*Igor Zgoliński*[1]

https://orcid.org/0000-0002-5097-6170

# Critical commentary to the judgment of Court of Appeal in Wrocław dated 9 October 2012 on the case of the number II AKa 276/12, OAW 2014/2/16, (KZS 2014 No. 4, item 55, Prok. I Pr. Gazette No. 11-12, item 19)

**Glosa krytyczna do wyroku SA we Wrocławiu z dnia 9 października 2012 r. w sprawie o sygnaturze II AKa 276/12, OAW 2014/2/16, (KZS 2014 nr 4, poz. 55, Prok. i Pr. 2014 nr 11-12, poz. 19)**

DOI: 10.5604/01.3001.0013.0379

The Court of Appeal in Wrocław in its judgment of 9 October 2012, II AKa 276/12, presented the view that the provision of art. 41a § 2 CC does not apply in the case of conviction of the perpetrator for the act of art. 200 § 1 CC, if the victim of the crime at the time of adjudication is over 15 years of age.

The decision was made in the light of the following facts. In its verdict the Regional Court found the accused guilty for that he, in the period from April 19, 2011 to May 30, 2011 in S.Z., in short intervals and in the execution of a predetermined intention, sexually interrelated with a minor below 15 years Małgorzata B. i.e. act from art. 200 § 1 CC in conjunction with art. 12 CC and was sentenced to 3 years of imprisonment. An appeal against the above ruling, to the detriment of the accused in the part of the ruling on criminal measures (or more precisely, the lack of such), was brought by the prosecutor. The public prosecutor accused the perpetrator of the offense of the substantive law, i.e. from art. 41a § 2 and § 4 CC, for the reason of not applying a punitive measure to the accused in the form of a ban on contacting the victim and approaching her at a certain distance, in a situation where a conviction for an act specified in art. 200 § 1 CC in conj. with art. 12 CC, which is an offense against sexual freedom to the detriment of a minor under 15 years of age, and imposing a penalty of deprivation of liberty without conditional suspension of its execution

[1] Prof. KPSW, dr hab. Igor Zgoliński – Kujawy and Pomorze University in Bydgoszcz, Institute of Law.

obliged the court to adjudicate the indicated criminal measure.

Justifying its position, the Court of Appeal in Wrocław raised, inter alia, that "the language interpretation of art. 41a § 2 of the Code of Criminal Proceeding leaves no doubt that the conviction of a defendant for an act qualified under art. 200 § 1 CC in conjunction with art. 12 CC obliges the District Court "to adjudicate any of the measures referred to in the article indicated". It seems that only due to an obvious typing mistake the fact of incorrectly establishing a legal act arose, from which the Court of Appeal has established the obligation to pass a criminal measure. In fact, this concerns the norms of substantive law laid down in the Criminal Code, and not the norms of a procedural nature, which is contained in the Code of Criminal Procedure. With this minor reservation the Court's of Appeal view can be divided. However, it is vain to seek for a further, in-depth ruling in the justification of the judgment, in the scope of the reasons for referring to literal interpretation. This is to explain, in dubious situations, the content of the expressions used in the act on the basis of their lexical meaning. It concerns, therefore, the role in which a particular word is used in colloquial language[2]. It seems, however, that the clear wording of art. 41a § 2 CC does not require the use of a linguistic explanation for its interpretation on the discussed level. Clara sunt non interpretanda...

In the further part of the justification, the Court of Appeal synthetically reported the introduction of the provision of art. 41 CC to the legal order, and referring probably to a logical interpretation, it concluded that in order to decide on the prohibition of contact between the accused and the victim and the question of approaching them, decisive importance was to analyze the signs of the type of act referred to in art. 200 § 1 CC, taking into account the ratio legis of this provision. According to the Court of Appeal in Wrocław, the fact that the accused was assigned an offense of art. 200 § 1 CC does not mean at the same time an automatic recognition that the court was obliged to order one of the penal measures provided for in art. 41a § 2 CC without considering the nature of the deed for which the perpetrator was convicted. One should not lose sight of the circumstance, that the decision to prohibit contact between the accused and the victim and the prohibition of approaching them, which - as a rule - have the task of protecting that person, also affect their rights and freedoms. In the present case, sexual contact between the accused and the victim was by mutual consent. Because the victim was under 15 during the period of sexual intercourse, the behavior of the accused was considered a crime. According to the Court of Appeal, the situation will be shaped in a different way when the aggrieved party reaches the age of 15. The decision to prohibit the accused from contacting and approaching the accused would then limit the civic rights of the aggrieved party. Art. 31 par. 3 of the Constitution shows that restrictions on the use of constitutional freedoms and rights by an individual can only occur if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the rights and freedoms of other people. Such a situation did not occur. As

[2] R. A. Stefański, *Wykładnia językowa* [Language interpretation], [in:] A. Marek (ed.), System Prawa Karnego, Źródła prawa karnego [Criminal Law System, Sources of Criminal Law], vol. 2, Warsaw 2011, p. 497.

a consequence, this line of reasoning led the Court of Appeal to the conclusion that the provision of art. 41a § 2 CC does not apply in the case of conviction of the perpetrator for the act of art. 200 § 1 CC, if the victim of crime at the time of adjudication is over 15 years of age.

It is impossible to agree with the view presented above. It is not only an example of an expanding interpretation, which is essentially unacceptable in criminal law, but also stands in sharp contrast to the actual wording of the Act. It seems that the Court of Appeal has focused too much on the rights of the aggrieved party, which undoubtedly violated the norms of substantive law and made *reductio ad absurdum*. It is obvious that an adult has the right to the free and unlimited use of his or her rights and freedoms, including the selection of sexual partners. The other thing is that you cannot say the same about yourself, who is 15 years old, but has not yet become an adult. However, I will not mention the violation of the right and freedom of the aggrieved party who is 15 (and is not of legal age) and their right to choose a sexual partner. In the present case, these facts are not strictly substantial, although the position of the court seems highly polemical in this respect. Regardless of the above circumstances, however, the rights of other persons may in no case violate the prohibitions resulting from the rules of substantive criminal law and those charging convicted persons. In this context, there can be no discussion of restricting liberties and freedoms, because we are talking here about two different levels of legal protection. Otherwise, with a reference to such a view as expressed in the gloss, for example, persons visiting convicts in prison could request visits at any time with them and without supervision of the prison service. Any type of restrictions in the field of visits with prisoners or detainees violate their rights, freedoms or liberties because they restrict their contact (including of sexual character) with other people. This view, applied in a wider scope (which probably would quickly be accepted by the society), can easily lead to legal anarchy. One can imagine a situation that, when referring to the legal rights and civil liberties, those who are not deprived of them can break the criminal-law prohibition in art. 141 CC and undertake military duties in a foreign army without the consent of the competent authority. Similar examples could be multiplied here countlessly. The Court of Appeal in Wrocław lost sight of the preventive nature of the criminal measure and of the fact that the prohibition is imposed not on the victim, but on the accused. In any case, the victim, as deprived of this type of prohibition, may approach the accused. In this way, there is no breach of the imposed criminal measure, and thus for the accused to carry out the crime from art. 244 CC. Just to clarify, the offense of art. 244 CC can only be committed intentionally, that is when acting with direct or potential intent[3]. The argument that this type of prohibition restricts her sexual freedom is therefore completely wrong. The accused then did not break the ban. After all, we talk about an intentional violation of the content of the court's judgment by the convict himself and not by the victim. This measure does not interfere with her rights and freedoms, and it should not be, somehow "forcefully", conjugated. Going back

[3] I. Zgoliński, *Komentarz do art. 244 k.k.* [Commentary to art. 244 CC], [in] V. Konarska-Wrzosek, Kodeks karny. Komentarz [The Criminal Code. Commentary], Lex/el. 2018, see also decision of the Supreme Court of 5 February 2009, II KK 254/08, LEX No. 486550.

to the preventive nature of this criminal measure, one must also articulate that the criminal law has, the affirmation and motivation function, among others. It consists in the fact that through the norms of duty (and therefore prohibitions and orders) it sets certain standards of behavior and existence of the individual in society, showing which goods are protected and to what extent. Criminal sanction is aimed at forming the motivation to comply with legal norms[4]. If not declaring the prohibition on contacting and approaching the victim in a situation where it is mandatory, this function is undoubtedly significantly weakened.

Breach of the logical interpretation by the Court of Appeal in Wroclaw can also easily be derived from the *lege non distinquente nec nostrum distinquere* - what the law does not distinguish, should not be distinguished. The provision does not indicate, however, that it wouldn't apply in such situations, hence, it cannot be effectively limited by way of a court decision. In this judgment, the Court of Appeal in Wroclaw de facto groundlessly usurped the role of the legislator, although in fact it should only be "the mouth of the act". In this case, the court has weakened the guarantee function of criminal law by this ruling.

The second level on which the Court of Appeal in Wrocław justified its position is the "general principles of punishment", which are based on art. 56 CC also belong to criminal measures. Regarding the sphere of the punishment dimension itself, one should point out a few paradoxes resulting from the judgment. It should be noted here that the penal measure in the form of a prohibition on getting closer and contacting the victim, referred to in art. 39 point 2b CC in accordance with art. 43 CC, is ruled for the period from one to 15 years. It is adjudged in years. By adopting the position of the Court of Appeal in Wrocław, it is impossible to pass this criminal measure in the upper limit of the threat. Thus, there is - once again - an unjustified restriction of the act. In the case of adjudication within the limits of the lower limit of the statutory threat of this measure, an equally interesting situation would arise because a court, intending to adjudicate a prohibition on getting close or contact, would be entitled to such a decision only if on the date of the judgment the aggrieved party did not yet turn 14. Otherwise, the court would already breach the principle enforced by the Court of Appeal in Wrocław that the criminal measure is not adjudicated if the victim of the crime has turned 15. Furthermore, a penalty of deprivation of liberty would have a great impact on the size of a criminal, and the question of the validity of the ruling, in which the prohibition under art. 41a § 2 CC is adjudicated, would play an equally important role. It would significantly impede this, if not made it impossible to pass a criminal measure. It is worth noting that according to the content of art. 43 § 2 CC the course of the imposed criminal measure starts as soon as the decision has become final. The date of implementation is undoubtedly difficult to forecast when issuing a judgment, especially in the necessary reference to the victim's age. In turn, according to the content of art. 43 § 2a CC, the period for which the prohibitions were ruled does not run during the penal measure of imprisonment, even if

[4] A. Marek, *Funkcje prawa karnego* [Functions of criminal law], [in:] A. Marek (ed.), System Prawa Karnego, Zagadnienia ogólne [Criminal Law System, General issues], vol. 1, Warsaw 2010, p. 14.

adjudicated for another offense[5]. As can be seen, the effects of the questioned opinion would be far-reaching, because the court would have to perform truly backbreaking activities in the course of the enforcement proceedings to enforce the penal measure mentioned. If, at the time of the prohibition, the accused would serve another prison sentence, it would automatically threaten to exceed the permissible penalty and its unlawful (?!) extension at the time of reaching 15 years of age by the victim.

When analyzing the finding, it is impossible to avoid the thought, that it has been given hastily, without a deeper analysis of the consequences that it entails. Reaching for the instrument of logical interpretation, in the absence of the considering the regulation in art. 41a § 2 CC, the correlation with other provisions of substantive law and, finally, the context of the case facts, undoubtedly made the bench go astray in its judgment. Taking into account all the above-mentioned arguments, it should not raise doubts that Gadecki B.[6] is right, concluding that the obligation to adjudicate a criminal measure, as specified in art. 41a § 2 CC, arises always, i.e. regardless of the age of the victim at the time of adjudication of the measure and regardless of whether the measure will also apply after the victim has reached 15 or 18 years of age, provided that the conditions justifying the obligation of this kind of judgment are met. Without referring to the views expressed in the doctrine or any legal interpretation, such an obligation can be inferred from the very wording of the provision of art. 41a § 2 CC[7].

## Bibliography


- Gadecki A., *Glosa do wyroku s.apel. z dnia 9 października 2012 r.* [Gloss to the Court's of Appeal judgment. of October 9, 2012], II AKa 276/12, "GSP-Prz. Orz." 2016, vol. 1.
- Marek A., *Funkcje prawa karnego* [Functions of criminal law], [in:] Marek A. (ed.), System Prawa Karnego, Zagadnienia ogólne [Criminal Law System, General issues], vol. 1, Warsaw 2010.
- Stefański R.A., *Wykładnia językowa* [Language interpretation], [in:] Marek A., (ed.) System Prawa Karnego, Źródła prawa karnego [Criminal Law System, Sources of Criminal Law], vol. 2, Warsaw 2011.
- Zgoliński I., *Komentarz do art. 244 k.k.* [Commentary to art. 244 CC], [in:] Konarska-Wrzosek V., Kodeks karny. Komentarz [The Criminal Code. Commentary], Lex/el. 2018, see also decision of the Supreme Court of 5 February 2009, II KK 254/08, LEX No. 486550.


[5] On the date of the decision of the Court of Appeal in Wrocław, this issue was normalized in the same way in the provision of art. 43 § 2 CC.

[6] B. Gadecki, *Glosa do wyroku s.apel. z dnia 9 października 2012 r. [*Gloss to the Court's of Appeal judgment. of October 9, 2012], II AKa 276/12, "GSP-Prz.Orz." 2016, vol. 1, p. 61-65.

[7] Both in the current legal status and on the date of the judgment of the Court of Appeal in Wrocław.