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GLOSS to the decision of the Supreme Court of 28 March, 2017, III KK 472/16, lex/el.

Abstract

The verdict of the Supreme Court was devoted to determining the land traffic criterion for the perpetrator of a road offence. The Supreme Court noted that the indicated concept should not be associated solely with the formal status of a given road, but with the criteria of its availability and actual use. This issue is extremely important for practice. Hence, the judgment comprises an analysis of the notion of land traffic from both juridical and dogmatic sides. The Author criticised the decision in question, as well as the previous sentences passed by the Supreme Court. He pointed to the introduction of an analogy in the area of criminal responsibility, the blanket character of the concept of accessibility and real use of the road, the reversal of the burden of proof in such matters. He postulated the unification of the criteria for places where land traffic takes place to all roads, with an exception of private property and areas clearly excluded from traffic. He argued that in practice, from the subjective point of view perpetrator's guilt and awareness do not undergo an analysis.

Keywords: public road, traffic zone, residential area, land traffic, safety rules, road accessibility, road use

"The criterion of land traffic defined in Art. 178a § 1 of the Criminal Code should be connected not only with the formal status of a particular road or place, but also with the actual availability to and use for vehicle traffic and other participants. Accordingly, the mere statement that an incident occurred on the forest road does not preclude the possibility of attributing the act to Art. 178 § 1 of the Criminal Code."

The sentence, to which the hereby Gloss refers, has given rise to critical remarks, although in the last paragraph it contains a conditional clause by the use of the term "does not exclude", which explicitly means that the matter of determining the criteria for land traffic belongs to the judicial authorities and requires specific factual findings. When examining the decision of the Supreme Court, the facts of the case ought to be briefly stated:

T. R. was found guilty of committing the offence under Art. 178a § 1 and 4 of the Criminal Code and Art. 64 §1 of the Criminal Code, which consisted in driving a motorcycle on a forest road, being in the state of insobriety, for which he was sentenced to imprisonment and lifelong ban on driving motor vehicles. The appeal of the defendant's attorney was rejected and his cassation was considered to be obviously unfounded, although the Supreme Court acknowledged that the plea of misinterpretation of "land traffic" required looking into, especially since the interpretation of that notion had caused disputes both in judicature and in the doctrine.

The Supreme Court's decision based the ruling, among others, on the judgement of this Court of June 24, 2013, V KK 435/15, Lex No. 1331400, and the Supreme Court decision of October 29, 2016, V KK 258/16, Lex No. 2141239. The Court considered that the criterion of "land traffic" should be associated not only with the formal status of a particular road or place, but with availability and actual use of it for the movement of vehicles and other participants.

The view expressed by the Supreme Court, as to which, as it has already been indicated, one may have many reservations, especially of dogmatic nature, which is extremely important for the sake of practice. It should be noted that the subject matter of the offences under Arts. 173, 177, 178, 178a §1 or 178b, and even Art. 179, 180 and 180a of the Criminal Code consist in infringing the safety rules applicable

in land, water or air traffic. The regulations of the said traffic were codified in various normative acts, and in relation to road traffic, in the Act of 20 June 1997: the Road Traffic Law (Journal of Laws 2017, item 1280, as amended). The places where the codified safety rules apply were been identified, and practice has formed the manner of assessing the non-regulated rules of conduct. (K. Pawelec, 2017).

The Supreme Court's ruling directly refers to its previous decisions. For example, in the judgment of 5 December, 1995, WR 186/95, OSNKW 1996, Nr. 3-4, pos. 19, it can be read: "Road traffic offence can be committed not only on the public road but also outside of it – where traffic is actually taking place and therefore potentially threatens the safety of the traffic"[1].

It might be said that the ruling voted resolution is identical to the one quoted. It should be noted, however, that acts characterised in Chapter XXI of the Criminal Code directly or indirectly refer to the safety regulations applicable to public roads, traffic zones, residential and non-public areas (Article 1 of the Road Traffic Law). Both the pending decision and the cited sentence are equivalent to acquiescence to the use of analogy in criminal law, which the current system does not provide (Pawelec, 2016). One must not overlook the fact that as the development of motorization increases the network of connections external to public roads, traffic and residential zones. The difference between the requirements imposed on the, so-called, "internal roads" that do not fall into these categories, and others, such as speed, priority, stopping, parking, using sound signals, and traffic regulations, etc. and on public roads blurs. The authorities of the road administration tolerate this state of affairs, although such activities are carried out of a private initiative and without any state control. There are many examples of such actions, such as setting up road signs in private areas. Persons who violate certain directives expressed by those road signs cannot be held liable for the offence, as the vast majority of the Code of Petty Offences restricts their place of entry into public roads, traffic and residential zones. Others refer directly or indirectly to the provisions of the Road Traffic Law. The same applies to offences against road safety. The content of Art. 98 of the Code of Petty offences concerning behaviours outside public roads diverges from them. Analysis of Arts. 86 and 98 of the Code of Criminal Offences allows concluding that the former refers exclusively to public roads, traffic and residential zones, although we do not find the term in its text nor does it refer to the Road Traffic Law. This, however, is directly related to the distinctness of the legal regulation expressed in Art. 98 of the Code of Petty Offences. A. Bachrach (1980) rightfully wrote that "it is impossible to question the road signs and traffic signals installed privately, upon order, outside the control of the communications departments of the administration, just as it is difficult to understand why on internal roads (outside public roads, traffic and residential zones – Author's note) the legal provisions established for public roads cannot be applied. This kind of action might be approved from an administrative and preventive point of view."

However, if we look at the issue from the penal or repressive point of view, we see that in the sphere of liability an unacceptable analogy was introduced. Articles 177 and 178 § 1 of the Criminal Code derive their content from regulations outside the scope of criminal law, but they are applied with reference to laws not applicable outside public roads, traffic or residential zones, where the principle of avoiding threats to safety is in force (here the analogy is found) which has not been observed by the rulings of the Supreme Court[2]. The decision in question thus appeals to vehicles and pedestrians states of movement, similar to those taking place on public roads, traffic and residential zones.

The complexity and ambiguity of the discussed issue is also confirmed by the subsequent rulings of the Supreme Court, which has not evoked an interest in the doctrine. And so, the incidents that occurred in certain locations were treated as road accidents. It was noted that since the vehicle and pedestrian traffic was taking place on a railroad ramp, a factory road, a railway track periodically excluded from public transport or even a forest path linking three towns or villages, we were dealing with traffic offences[3].

Returning to the content of the discussed decision, especially to its motivating part, the following fragment is worth quoting: "The criterion of land traffic should not be related to the formal status of a particular road or place but to its availability and actual use for traffic of vehicles and other participants. "That is the essence of the problem. One can agree that there are safety rules in force on a "forest road", so that the offender may be held liable for the breach. However,

[1] See: approving Gloss: Stefański, 1996, p. 121; Guzik, 1997, p. 102.

[2] See: Supreme Court Decree of 14 September, 1972, VI KZP 33/72, OSNKW 1972, No. 12, item 187; Supreme Court Decree of 28 February, 1975., V KZP 2/74, OSNKW 1975, Nos. 3-4, items 3-4, item 33; Supreme Court Decision of 20 August, 1976, VII KZP 11/76, OSNPG 1976, No. 9, item 74.

[3] See: Supreme Court Decree of 25 April, 1979, V KRN 72/79, OSNPG 1979, No. 10, item 143; Supreme Court Decree of 21 September 1999, V KRN 208/79, unpublished; Supreme Court Sentence of 15 August, 1979, V KRN 164/79, unpublished.

this requires gathering of convincing evidence that, in such a place, the actual movement of vehicles, as well as of other participants, actually occurs, with respective intensity comparable to traffic on the public roads, traffic or residential zones. The criterion for determining the above is among the imprecise concepts dependent on assessment by the state authorities. Undoubtedly, they cannot be based on short-term observation whose results have been documented in a brief official note. They are required to have a form accepted in legal proceedings, i.e. of obtaining testimonies or relevant documents.

Another question that should be answered is significant from the subjective point of view. Perpetrator's guilt ought to be proven, i.e. it should be demonstrated that he/she was aware of moving on such a road where the rules indicated in Art. 177 § 1 or § 2 of the Criminal Code applied. By observing the practice, it can be found that such arrangements are not, in principle, made. It is therefore prudent to introduce the element of risk to the perpetrator in the sphere of criminal liability, which means reversing the direction of the burden of proof and eliminating the principle of interpreting of doubts in favour (Art. 5 § 2 of the Code of Criminal Proceedings).

In the conclusion of the hereby considerations it is worth to postulate *de lege ferenda* that all the offences characterised in Chapter XXI of the Criminal proceedings Code and offences from Chapter XI of the Code of Petty Offences may have been committed in every road, with explicit exclusion of designated private or non-traffic areas. This legislative operation, which requires an amendment of Art. 1 of the Road Traffic Law will eliminate the application of analogy in criminal law, and clarify the criteria for the applicable safety rules in specific places. Hence, this eliminates the blanket character of the regulation in force.

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