

The rules for imposing a financial penalty for the offence of destruction of a historical monument

Judgement of the Regional Court in Toruń of 29 March 2018, IX Ka 688/17

“However, the claim of glaring incommensurability of the financial penalty imposed on the defendant turned out to be justified. Taking into account the nature and the circumstances in which the criminal offence was committed, the degree of guilt and social harmfulness of the Act, and the defendant’s financial capacities, the Court of Appeal concluded that the amount of the day fine unit (50 PLN) imposed by the court *meriti* will not ensure adequate execution of all the goals of punishment, in particular considerations pertaining to specific and general prevention. The punishment imposed could not be deemed onerous, which, after all, is one of its goals, because punishment should also have a deterrent effect and discourage the perpetrator from breaching the legal order again.

(...)

Both the educational objectives concerning the defendant as well as the needs related to the shaping of the society’s legal awareness made it necessary – in the view of the Court of Appeal – to condemn the defendant to a hefty fine. Therefore it was necessary to increase the amount of each day fine unit to 400 PLN. This amount is adequate to the defendant’s financial capacities – in other words: 200 instalments of financial penalty (which the court of first instance rightfully deemed to be a justified punishment for the offence committed by the defendant) will constitute an adequate sanction for a person as wealthy as the defendant, provided that the above-specified amount of each day fine unit is accepted. The amount of fine at the rate hitherto in force would not meet the preventive objectives of this punishment.

(...)

The fine imposed by the court *meriti* amounting to 10,000 PLN was so low that it actually made the defendant’s lawlessness profitable because if the defendant had to meet the requirements of the historic monument inspector, he would have to spend a much larger sum; therefore, failure to increase the level of the burden in this fine would encourage similar lawless behaviour in the future, both as regards the defendant and any potential imitators”.

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Commentary

In the case which is the object of the present commentary, by the judgment of the Regional Court, the defendant was found guilty of "having destroyed, between March and September 2016, in the locality of O., within the area of the palace and park complex, a stable building together with the partly preserved equipment for horse stalls, which were listed in the register of historical monuments by the decision of the Voivodship Conservation Officer of Historical Buildings and Monuments in T. of 3 March 1997 (...), through the execution of construction work which consisted in the demolition of the roof, the ceiling, walls, and foundations of the building, and the subsequent reconstruction, without prior notification of the work to the relevant institution and without the authorisation of the (...) Conservation Officer of Historical Buildings and Monuments in T.", i.e. committing the criminal offence covered by art. 108 para. 1 of the Act of 23 July 2003 on the protection and preservation of monuments (consolidated text: *Journal of Laws* of 2021, item 710) in conjunction with art. 90 of the Act of 7 July 1994, Construction law (consolidated text: *Journal of Laws* of 2020, item 1333, with amendments) in connection with art. 11 para. 2 of the Act of 6 June 1997 – Criminal Code (consolidated text: *Journal of Laws* of 2020, item 1444), and on the basis of art. 108 para. 1 of the Act of 2003 on the protection and preservation of monuments in connection with art. 11 para. 3 of the Criminal Code, on the application of art. 37a of the Criminal Code the defendant was sentenced a fine of 200 daily instalments, whereby a single day fine unit amounted to 50 PLN.¹

Having considered the appeal, the Regional Court in Toruń changed the contested sentence in such a way that the specified amount of each day fine unit was increased to the amount of 400 PLN. In its justification of the sentence, the Regional Court pointed out the following: "However, the claim of the glaring incommensurability of the financial penalty imposed turned out to be justified. Taking into account the nature and the circumstances in which the criminal offence was committed, the degree of guilt and social harmfulness of the Act, and the defendant's financial capacities, the Court of Appeal concluded that the amount of the day fine unit (50 PLN) imposed by the court *meriti* will not ensure adequate execution of all the goals of punishment, in particular those considerations pertaining to specific and general prevention. The punishment imposed could not be deemed onerous, which, after all, is one of its goals,

¹ The sentence of the Regional Court in Toruń of 29 March 2018, IX Ka 688/17, Portal Orzeczeń Sądów Powszechnych, <http://orzeczenia.ms.gov.pl/search/advanced> (accessed: 20.03.2021).

because punishment should also have a deterrent effect and discourage the perpetrator from breaching the legal order again".² The Court further argues that "both the educational objectives concerning the defendant as well as the needs related to the shaping of the society's legal awareness made it necessary – in the view of the Court of Appeal – to condemn the defendant to a hefty fine. Therefore it was necessary to increase the amount of each day fine unit to 400 PLN. This amount is adequate to the defendant's financial capacities – in other words: 200 instalments of financial penalty (which the court of first instance rightfully deemed to be a justified punishment for the offence committed by the defendant) will constitute an adequate burden for a person as wealthy as the defendant only provided that the above-specified amount of each day fine unit is accepted. The amount of the fine at the rate hitherto in force would not meet the preventive objectives of this punishment".³

It is impossible to agree with the view expressed in the sentence and with the level of the fine imposed by the court. According to art. 33 para. 1 of the Criminal Code a fine is imposed in day fine units, by specifying the number of instalments and the amount of a single day fine unit; unless the Act states otherwise, the lowest number of instalments amounts to 10, while the highest number amounts to 540. At the same time art. 33 para. 3 of the Criminal Code indicates that while specifying the day fine unit the court takes into account the perpetrator's income, his or her personal and family situation, property relations, and earning potential; a day fine unit cannot be lower than 10 PLN, nor can it exceed 2,000 PLN.

Therefore, a financial punishment is imposed in the instalment system in two stages. In the first stage, the number of day fine units is specified taking into account the directives mentioned in the articles 53 and 54 of the Criminal Code (i.e. the number of day fine units reflects the degree of lawlessness of the criminal offence ascribed to the perpetrator); whereas in the second stage, the amount of a single day fine unit is specified taking into account the recommendations pointed out in art. 33 para. 3 of the Criminal Code reflecting the perpetrator's financial status (i.e. the amount of a single day fine unit reflects the perpetrator's financial status).⁴

² *Ibidem.*

³ *Ibidem.*

⁴ See: the sentence of the Court of Appeal in Wrocław of 3 December 2014, II AKa 358/14, Lex; K. Buchała [in:] K. Buchała, A. Zoll, *Kodeks karny. Część ogólna. Komentarz do art. 1–116 kodeksu karnego*, Kraków 1998, pp. 313–314; M. Melezini [in:] *System Prawa Karnego*, vol. 6, *Kary i inne środki reakcji prawnokarnej*, ed. M. Melezini, Warszawa 2016, p. 122; *idem*, "System wymiaru grzywny w nowym Kodeksie karnym", *Monitor Prawniczy* 1998, no. 3, p. 90; J. Majewski, "O niektórych wątpliwościach związanych z wykładnią przepisów dotyczących orzekania grzywny w nowym kodeksie karnym", *Palestra* 1998, no. 3–4, p. 7; *idem* [in:] *Kodeks karny. Część ogólna. Komentarz*, vol. 1, *Komentarz do art. 1–116 k.k.*, ed. A. Zoll, Kraków 2004, pp. 613–615; Z. Sienkiewicz, "Z rozważań o celach kary grzywny i dyrektywach jej wymiaru" [in:] *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Tomasza Kaczmarka*, ed. J. Giezek, Kraków 2006, pp. 575–576; A. Marek, *Kodeks karny. Komentarz*, Warszawa 2005, p. 184; V. Konarska-Wrzosek [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Warszawa 2016, pp. 208–209; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warszawa 1998, p. 90; J. Wojciechowska [in:] *Kodeks karny. Część ogólna. Komentarz*, ed. G. Rejman, Warszawa 1999, p. 847.

Jarosław Majewski is correct in his view that “the basic idea behind the instalment model (...) is a diligent and clear division of the process of imposing a fine into two stages: the stage of specifying the number of day fine units and the stage of specifying the amount of a single day fine unit. The objectives of the procedure in those two stages are diametrically different. In the first one, deciding on the severity of the sanction in a strict sense is the key issue, whereas the second stage involves a purely technical procedure which aims at ensuring that the given fine, consisting of a specific number of day fine units, is, in fact, equally severe for all perpetrators upon whom it is imposed, regardless of the differences in their financial status”.⁵ In addition, Majewski emphasizes that art. 33 para. 3 of the Criminal Code offers a closed catalogue of circumstances which are intended to delimit the amount of the day fine unit.⁶

In the case which is the object of the present commentary, the Regional Court in Toruń was wrong to indicate that such circumstances as the nature and circumstances of the criminal offence committed, the degree of guilt, social harmfulness, and considerations pertaining to specific and general prevention make it impossible for the amount of the day fine unit (50 PLN) to ensure adequate execution of all the goals of punishment, and that, thus, they warrant an increase in each day fine unit to the amount of 400 PLN. Existing case law was right to establish that “the measure of the severity of the fine is the number, not the amount of day fine units. Hence, specifying the day fine unit imposed by the court is not a procedure aimed at executing directly a penal function, but its objective is to establish the real fiscal burden of that sanction for the individual perpetrator, in accordance with the directives included in art. 33 para. 3 of the Criminal Code”.⁷ On the other hand, there were circumstances, indicated also by the Regional Court in Toruń,⁸ that justified the increase of the day fine unit, such as the defendant’s financial capacities – the defendant was an entrepreneur and as a result of his business activity earned a high income; his financial situation was above average.

Therefore, bearing in mind the facts of the case at hand, and taking into account the directives concerning the degree of sanction, as specified in art. 53 paras. 1 and 2 of the Criminal Code, the Regional Court should have changed the contested sentence by increasing the number of day fine units and – taking into account the content of art. 33 para. 3 of the Criminal Code in connection with the defendant’s financial capacities – by also increasing the amount of the day fine unit rather than merely increasing the amount of each day fine unit.

It is evident that the ratio of the number of day fine units and the specified amount of a single day fine unit will yield the amount of the fine that the convicted person is

⁵ J. Majewski [in:] *Kodeks karny. Część ogólna. Komentarz*, vol. 1, *Komentarz do art. 1–116 k.k....*, pp. 611–612.

⁶ *Ibidem*, p. 616.

⁷ The sentence of the Supreme Court of 16 April 2015, V KK 407/14, Baza Orzeczeń Sądu Najwyższego, http://www.sn.pl/orzecznictwo/SitePages/Baza_orzecen.aspx (accessed: 13.03.2021).

⁸ See: The sentence of the District Court in Toruń of 29 March 2018, IX Ka 688/17.

supposed to pay.⁹ Nevertheless, it is not possible to treat the amount of the fine to be paid by the convicted person (calculated by multiplying the number of day fine units by the specified amount of a single day fine unit) as the basis for assessing whether a punishment is glaringly incommensurable to the criminal offence committed by the defendant. It runs counter to the principle of imposing the fine in two stages, which is established in the Criminal Code. Therefore, it is not possible, either, to agree with the standpoint of the Regional Court in Toruń that “the fine decreed by the court *meriti* amounting to 10,000 PLN was so low that it actually made the defendant’s lawlessness profitable because if the defendant had to meet the requirements of the historic monument inspector, he would have to spend a much larger sum; therefore, failure to increase the level of the burden of this fine would encourage similar lawless behaviour in the future, both as regards the defendant and his potential imitators.”¹⁰

Finally, it should be emphasized that “the circumstance which constitutes an indication of committing an act which is forbidden by penal act and has already been taken into account by the lawmaker in the process of outlining the boundaries of legal threat (penal sanction) cannot be treated as an additional circumstance influencing the amount of punishment within this very sanction, unless it is subject to degrees as regards its intensity or quality.”¹¹ Therefore, while justifying the imposition of a more severe sentence, it is necessary to indicate that, for instance, the destruction involved a unique historical monument, having an exceptional historical, artistic, and scientific value etc.

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⁹ The sentence of the Court of Appeal in Wrocław of 3 December 2014, II Aka 358/14.

¹⁰ The sentence of the Regional Court in Toruń of 29 March 2018, IX Ka 688/17.

¹¹ The sentence of the Court of Appeal in Wrocław of 9 September 2009, II Aka 228/09, Lex.

Summary

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The rules for imposing a financial penalty for the offence of destruction of a historical monument

The author does not agree with the standpoint of the Regional Court in Toruń that circumstances such as the nature and the circumstances in which a criminal offence was committed, the degree of guilt and social harmfulness of an act, as well as considerations pertaining to specific and general prevention warrant an increase in each daily rate of financial penalty imposed on the perpetrator of the destruction of a historical monument. It has been emphasized that the criminal code imposes a financial penalty according to the rate system in two stages. In the first stage, the number of day fine units is specified (taking into account the directives mentioned in articles 53 and 54 of the Criminal Code); in the second stage, the amount of a single day fine unit is specified (taking into account the recommendations pointed out in art. 33 para. 3 of the Criminal Code reflecting the perpetrator's financial status). Therefore, the circumstances indicated by the Regional Court in Toruń warranted the increase of the number of daily instalments, whereas the perpetrator's financial status warranted an increase in the day fine unit.

Keywords: criminal code, financial penalty, historical monument

Streszczenie

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Zasady wymiaru kary grzywny za przestępstwo zniszczenia zabytku

Autor nie zgadza się ze stanowiskiem Sądu Okręgowego w Toruniu, że takie uwarunkowania, jak charakter i okoliczności popełnienia przestępstwa, stopień winy i społecznej szkodliwości czynu oraz względy prewencji szczególnej i ogólnej przemawiają za podwyższeniem wysokości każdej stawki dziennej grzywny orzeczonej wobec sprawcy przestępstwa zniszczenia zabytku. Podkreślono, że w kodeksie karnym kara grzywny orzekana jest w systemie stawkowym dwu-etapowo. Na pierwszym etapie następuje określenie liczby stawek dziennych (przy uwzględnieniu dyrektyw wymienionych w art. 53 i 54 k.k.); natomiast na drugim następuje ustalenie wysokości jednej stawki (mając na uwadze wskazania określone w art. 33 § 3 k.k., obrazujące sytuację majątkową sprawcy). Zatem okoliczności wskazane przez Sąd Okręgowy w Toruniu przemawiały za podwyższeniem liczby stawek dziennych. Natomiast za podwyższeniem wysokości stawki dziennej grzywny przemawiała sytuacja materialna oskarżonego.

Słowa kluczowe: kodeks karny, kara grzywny, zabytek