur)

having examined the case in the Disciplinary Chamber on 23 September 2020 at a meeting without the participation of the parties
brought by **W. P.,** prosecutor at the District Prosecutor's Office in O.
for resumption of proceedings ended by a valid resolution of the Supreme Court dated 19 December 2019, case file no. I DO 51/19
pursuant to Article 547(1) of the Code of Criminal Procedure in connection with Article 544(2) and (3) of the Code of Criminal Procedure,

has decided

leave the application unconsidered.

GROUNDS FOR THE DECISION

By letter of 14 January 2020, W. P., the prosecutor at the District Prosecutor's Office in O., submitted an application, addressed to the First President of the Supreme Court, for resumption of the proceedings which ended with a valid resolution of the Supreme Court Disciplinary Chamber of 19 December 2019 in the case with file no. I DO 51/19.

As the basis for resumption of the proceedings, the applicant referred to Article 540(3) of the Code of Criminal Procedure, thus, that the need for resumption stems from the decision of an international body acting under an international

agreement ratified by the Republic of Poland. Also, he pointed to the judgement of the Court of Justice of the European Union of 19 November 2019, in Joined Cases C-585/18, C-624/18 and C-625/18.

The complainant requested that the resolution of 19 December 2019 be repealed and the case be referred back to the Supreme Court in the relevant Chamber for reconsideration.

The Supreme Court considered as follows:

First of all, it should be noted that the application of W. P., the prosecutor at the District Prosecutor's Office in O., to resume the proceedings ended by the resolution of the Supreme Court Disciplinary Chamber of 19 December 2019, in the case with file no. I DO 51/19, is inadmissible. In the case law, the view that the institution of resumption of the proceedings is, as a rule, applicable to proceedings ended with a final decision adjudicating on criminal liability and not to procedural decisions, as they do not adjudicate on the subject of the proceedings (cf. decisions of the Supreme Court of 27.08.2008, IV KZ 59/08, OSNwSK 2008, item 1715; of 11.09.2008, IV KZ 62/08, OSNwSK 2008, item 1823), is well established. What is more, such a decision is a resolution of the disciplinary court allowing a prosecutor or a judge to be held criminally liable. The Supreme Court stated this expressly in its decision of 30 June 2009 (file no. SNO 16/19, Lex No. 1288799), which indicated, *The resolution of the disciplinary court passed pursuant to Article 80(2)(c) of the Common Courts System Law Act is only, which is clearly stated in that provision, the consent to hold a judge criminally liable, which does not in any case prejudge the judge's guilt, let alone the penalty. This resolution, by allowing the prosecutor to instigate proceedings* in personam*, does not deprive the person against whom it was passed of any procedural rights vested in any entity in such a procedural situation. Such a person remains innocent under the law; in particular, he or she has the right to actively defend himself or herself against the charges against him or her by submitting motions for evidence or at least the right to complain to the court against the prosecutor's procedural decisions, in the cases indicated in the Code of Criminal Procedure. Therefore, there are no prerequisites to consider that the resolution*

passed by the disciplinary court in the proceedings regulated in Article 80(2)(c) of the Common Courts System Law Act is a judgement referred to in Article 126 of the Common Courts System Law Act, and consequently, there is a possibility, provided for by law, to resume such proceedings. This thesis, although it concerns the issue of allowing a judge to be held criminally liable, it nevertheless applies by analogy to the possibility of prosecutors being held criminally liable. The regulations in this regard are, in fact, the same for the two professions. Hence, the application to resume the proceedings for consent to hold the prosecutor criminally liable was inadmissible and, as such, was left unconsidered.

It should be noted that this application also did not deserve to be taken into account on substance. The applicant's argumentation, however, required the Supreme Court to briefly refer to the problem referred to.

Resumption of criminal proceedings is an extraordinary means of challenging a final decision ending criminal proceedings. The main objective of resuming the proceedings is to offer the possibility of eliminating miscarriage of justice which has an impact on the final judgement and which was, to a large extent, independent of the court.

Pursuant to Article 540(3) of the Code of Criminal Procedure, proceedings are resumed for the benefit of the accused, if such need arises from a decision of an international body acting under an international agreement ratified by the Republic of Poland.

In his letter of 14 January 2020, the applicant referred to such a premise of resumption. However, he did not explain what he saw as a link between the judgement of the Court of Justice of the European Union of 19 November 2019, in Joined Cases C-585/18, C-624/18 and C-625/18, and the proceedings in which the resolution in case I DO 51/19 was adopted. It should be noted, however, that the said CJEU judgement concerned only the ruling of the Disciplinary Chamber in cases concerning the retirement of Supreme Court judges and did not in any way concern the ruling on the consent to hold prosecutors criminally liable or to detain them. If only for this reason, the application for resumption is completely misguided, and the basis on which it has been established has no legal effect.

It should be recalled that, in accordance with the established case law, the proceedings referred to in the provision in question should be resumed as a result of a finding by the European Court of Human Rights that a legal provision in conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms was applied to the applicant *in concreto* or that the Convention had been breached, despite the compatibility of the relevant provisions of Polish law with the Convention (cf. Decision of the Supreme Court of 24 November 2005, III KO 10/05, LEX No. 164382).

It should be added that the judgement of the Court of Justice of the European Union of 19 November 2019, referred to by W.P., the complainant, in Joined Cases C-585/18, C-624/18 and C-625/18, cannot be regarded as binding on the grounds of the Polish legal system, since in all proceedings before the Supreme Court Chamber of Labour and Social Security in which questions for a preliminary ruling were submitted to the CJEU (III PO 7/18, a question for a preliminary ruling registered by the CJEU with file no. C-585/18; III PO 8/18, a question for a preliminary ruling registered by the CJEU with file no. C-624/18; and III PO 9/18, a question for a preliminary ruling registered by the CJEU with file no. C-625/18), activities were carried out in the compositions contrary to legal regulations.

Pursuant to Article 79 of the Act of 8 December 2017 on the Supreme Court (hereinafter: the SCA), labour and social security law cases concerning Supreme Court judges and cases concerning the retirement of a Supreme Court judge are examined in the first instance, the Supreme Court composed of one Disciplinary Chamber judge, while in the second instance the Supreme Court composed of three Disciplinary Chamber judges.

Each of the decisions formulating questions for a preliminary ruling was made by a panel of three judges. There is no justification for omitting to apply Article 79 of the SCA, as quoted, and the proceedings in a composition contrary to the provisions of law in a case conducted pursuant to the Code of Civil Procedure lead to absolute invalidity of the proceedings, in accordance with Article 379 of the Code of Civil Procedure. It should be stressed that it is not necessary to prove the causal link between the procedurally faulty act causing the invalidity of the proceedings and the

outcome of the case (as in T. Erenski, Commentary to Article 379 of the Code of Civil Procedure, point 2 [In:] T. Ereciński (ed.), J. Gudowski, K. Weitz, Code of Civil Procedure. Commentary. Volume III. Examination proceedings, edition V, WK 2016). Moreover, the established case law of the Supreme Court assumes that proceedings are invalid whenever the composition of the adjudicating court was contrary to the provisions of law (e.g. Supreme Court of 18 December 1968, III CZP 119/68, OSPiKA 1970, opinion 1, item 4; similarly T. Ereciński, Commentary to Article 379 of the Civil Code, point 9 [In:] T. Ereciński (ed.), J. Gudowski, K. Weitz, Code of Civil Procedure. Commentary. Volume III. Examination proceedings, edition V, WK 2016).

This circumstance was also indicated in a dissenting opinion drawn up in cases III PO 8/18 and III PO 9/18.

In addition, the composition of the Supreme Court Labour and Social Security Chamber ruled in the above-mentioned cases under conditions limiting the court's independence and impartiality. Before the same Supreme Court Chamber, a case concerning J. I.'s appeal against a resolution of the National Court Register (III PO 4/18) was conducted in parallel to cases in which questions were asked to the CJEU for a preliminary ruling. Supreme Court Judge J. I. is the President of the Supreme Court Chamber of Labour and Social Insurance and the official superior of all judges adjudicating in that Chamber. The case concerning Judge J. I. is of the same type as the cases in which the CJEU passed its judgement on 19.11.2019. What is more, the case concerning the appeal of President J. I. against the resolution of the National Court Register (III Po 4/18) was postponed until the CJEU passed its ruling. In this situation, taking into account the standards of judicial independence and impartiality developed in the case law of the ECHR and the CJEU, there can be no question at all of a court within the meaning of Article 45(1) of the Constitution, since the compositions of the Supreme Court Chamber of Labour and Social Security adjudicate on their superior's court disputes.

The case law of the CJEU has formulated the principle that the admissibility of hearing questions for a preliminary ruling depends on whether the referring authority meets the criteria of an independent court. In its judgement of 19 September 2006, C-506/04, the Court formulated the boundary conditions for independence, among

other things by linking it to, *the concept of impartiality and equal distance to the parties to the dispute and their interests in relation to its subject matter*. Those conditions are intended to, *remove any reasonable doubt on the part of the legal entities as to the independence of that authority from external factors and its neutrality in relation to the interests at issue*. The need for objectivity (ruling of 6 July 2000 in Case C-407/98 Abrahamsson and Anderson [2000] ECR I-5539, paragraph 32) and the absence of any interest in the concrete settlement of the dispute other than the strict application of the law (similarly rulings of 30 March 1993 in Case C-24/92 Corbiau [1993] ECR I-1277, paragraph 15, and of 30 May 2002 in Case C516/99 Schmid [2002] ECR I-4573, paragraph 36) are emphasised.

In the context of these observations, there is no doubt that the Supreme Court Chamber of Labour and Social Security, while also dealing with other one-type cases, one of which was instigated by the President of that Chamber, Supreme Court Judge J. I., is not an independent court within the meaning of the above mentioned CJEU case law. There is no question of the court's impartiality towards the parties to the dispute, and any external observer will easily see the court's lack of neutrality with regard to the interests in dispute.

To sum up, the Supreme Court, in view of these obvious flaws in the filling of court compositions adjudicating in the cases, file no. III PO 7/18 (a question for a preliminary ruling registered by the CJEU with file no. C-585/18), III PO 8/18 (a question for a preliminary ruling registered by the CJEU with file no. C-624/18), III PO 9/18 (a question for a preliminary ruling registered by the CJEU with file no. C-625/18), resulting in the invalidity of the proceedings, considers that since the invalidity concerns the entire proceedings, a preliminary ruling of the CJEU which was obtained in such invalid proceedings cannot be valid either.

It should be stressed that there can be no question of acting in good faith in the composition of the Supreme Court or Court of Justice of the European Union. The President of the Disciplinary Chamber pointed out the flagrant violation of the law and the threat of sanctioning the absolute invalidity of the proceedings, also in the letters to the CJEU President and to the case files of 17 October 2018 (D.Prez. 15/18, http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=4842 92d9931-

9fa5-4b04-8516-5c932ff6bdf2&ListName=Wydarzenia&rok=2018) and of 7 November 2018 (D.Prez. 21/18, http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=486292d991-9fa5-4b04-85165c932ff6bdf2&ListNa me=Wydarzenia&rok=2018); therefore, there is nothing to explain the procedural steps taken by the CJEU and subsequently by the Supreme Court in invalid proceedings. Nevertheless, even the lack of bad faith on the part of those bodies would not be relevant for the assessment of the effects of a flagrant violation of the law, because, as already mentioned above and as it results from the established line of jurisprudence of the Polish Supreme Court and the doctrine, the sanction of nullity that may be applicable is absolute.

Moreover, the complainant prosecutor failed to notice that the CJEU judgement of 19 November 2019 was passed before the resolution of 19 December 2019 in case I DO 51/19, so it cannot be claimed that this is a new circumstance, unknown to the court at the time of the ruling.

In view of the above, it should have been ruled as above.

Pursuant to Article 547(1) of the Code of Criminal Procedure, no complaint can be lodged against this decision.

Justification of a dissenting opinion by Supreme Court Judge Paweł Zubert to the decision of the Supreme Court of 23 September 2020 in the case with file no. II DO 52/20.

First of all, I would like to point out that I share the majority opinion expressed in the conclusion of the decision of 23 September 2020 on the necessity to leave unconsidered the application of Prosecutor W. P. to resume the proceedings which ended with a valid resolution of the Supreme Court Disciplinary Chamber of 19 December 2019 in the case with file no. I DO 51/19.

However, I do not share some of the views presented in the justification for this decision.

First of all, in my opinion, the part of the justification which begins with the words, *It should be added that the judgement,* (page 3 of the justification, line 14 from the bottom), ending with the words, *the sanction of nullity that may be applicable is absolute in this case* (page 6 of the justification, lines 3 and 4 from the top), is superfluous with regard to the decision. The views expressed in this excerpt of the justification are more than controversial and too far-reaching, and the remainder of the justification is sufficient to explain the reasons for the decision.

The issue which has given rise to my dissent is the view expressed in the justification of 23 September 2020, file no. II DO 52/20, from which it follows that, ***the judgment of the Court of Justice of the European Union of 19 November 2019, in Joined Cases C-585/18, C-624/18 and C-625/18, cannot be regarded as binding on the grounds of the Polish legal system*****.** The reason for this view, in the opinion of the majority, is the fact that the referring court ruled in a composition contrary to the provisions of law (Article 379(4) of the Code of Criminal Procedure). As a consequence, this led to the expression of the Supreme Court's views in the case with file no. II DO 52/20 that, ***since the invalidity concerns the entire proceedings, a preliminary ruling of the CJEU which was obtained in such invalid proceedings cannot be valid either*****.**

In my view, the categorical nullity statements set out above are more than too far-reaching, since the rules of civil procedure do not provide for nullity by law alone.

Referring to this issue, I would also like to point out that invalidity is taken into account *ex officio*, but only within the limits of an appeal (see, in particular, Manowska, Małgorzata (ed.), Code of Civil Procedure. Commentary. Volume I. Published: LEX/el. 2020; Jakubecki, Andrzej (ed.), Code of Civil Procedure. Commentary to selected provisions of the 2019 amendment. Published: LEX/el. 2019) which must take place in order to have the effect provided for in Article 379 of the Code of Civil Procedure. In other words, the ruling must be appealed against and then the appeal court should declare it invalid if, within the limits of the appeal, it

reveals one of the prerequisites indicated in Article 379 of the Civil Procedure Code. If no appeal is lodged, the ruling is valid and binding on the parties and the court that made it, as well as on other courts and other state bodies and public administration bodies, and in cases provided for in the Act, also on other persons (Article 365(1)), unless it is overturned after an appropriate procedure that leads to it being challenged (see Article 365(1)). Piaskowska, Olga Maria (ed.), Code of Civil Procedure. Proceedings. Commentary. Published: WKP 2020, Lex/el. 2020).

In view of the scientific views as presented, I believe that the considerations concerning the invalidity of the proceedings in which the questions for a preliminary ruling were formulated are only of a theoretical nature, because both the preliminary ruling and the decision ending the proceedings in the case have not been challenged. As a result, there was no possibility of annulment, and consequently the comments relating to the invalidity of these proceedings are only postulatory.

Moreover, as completely unfounded, I assess the application included in the grounds for the decision that the judgement of the CJEU of 19 November 2019 cannot be regarded as binding in the Polish legal system. In my opinion, this statement is completely devoid of normative basis, and the justification does not provide extended arguments in favour of the accuracy of such far-reaching consequences.

Incidentally, I would like to point out that the justification does not in any way refer to the legal principle expressed in the resolution of the Supreme Court of 8 January 2020, ref. I NOZP 3/19, which results in the obligation of the Supreme Court to apply the criteria set out in the judgement of the CJEU of 19 November 2019, which leads to the obvious conclusion that this judgement is binding in the Polish legal system.

For the reasons presented synthetically above, I believe it was necessary to express the dissenting opinion.