

REVIEW OF COURT DECISIONS BASED ON THE JURY'S DECISION IN THE SUPERVISORY INSTANCE

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The subject. The article discusses the procedural peculiarities and grounds for the supervisory (cassation) review of court decisions based on the jury's decision.

The purpose of the article is to assess the effectiveness of the rules on the grounds for review of courts' decisions based on jury's verdict.

The description of methodology. The author uses formal-legal and comparative-legal methods as well as legal interpretation of the text of Russian Criminal Procedure Code and Russian Supreme Court's decisions. The decisions of Russian Constitutional Court and court statistics are also analyzed.

The main results and scope of their application. In the introduction the author substantiates the relevance of the proposed research by creating a separate cassation and appeal courts of General jurisdiction, a significant extension of jurisdiction of the Russian court with participation of jurors in the district courts as of 1 June 2018, that will result in a manifold increase in the cases before the courts with participation of jurors in the first instance, and a manifold increase in appeals and representations on the decision of the jury. In the second section of the work the characteristic of legal institution of possible turn to the worst for the condemned situation in cassation and Supervisory instances is given, the analysis is widely known of the resolution of the constitutional court of the Russian Federation of May 11, 2005. The third section of the work considers the grounds for possible review of the decision of the courts with the participation of jurors in the order of Art. 401.6 of the Code of Criminal Procedure and grounds proposed by the Plenum of the RF Supreme Court in the Decree of January 28, 2014. The fourth section of the work is devoted to the characteristics of the rules and procedure of Supervisory proceedings, specifies the types of appealed decisions, powers and limits of the rights of the Presidium of the Russian armed forces, provides examples of review of judicial decisions with the participation of juries that have entered into force.

Conclusions. The author suggests to replace the grounds for cancellation or amendment of acquittal decisions of courts based on the jury's decision with the grounds of cassation review of jury trials that are included in art. 664 and 665 of the Code of Criminal Procedure of the Republic of Kazakhstan due to their clearer legal definition and lack of evaluative concepts.

1. Introduction.

The year 2018 was quite interesting for the Russian legal system, the legal community and all other interested parties due to regular (albeit to a certain extent formal – declarative) attempts by the Russian legislator and the Russian law enforcement Agency to improve the system of Russian justice in the direction of real democratization through, first, the entry into force on June 1, 2018. Federal law No. 190-FZ of 23 June 2016, according to which it is proposed to expand the jurisdiction of the court with the participation of jurors by introducing such in the district (inter-district, city) courts of the Russian Federation for consideration by a panel of six jurors and one professional judge of criminal cases of premeditated murder without aggravating and mitigating circumstances, the intentional infliction of serious harm to health, resulting in the death of the victim by negligence and four particularly serious crimes (art. 277, 295, 317, 357 of the criminal code), where it is impossible to impose the death penalty or life imprisonment (for example, against women) [1, p. 43]. Second, through the adoption and publication of law No. 1-FKZ of 29 July 2018, in connection with which are introduced (no later than October 1, 2019.) separate cassation and appeal courts of General jurisdiction to consider cassation and appeals against decisions of lower courts. Third, through the adoption and publication of the Federal law of October 3, 2018, according to which changes and additions caused by creation of separate cassation and appellate (courts) instances and the corresponding changes of the order of submission and consideration of appeal and cassation and Supervisory complaints and representations are made to the criminal procedure code of the Russian Federation.

Being a staunch supporter of the jury, I cannot but welcome such an expansion in the use of such a court, but, for the sake of objectivity, I must say that such an expansion was preceded in recent years by a significant reduction in the jurisdiction of the jury, which, unfortunately, shows the disinterest of the modern Russian state in the jury trial and the reluctance to keep it later in this form (I think, in the foreseeable future, the Russian legislator will come to a joint decision by jurors and professional judges), which is not and cannot be a jury trial in the classical sense of this institution). Such formal improvements are caused by the latent (or intentional) desire to influence (show a positive attitude of the judicial-investigative system) public opinion, public mood, public sympathy, which is generally on the side of the jury. Moreover, there is no significant expediency in the consideration of jury cases of crimes under part 1 of article 105 and part 4 of article 111 of the criminal code, as the vast majority of those (in the opinion of the author – lawyer) is a conflict on domestic grounds after drinking alcohol together with the presence of a convincing evidence base against the defendant.

The absence of separate (from the point of view of organizational structure) cassation and appeal courts to appeal decisions of lower courts is hardly one of the main shortcomings of the Russian criminal proceedings or its main problem. According To the Chairman of the constitutional court, for example, such systemic shortcomings are violation of reasonable terms of legal proceedings at the stage of investigation, excessive detention, ineffectiveness of consideration of complaints by the court in accordance with Art. 125 code of criminal procedure, violation of the victim's right to access to justice and the protection of his interests, abuse of criminal prosecution bodies of the secret preliminary investigation, poor regulation of the return of the case to the Prosecutor according to article 237 code of criminal procedure, the absence of the institution of investigative judges, the restriction of the right of counsel at the pretrial stages of the process. The extremely interesting and informative article by V. D. Zorkin also notes a noticeable increase in complaints challenging the constitutionality of the norms establishing a new order of appeal, cassation and Supervisory proceedings [2].

Similar to other deficiencies, according to the author, you can add and the lack of protection of the right parallel investigations, and overriding everything decisive importance of the recognition (even partial) of the fault, and the virtual absence of acquittals in the court of first instance and appeals courts (except the jury), and the prevalence of a special order of the court decision in full recognition of his guilt, which is almost always beneficial to the justice, but not always useful (necessary) to the defendant.

The allocation of cassation and courts of appeal (courts) to separate levels of the judicial system of the Russian Federation in view of their greater independence does not mean their isolation from the General judicial system, which exists, operates according to certain rules (formal and informal), and the main unofficial rule of our courts, according to the author, is the justification of the defendant at the very least, when you do not or cannot be justified when the criminal case has become *громадный* public outcry. Moreover, the allocation of cassation and appeal instances from the composition, for example. courts of a constituent entity of the Federation in separate and more independent nine cassation courts and five appellate courts mean their considerable distance from the place of residence or location of persons filing cassation or appeal, if they do not reside or are not in the place of permanent residence of one of the nine cassation or five appellate courts of General jurisdiction. Part 3 of articles 23.1 and 23.9 of chapters 2.1 and 2.2 of the Federal law "on the judicial system of the Russian Federation" (ed. on July 29, 2018.) offers for the solution of such problems of the remoteness of the possibility of formation of permanent judicial presence (separate divisions of the court) outside the place of permanent residence of cassation and appellate court of General jurisdiction.

The start of the jury trial in the district courts will entail both a multiple increase in the first instance cases with the participation of jurors, and a significant increase in appeals and submissions to the decisions of these courts, as well as a significant number of cassation complaints and submissions (after October 1, 2019). these will be submitted to the appropriate court of cassation) for decisions of district courts with the participation of jurors who have entered into legal force. In terms of their procedural content, cassation and supervision are almost identical legal concepts (institutions), this work focuses on the Supervisory review of decisions of courts with the participation of jurors, mainly due to the lack of today's practice of appealing decisions of district courts with the participation of juries in cassation.

2. The possibility of turning to the worst in the court of Supervisory (cassation) instance

In the statistical data on the work of courts in Supervisory proceedings there is practically no allocation of data (or similar is fragmentary) on the cancellation or change of decisions of courts with the participation of jurors, because the text of this work provides data of a General nature. According to the Judicial Department of the Supreme Court of the Russian Federation, in the first half of 2018, the Presidium of the Supreme Court of the Russian Federation considered 2,923 Supervisory complaints and representations in criminal cases. In the supervision order the hearing of the Presidium of the Supreme Court of the Russian Federation has considered 119 criminal cases (including cases of military jurisdiction) in respect of persons. 138 are Satisfied with complaints and representations in respect of 135. In respect of 5 persons cancelled the guilty verdict and direct the case for a new trial. Changed sentences against 6 prisoners against 2 convicts changed qualification with commutation and 4 – punishment mitigated without changing the qualifications. In respect of 21 persons, the appellate rulings with the referral of the case to a new appeal have been cancelled. Total satisfied complaints and submissions (including simultaneously with the abolition of the sentence, the decision, the decision of the first instance) canceled and changed the appellate determination in respect of 97 persons.

Supervisory proceedings, as well as cassation, in the current version of the code of criminal procedure, have the task of checking the legality of judicial acts (including those adopted with the participation of jurors) that have entered into force and are subject to execution [3-5]. It is considered that in cassation and Supervisory instances about one third of the judicial mistakes which are not eliminated in the appeal are revealed and corrected. Another form of review of decisions of both ordinary courts and decisions of courts with the participation of jurors, which entered into legal force, is the revision of the decision on the criminal case on new and newly discovered circumstances in the order of Chapter 49 of the code of criminal procedure (which is rare in respect of a jury trial, but still found in judicial practice) [6-7].

In accordance with part 2 of article 401.2 and part 3 of article 412.1 of the criminal procedure code of the Russian Federation before October 1, 2019. decisions of courts of the subject of the Federation (we mean Supreme courts of the republics, regional regional courts, courts of the cities of Federal value, courts of the Autonomous region and Autonomous districts of the Russian Federation) with participation of jurors in the order of cassation (as it was mentioned, currently, this kind of Supervisory proceedings) may be appealed to The judicial Board for criminal cases of the Supreme Court of the Russian Federation (if they were not the subject of consideration by the Supreme Court of the Russian Federation on appeal) or appealed to the Presidium of the Russian armed forces (if they were the subject of consideration by the Supreme Since the beginning of the activities of cassation and appeal courts of General jurisdiction, the Presidium of the armed forces of the Russian Federation examines a Supervisory appeal and submission to judicial decision of the Appeals chamber of the Supreme court of the Russian Federation, cassation definition of SK in criminal cases and military cases the armed forces, the decree of the Presidium of the RF armed forces (article 412.1.part 3 of the code of criminal procedure as amended by the Federal law of October 3, 2018. No. 361-FZ).

Quite critically assessing both the current judicial system of Russia and the legal framework of such activity, it should be noted as a positive characteristic of the Russian justice (from the point of view of the current lawyer) the presence of a time period when the art. 405 code of criminal procedure (as amended on December 18, 2001) it completely prohibited the Supervisory review of the conviction, as well as the determination and decision of the court in connection with the need to apply the criminal law on a more serious crime, because of the leniency of the punishment or on other grounds entailing a deterioration of the situation of the convicted person, as well as the revision of the acquittal or the determination or decision of the court on the termination of the criminal case were not allowed, in this regard, such judicial acts and were excluded from the scope of Supervisory review.

Of course, such a ban had both positive and negative aspects, and its most significant drawback in fact was the impossibility of correcting a gross judicial error, even in favor of the convicted person. In General, the author has a negative attitude to the possibility of worsening the situation of the convict in the Supervisory and cassation proceedings, but the judicial examples he observes still do not allow to speak about the unambiguity and indisputability of such an attitude. So, for example, in the case of the famous plastic surgeon, Tapia (the author – lawyer participated on the side of the victims in the Supervisory proceedings), accused of long-term and multiple sexual crimes against their children were acquitted in the first two instances, despite the practical lack of exculpatory evidence and a lot of procedural violations by

the defense in the court of first instance, to which the court of appeal has not been paid any attention. The attempt of Supervisory review was expected to be unsuccessful, although the Supervisory complaint indicated many different procedural violations, in which the Presidium of the Russian armed forces in the vast majority of cases overturns the decision of the jury.

In a well-known criminal case, the former judge of the Primorsky district court of St. Petersburg Kazakov, who was accused of premeditated murder with aggravating circumstances of his ex-wife for reasons of unwillingness to share the disputed property (garage, car, shares in the apartment) worth about 6 million rubles. (in 2006 prices) also, there were acquittals of the first two courts, again, despite the predominant amount of accusatory evidence and procedural violations on the part of the defense, the deprivation of the prosecution to appeal such in Supervisory proceedings is unlikely to be consistent with the principle of justice, adversarial and equality of the parties.

The presence of such a version of article 405 of the code of criminal procedure has probably caused the need for appropriate judicial decisions and the Constitutional Court of the Russian Federation. So, in July 2002 The constitutional court of the Russian Federation adopted Resolution No. 13-P " on the case of checking the constitutionality of certain provisions of articles 342, 371, 379, 380 and 382 of the criminal procedure code of the RSFSR...", which, in particular, determined that the revision of the acquittal entered into force is possible in the order of supervision only in the presence of fundamental (significant, fundamental) violations that influenced the outcome of the case, as provided for in paragraph 2 of article 4 of Protocol No. 7 (as amended by Protocol No. 11) of the Convention for the protection of human rights and fundamental freedoms of 1950. (as amended in 1998).

In May 2005. a well-known Decision of the constitutional Court of the Russian Federation "on the case of checking the constitutionality of article 405 of the code of criminal procedure in connection with the request of the Kurgan regional court, complaints of the Commissioner for human rights in the Russian Federation, production and technical cooperative "Assistance", limited liability company "Karelia" and a number of citizens", on the analysis of which we will allow ourselves to dwell a little more.

In the text of this Decision, in particular, it is stated that the right to appeal a sentence or other court decision to a higher court is also possessed by the prosecution (victim and Prosecutor). therefore, the legislator in order to create a mechanism for the effective restoration of violated rights provided in the CPC of the Russian Federation procedures for review of illegal decisions that have not entered into force, and as an additional guarantee of the legality and validity of court decisions - proceedings to review entered into force sentences, rulings and judgments of the court, namely the proceedings in the Supervisory instance and the resumption of criminal proceedings in view of new and newly discovered circumstances. Judicial error, the elimination of which is associated with the deterioration of the convicted (acquitted), as follows from the code of criminal procedure of the Russian Federation, cannot serve as a basis for the revision of the court decision in the order of supervision, since it is expressly prohibited to turn to the worst, nor the basis for the resumption of production due to new or newly discovered circumstances, as newly discovered circumstances can be recognized only criminal actions of participants in criminal proceedings, established by the court verdict, and new circumstances. - only such circumstances, which are not known to the court at the time of the court decision, which eliminate the criminality and punishability of the act. Correction of a miscarriage of justice, if it leads to a deterioration of the situation of the convict, in the current system of criminal procedure regulation is impossible-neither in the revision of the court decision in the order of supervision, nor in the order of the resumption of criminal proceedings in view of new or newly discovered circumstances (this is not quite so, if you pay attention to part 3 of article 414 of the code of criminal procedure - author's note). The review of enforceable sentences, rulings and judgments and the re-examination of the case in terms of its content and purpose are an additional means of ensuring the justice of judicial decisions, which, with reserve value, is used when all the usual remedies are not applicable or have been exhausted.

Supervisory proceedings in criminal cases are designed to ensure (as rightly emphasized by the constitutional court) the correction of judicial errors by reviewing the entered into force sentences, definitions and decisions, in order to - based on the principles of justice, proportionality and legal security - to guarantee the effective protection of constitutional values, especially the rights and freedoms of man and citizen. Within the meaning of the provisions of the Constitution of the Russian Federation and international legal acts, an arbitrary change in the legal regime for a person in respect of whom a final sentence is imposed is impossible-a turn to the worst for a convicted (acquitted) when reviewing a

sentence that has entered into legal force, as a General rule, is unacceptable. However, the Convention for the protection of human rights and fundamental freedoms of 1950. establishing that the right not to be tried again or to be re-punished does not preclude the re-examination of the case in accordance with the law and the criminal procedure rules of the state concerned, if there is evidence of new or newly discovered circumstances or in the course of the previous proceedings, a fundamental, fundamental violation that affected the outcome of the case, makes a distinction between re-charging or re-prosecuting the same crime and reopening the case in exceptional cases. From these legal positions it follows that the requirements of legal certainty and stability are not absolute and do not prevent the resumption of proceedings in connection with the emergence of new or newly discovered circumstances or the detection of significant violations that were made at the previous stages of the process and led to the wrong resolution of the case.

The constitutional Court of Russia reminded that the legislator, providing - in compliance with the criteria and conditions enshrined in them-procedural mechanisms and procedures for the review and abolition of the sentence that has entered into legal force, is obliged to formulate their unconditional grounds (our italics) in order to exclude the arbitrary application of the law and taking into account the fact that we are talking about the revision of such a decision of the judiciary, which has already entered into legal force and which finally resolved the issues of guilt of the person and the punishment. At the same time, exceptions to the General rule prohibiting turning to the worst are permissible only as a last resort, when the failure to correct a judicial error would distort the very essence of justice, the meaning of the sentence as an act of justice, destroying the necessary balance of constitutionally protected values, including the rights and legitimate interests of convicts and victims. The inability to review a final judgement in connection with a substantial (fundamental) breach that had affected the outcome of the case during the previous proceedings would mean that - contrary to the principle of justice and the constitutional guarantees based on it for the protection of the dignity of the individual and the judicial protection of human rights and freedoms - such a erroneous judgement cannot be corrected. The court of Supervisory instance shall not be entitled to annul an acquittal that has entered into legal force with reference to its groundlessness, unless a violation that meets the criterion of fundamental nature has been committed in the course of the previous proceedings. Accordingly, the Prosecutor or the victim is not entitled to raise the issue of review of the sentence with reference to the groundlessness that does not fall under this criterion before the court of Supervisory instance. In court, the prosecution, in addition to the Prosecutor, who, in order to ensure the rule of law, the protection of human and civil rights and freedoms, as well as the legally protected interests of society and the state, carries out criminal prosecution by maintaining the prosecution on behalf of the state and challenging judicial acts contrary to the law in accordance with the existing powers, represents, in particular, the victim - a person who has suffered physical, property, moral harm by a crime and who has his own interests in criminal proceedings. The necessary guarantee of judicial protection and fair trial is an equally real opportunity for the parties to bring to the attention of the court their position on all aspects of the case, since only under this condition the right to judicial protection, which must be fair, full and effective, is realized in the court session.

It is also clear that the interests of the victim in criminal proceedings are to a large extent linked to the resolution of issues raised before the court by the Prosecutor who supports the prosecution on behalf of the state in cases of public and private-public prosecution (on the evidence of the charge, its scope, application of criminal law and sentencing). Providing the victim with the opportunity to defend in criminal proceedings their rights and interests protected by law, and the Prosecutor - to exercise the powers granted to him, the legislator gave them the right on an equal basis with the defense - the accused, convicted, justified, their defenders and legal representatives - to challenge the entered into force verdict, determination, court order, thereby initiating their review. Such review, according to the constitutional court of the Russian Federation, should be carried out taking into account the constitutional provisions on the implementation of legal proceedings on the basis of adversarial and equal rights of the parties. The right of the victim and his representative, as well as the Prosecutor to request a review of the court decision that has entered into force on the grounds that worsen the situation of the convicted (acquitted), is reduced only to the formal opportunity to apply to the court of Supervisory instance with the relevant application and does not necessarily imply its satisfaction. This is due to the fact that, unlike the current rule, according to which the review of the sentence on the grounds entailing deterioration of the convicted (acquitted) is not allowed, unless the complaint of the victim or the submission of the Prosecutor is brought

on this basis, an absolute prohibition on such review is established for the Supervisory proceedings, including in cases where in the previous trial there was a significant violation leading to the wrong resolution of the case. Such a judicial error caused by a significant violation is not provided as a basis for the resumption of criminal proceedings in view of new or newly discovered circumstances provided for in article 413 of the code of criminal procedure. On the other hand, a convicted (acquitted) person is not restricted in his / her ability to request a review of a court decision on grounds that improve his / her situation, and such an application is mandatory for the consideration and resolution of the merits of the arguments given in it by the court of Supervisory instance. The similar party of protection is put in the preferential position in relation to the party of charge (to the victim, his representative and the Prosecutor) that is not consistent with the constitutional instructions on implementation of legal proceedings on the basis of competitiveness and equality of the parties, leads to violation of balance of constitutionally protected values, including the rights and legitimate interests of condemned, on the one hand, and the rights and legitimate interests of other persons, public interests - on the other hand, the unlawful restriction of the rights of victims of crimes and abuse of power and contradicts the requirements of ensuring their access to justice, compensation for damage, guarantees of judicial protection. In addition, due to the absolute prohibition on review of the court decision on the grounds that worsen the situation of the convicted (acquitted), the court of Supervisory instance is deprived of the opportunity to consider the complaint of the victim, his representative and the Prosecutor on the merits.

The constitutional court came to the conclusion, article 405 of the criminal code (in the current version of the criminal code is article 401. 6-the author's note) to the extent that in the system of the current criminal procedural regulation of the revision of the entered into force sentences, rulings and court decisions, it does not allow for a turn to the worst in the revision of the court decision in the order of supervision on the complaint of the victim or on the proposal of the Prosecutor, thus does not allow to eliminate the significant fundamental violations of the criminal and criminal procedural law in the previous proceedings, leading to the wrong resolution of the case, does not comply with the Constitution of the Russian Federation.

3. Grounds of the review of court decisions with the participation of jurors in the supervisory review.

As mentioned, Art. 412. 9 h. 2 and 401. 6 of the Criminal Procedure Code of the Russian Federation provides for a turn for the worse in both the supervisory and cassation instances only for those significant violations of the criminal procedure or criminal law that influenced the outcome of the case (the conclusion of guilt, the legal assessment of the offense, design and content of court sentence or application of other measures of criminal etc. ABO Vågã nature, the decision in the civil suit) and distorted the very meaning of the judgment as an act of justice. (In one of the most interesting criminal cases (reviewed without a jury), the argument of the satisfied supervisory submission to set aside the decision of the court of second instance was an indication of the mistaken exclusion of the confiscation of five real estate objects of the convicted by the court due to their acquisition before the introduction of action July 2006.) In the supervisory review, it was also stated that the use of confiscation of property was due to the international obligations of the Russian Federation, that real estate transactions were conducted by a convicted person even after 27 July 2006. and that the convict was convicted also for the legalization of criminal proceeds through the acquisition of real estate. Resolution of the Presidium of the Armed Forces of the Russian Federation dated December 10, 2014 No. 122 –P14pr). As mentioned, the concept of such violations is proposed in the above Resolution of the Constitutional Court of the Russian Federation of May 11, 2005, previously proposed in Part 3 of Art. 405 Code of Criminal Procedure (in the red of the Federal Law of the Russian Federation dated March 14, 2009). Fundamental violations were recognized violations of the criminal procedure law, which led to the verdict of the unlawful composition of the court or the verdict of the illegal composition of the jury, as well as deprived participants in criminal proceedings the possibility of exercising the rights guaranteed by the Code of Criminal Procedure on a fair trial based on the principle of adversarial proceedings and equality parties or significantly limited these rights if such deprivations or restrictions affected the law or court order.

In the current edition of the Code of Criminal Procedure of the Russian Federation, the concept of such violations is provided for in Art. 401. 6 of the Criminal Procedure Code of the Russian Federation and detailed in the aforementioned Resolution of the Plenum of the Armed Forces of the Russian Federation

dated January 28, 2014. No. 2 “On the application of the norms of Chapter 47. 1 of the Code of Criminal Procedure of the Russian Federation governing the proceedings before the court of cassation” (paragraph 21), although, in our opinion, the Plenum clearly goes beyond the legal meaning of Art. 401. 6 Code of Criminal Procedure, if such in this article is present and traceable. As such, violations by the Plenum of the Armed Forces of the Russian Federation today offer:

- The illegal composition of the court or the illegal composition of the jury (in relation to our research topic, for example, one of the jurors outstanding criminal record, violation of the jury selection procedure, violation of the procedure of jurors).

- violation of the secrecy of the jury board meeting when rendering a verdict or secrecy of the meeting of judges when sentencing (for example, the presence of a lawyer when discussing the verdict, although this is extremely incredible and almost impossible);

- the absence of the signature of the judge or one of the judges on the relevant court decision (for example, the verdict of the court of first instance or the appeal decision);

- absence of the court record (such a procedural document is extremely important for jury trials - it is from the text of the protocol that one can understand and analyze the essence of the available evidence and the procedural order of their permissible receipt, because in the verdict, decided on the basis of the jury verdict, analysis of available evidence is not performed). Such unconditional essential violations of the criminal procedure law as a basis for the cancellation or change of the court decision (appeal) are provided for by paragraph. 2, 8, 10 and 11 point 2 Art. 389. 17 Code of Criminal Procedure;

- incorrect application of the criminal law (in particular, the use of the wrong article, or part of the article, or paragraph of the article part of the Special Part of the Criminal Code of the Russian Federation, which were to be applied). For example, the Ivanovo Regional Court with the participation of jurors for premeditated murder with special cruelty N. was sentenced to a long term of imprisonment. By the appeal definition of the Investigative Committee in criminal cases of the Armed Forces of the Russian Federation, his actions were re-qualified for premeditated murder without aggravating and mitigating circumstances with a significant reduction in the term of imprisonment. According to the supervisory complaint of the victim, which was referred by the judge of the Supreme Court of the Russian Federation for consideration on the merits in accordance with paragraph 2 of Part 2 of Art. 412. 5 Code of Criminal Procedure, the Presidium of the Armed Forces of the Russian Federation, the aforementioned appeal determination (contrary to the jury's verdict) was reasonably canceled with the transfer of the case to a new appeals hearing, since 5 injured wounds, 3 incised wounds and 52 stab wounds - incised wounds were inflicted on the victim during the course of at least 30 minutes by a decanter, knife, an unidentified blunt object, which was actually qualified by the jury as a murder with special cruelty;

- significant violations of the criminal procedure law, provided as grounds for cancellation or amendment by appeal of the acquittal court decisions with the participation of jurors in accordance with Art. 389. 25 Code of Criminal Procedure. A detailed and critical analysis of these grounds in relation to the appeal was proposed by us in previous publications on this subject [10 , p. 343 - 347], there is no need to repeat, but we note once again that, in the opinion of the author, the content of this legal norm (in relation to conditional violations) allows essentially to cancel any acquittal of the jury in the appeals instance;

- other violations that deprived the participants in criminal proceedings the possibility of exercising the rights guaranteed by law to a fair trial on the basis of the principles of adversarial and equal rights of the parties or significantly limited these rights if such deprivation or such restrictions affected the legality of the sentence, ruling or court ruling. Such a basis is of an evaluative nature and essentially allows the supervisory instance to cancel any decision of the lower court, for example, if the side of the state prosecution repeatedly refuses to call the non-witness of the prosecution whose testimony has a certain value; during the trial on the territory of the remand prison; if the public is not allowed in the courtroom due to lack of space ; on handing over his business card lawyer one of the jurors n e ed the beginning of the judicial debate at the request of the jury ; when expressing external approval by someone from the jury to the contents of the defense attorney speech in judicial debate, etc .;

- identification of data indicating non-compliance of convicted persons with words and their failure to fulfill obligations under the pre-trial cooperation agreement (this basis was added to Article 401. 6 of the Code of Criminal Procedure of the Federal Law of the Russian Federation of 03.07. 2016 No. 322 - Φ3). The institution of the pre-trial cooperation agreement (ch. 40.1 of the Code of Criminal Procedure of the Russian Federation) appeared in the Russian criminal procedural legislation in 2009. The essence of this is

to significantly reduce the punishment of the defendant in exchange for helping them solve and investigate a crime, incriminate other accomplices in a crime, and search for property obtained by criminal means.

The analysis of this legal institution is clearly beyond the scope of this scientific article, but with certain advantages of a pre-trial agreement on cooperation, the main disadvantage of such an article, in the author's opinion, is the legal possibility of a particularly dangerous criminal to avoid punishment adequate to the committed act. Thus, in the most famous case, a large number of members of the criminal community accused of abductions and murders of people with aggravating circumstances, large-scale frauds and other crimes (the defendants were charged with eight aggravating murders, but in reality there were many more).

On the other hand, the accused and by no means always in reality guarantee the final implementation of the agreement concluded by the prosecution and judicial authorities. In the author's advocate's practice, there was also a case in which defendant K. had practically fulfilled all the conditions of a prisoner's voluntary pre-trial cooperation agreement in a criminal case (due to his actions, on the day of the attack they managed to detain two accomplices of the robbery attack and find out where the 9,1322 million stolen rub.), but the deputy district prosecutor was subsequently denied the transfer of the concluded agreement to the court, since during the seizure of the stolen, only 3 million rubles were found instead of the above amount, the remaining part could not be found. The author's defendant was detained almost immediately after the attack, after putting money in the store's cell for storage, two accomplices left for another (considerably removed from the site of the attack i) the district of St. Petersburg, where they were detained according to information received from K. Only those who actually carried out the seizure could actually assign a part of the seized (seized). As a result, K. was sentenced to 8 years imprisonment, accomplices received 9 years imprisonment, the civil suit of the victim was fully satisfied jointly in the amount of over 6 million rubles.

Returning to the grounds for cancellation or amendment of court decisions with the participation of jurors who entered into legal force in the direction of a possible worsening of the convicted person's position, one cannot but agree with the opinion that the fuzzy, vague wording of the fundamental violations of the criminal procedure law in part 3 previously valid Art. 405 Code of Criminal Procedure, cannot be considered successful [11, p. 183], although, as it is impossible to recognize as successful today's content of art. 406. 1 Code of Criminal Procedure. Moreover, the interpretation of such violations by the Plenum of the Armed Forces of the Russian Federation in the aforementioned Resolution No. 2 from January 28, 2014 It seems unnecessarily broad compared with the grounds for cancellation or change of the court decision on appeal (those in appeal and supervision should be significantly less) and too evaluative, allowing to consider any violation as a violation affecting the outcome of the case (according to the author, in most cases it is impossible to establish how violations affected the outcome of the case).

In fairness it should be noted that the cases of cancellation or changes in the supervision of the acquittal of the jury is extremely rare. For example, in 2013 g . on the grounds of art. 401.6 of the CPC was canceled all decisions of all lower courts, which entered into force, only in respect of 36 persons, in 2017 g . 14 jury decisions that entered into force were appealed; three sentences were amended to be mitigated without changing qualifications. In the first half of 2018 g . Also, 14 jury cases were considered, in 5 cases, the jury's convictions were reversed and sent to the court of first instance for reconsideration, two cases were sent to the appellate instance, one to the cassation, one case was returned to increase the penalty. (in general, higher courts rather successfully use their powers to annul appeals by jury judges).

Note that Art. 666 Criminal Procedure Code of Kazakhstan completely prohibits supervisory review of court decisions involving jurors in the direction of worsening the situation of the convict, allowing this only at the stage of cassation review (a kind of supervisory) if there are (6.1 of the Criminal Code of the RK) significant violations of the criminal procedure law, 1) entailing the ruling of an unlawful sentence by an unlawful composition of the jury or 2) depriving the victim of the right to judicial protection if the victim or the prosecutor contests in these two cases the substance of the sentence and during the appeal proceedings will be set as the above violations and illegal acquittal. Part 2 of Art. 664 of the Code of Criminal Procedure of the Republic of Kazakhstan also provides that the following are subject to revision: 1) an incorrect definition of the type of relapse and the type of regime of the institution of the penitentiary system; 4) an incorrect resolution of a civil claim, except when leaving a civil claim without consideration (Article 664 of the Code of Criminal Procedure of the RK).

Note that the Criminal Procedure Code of the RSFSR in Art. Art. 466 and 465 h. 1 offered identical grounds for cancellation or change of acquittals or accusatory decisions of the jury in the supervision and cassation (now this appellate court for appealing decisions that have not entered into legal force) among which it was indicated: for example, in view of the erroneous exclusion from the proceedings of admissible evidence that may be significant for the outcome of the case, 2) a substantial violation of the criminal procedure law, 3) an incorrect application of the law to the circumstances of the case, as established by the jury, 4) the appointment of an unfair sentence.

The grounds for cancellation or amendment of an accusatory court decision that has entered into legal force are specified in Art. 412. 9 of the Code of Criminal Procedure and we have already partially disclosed above:

1) significant violations of the criminal procedure law that influenced the outcome of the case (Article 389. 17 Code of Criminal Procedure of the Russian Federation);

2) substantial violations of the criminal law that influenced the outcome of the case (Article 389. 18 of the Code of Criminal Procedure of the Russian Federation);

3) identification of data indicating that the convicted person does not comply with the conditions and fails to fulfill the obligations stipulated by the pre-trial agreement on cooperation in the criminal case (being quite critical of such an institution, the author considers it necessary to exclude such a basis from the provisions of Article 401. 6 of the Code of Criminal Procedure, although The case for a person who has entered into such an agreement, a criminal case will be tried by a jury, even if such a direct prohibition is not provided for by chapter 40 .1 Code of Criminal Procedure). It seems that such a basis in general cannot be a basis for review, entered into force of judicial acts under Art. 412. 9 Code of Criminal Procedure (including and because all the same, it is the appeal is the main form of review of judicial decisions), in order to avoid, for example, possible abuses on the part of law enforcement officials with regard to the convicted person who is serving a sentence or against a person who refuses to continue covert cooperation with such persons after applying the court procedure to them, as provided for in Ch. 40. 1 Code of Criminal Procedure.

3. Procedure and rules of Supervisory review.

Subjects of appeal in the order of supervision (cassation) are, in particular, convicted, acquitted, their defenders, legal representatives of the convicted or acquitted, the victim, the representative of the victim, the Prosecutor of the appropriate level.

The term for appealing against judicial acts in the order of supervision in the direction of the deterioration of the situation of the convicted person, as mentioned, is one year from the date of their entry into force, the revision towards improvement has recently not been limited to the maximum period.

Unlike appeals against judicial acts that have not entered into legal force (appealed to the appeal), Supervisory (cassation) complaints and submissions are submitted directly to the court of Supervisory instance (to the Presidium of the armed forces of the Russian Federation).

Note that in the order of supervision under the rules of Chapter 48.1 of the code of criminal procedure can be appealed only court decisions that entered into force after January 1, 2013. The provisions of Chapter 48 of the code of criminal procedure apply to appeals against court decisions that have entered into force before that date.

A Supervisory appeal or presentation must contain:

1) the name of the court to which they are addressed;

2) the name of the person filing a complaint or representation, his place of residence or location and procedural status in the case;

(3) reference to the courts of first and second instance and the content of their decisions;

(4) reference to judicial decisions that are appealed;

(5) an indication of the nature of the violations of the law committed by the courts;

(6) the request of the person making the complaint or submission.

In the complaint or submission, it makes no sense to provide a detailed text of the appealed court decisions, since copies of the court decisions adopted in the case are attached to the complaint. In addition, it is not necessary to refer in detail to the evidence investigated in the case, since the Supervisory authority does not establish the actual circumstances of the case and does not assess the evidence. Therefore, you should focus on procedural or substantive violations committed in the case.

The petitive part of the complaint or consists in specifying one of the following consequences:

- annulment of court order;
- changes in the court order;
- leaving in force one of the adopted court decisions;
- the adoption of a new court order.

Received Supervisory complaint or submission must be considered within one month from the date of receipt (or two in the case of a criminal case).

In the Supervisory proceedings, as in the past, as in the current cassation proceedings, in fact a kind of Supervisory, there are two stages.

At the first stage (it can be called preliminary) the received Supervisory complaint (Prosecutor's representation) is submitted to one of the judges of the court of Supervisory instance. Part 1 of article 412.5 the code of criminal procedure provides that, where necessary, a judge examining a Supervisory complaint or submission may request, within the limits of his or her competence, any criminal case for the resolution of a Supervisory complaint or submission. Having examined the Supervisory complaint or submission, the judge makes one of the following decisions:

1) about the refusal to satisfy the Supervisory complaint or presentation in the absence of grounds for reconsideration;

2) on the transfer of Supervisory complaints to the court of Supervisory instance (Presidium of the armed forces of the Russian Federation), together with the criminal case, if it was requested by the data of S. A. Pashin , about 7% of the submitted complaints are transferred to the Presidium of the respective courts for consideration in cassation proceedings [12, p.10].

The form of the resolution on transfer of the Supervisory complaint was earlier established by Appendix 59 to Art. 460 of criminal procedure code of the Russian Federation (now the content of the similar resolution is provided by Art. 412. 8 of the CCP).

The Chairman of the Supreme Court of the Russian Federation or his deputies have the right to disagree with the decision of the judge to refuse to satisfy Supervisory complaints or submissions. In this case, it cancels the decision and makes the decision to transfer the complaint for consideration (part 3 of article 412. 5 of the CPC).

The second stage includes the direct consideration of the Supervisory complaint or submission on the merits. Terms of consideration for the armed forces are specified in part 1 article. 412.10 code of criminal procedure (no later than two months from the date of the decision to transfer the case to the court of Supervisory authority).

Persons who have the right to appeal against the sentence in the order of supervision, must be notified by the court of Supervisory instance of the date, place and time of consideration of the case.

At the hearing attended by the Prosecutor (mandatory), and also condemned, justified, their defenders and lawful representatives, other persons whose interests are directly affected by the complaint or representation, under condition of the statement them of the petition about or during their attendance at the hearing. These persons are given the opportunity to review the Supervisory complaint or submission. The Chairman of the RF armed forces, the Deputy Chairman, as well as a member of the Presidium of the RF armed forces may not participate in the consideration of the case, if they transferred a Supervisory complaint to the Presidium for consideration on the merits

The procedure for consideration of the case in the court of Supervisory instance is established in Article 412.10 Code Of Criminal Procedure. As in cassation, consideration of the case begins with the report of a member of the Presidium of the court (or another judge who has not previously participated in the consideration of the case). The report sets out:

- factual background;
- the content of the appealed court decisions in the case;
- reasons for the Supervisory review (the submission);
- arguments which served as the basis for transfer of the complaint for consideration in court session of Presidium of AF of the Russian Federation.

Next, the floor is given to the Prosecutor (usually Deputy Prosecutor General of the Russian Federation) to maintain his Supervisory submission. If the convicted, acquitted, their defenders or legal representatives, the victim and his representative participate in court session, they can give the explanations after performance of the Prosecutor. Further consideration of the case takes place without the participation of the parties, they are removed from the courtroom.

After removal of the parties from the courtroom, the Presidium of the Supreme Court of the Russian Federation makes a decision, which refers to the execution in the order of Art. 389. 33 Code Of Criminal Procedure. The form of the decision of the court of Supervisory instance was previously specified in Annex 61 to Art. 477 of the code of criminal procedure (now the content of the decision must meet the requirements of part 3 and 4 of Article 389.28 of the Code Of Criminal Procedure). Decisions on all matters shall be taken by a majority vote of the judges. The proposal most favourable to the convicted person shall be put to the vote first. In case of equality of votes of the judges filed for review of the case and against its review, the Supervisory complaint or submission shall be considered rejected.

As a result of consideration of the criminal case, the court of Supervisory instance in accordance with part 1 of Article 412. 11 the code of criminal procedure, in particular, :

1) to leave the Supervisory complaint or presentation without satisfaction, and the appealed judicial decisions without change. For example, the Presidium of the Russian armed forces left without satisfaction the protest (presentation) of the Deputy Prosecutor General on the acquittal of the Moscow regional court of juries and the determination of the IC in criminal cases of the Russian armed forces in the case of R. on part 1 art. 205 of the criminal code, not to establish the violations of criminal procedure law and the circumstances referred to in the protest, putting, for example, the failure to mount additional (optional) questions in terms of the negative response from the jury on the question of proof of Commission of the criminal act the defendant could not result in a distortion of the will of the jury or limiting the legal rights of the defendant [13, p. 809 - 810].

In April, 2006. The Presidium of the Supreme Soviet of the Russian Federation upheld the acquittal of the Moscow city court and the cassation definition of the armed forces in relation to the infamous V. Ivankov, although the main argument of the oversight presentation to the General Prosecutor's office and was a reference to the fact that the alleged seven of the twelve jurors had either been previously convicted, or was convicted relatives .

2) to annul the sentence, ruling or decision of the court and all subsequent court decisions and to terminate the proceedings in this criminal case.

For example, the Presidium of the armed forces overturned the conviction of the Moscow regional court of juries and the cassation (now – appeal) determination of the IC in criminal cases of the armed forces of the Russian Federation, stopping the case against P. production on the basis of notes to Art. 222 of the criminal code, due to procedural violations of the order of the search on the investigation (not arrested suspect was not given the opportunity of his participation in the search for the voluntary issue of weapons) [13, p.267 - 268].

(3) to annul the sentence, ruling or decision of the court and all subsequent judicial decisions and to refer the criminal case to a new court. For example, in a well-known case on the charge of murder and fraud, the Presidium of the Russian armed forces abolished the acquittal of the Moscow regional jury and the determination of the court of Cassation of the Russian armed forces, but in the preparatory part of the hearing at the request of the defender it was terminated on the basis of paragraph 7 of article 14 of the International Covenant on civil and political rights, The decision of the constitutional court of July 3, 1997. and clause 9 of part 1 of article 5 UPK of the Russian Federation (clause 4 part 1 article 27 UPK the Russian Federation) (the presence in person of a legally valid sentence on the same charges) due to the fact that the criminal procedure law contains no special procedure for revision of sentences imposed by the court on the basis of the acquittal verdict of the jury [14 , p. 291, 295-296].

In the case of Z. the conviction of the armed forces of the Republic of Dagestan with the participation of jurors and appeals definition of SK in criminal cases the armed forces were abolished in sending the case for retrial to the same court with the trial stage of a different structure of the court the violation of the requirements of article 267 of the criminal procedure code of the Russian Federation, expressed in nerazjasnenie convicted of their procedural rights under article 47 of the code of criminal procedure, namely the right to participate in judicial debate after the dissolution of the jury and resuming the trial with a new jury .

4) cancel the decision of the court of cassation or appeal and transfer the criminal case to a new cassation or appeal.

Thus, the Presidium of the Supreme Soviet of the Russian Federation was abolished cassation (now appeals) the decision to change the conviction of the Moscow regional court jury on charges of Z. B. S. and of intentional homicide and robbery due to the fact that the court of cassation has worsened the situation

of the convicted in the absence of protest (submission) the Prosecutor or a complaint of the victim on the ground, having reclassified the actions of the perpetrators though on the softer part of the article, but with imputation greater number of aggravating circumstances and the jury's verdict recognized the lack of evidence that it was S. made shots in the head and shoulder of the victim ,and Z. the Commission of such shots.

It is extremely interesting, still in judicial practice it is possible to meet cases and cancellations of the decision of court of the second instance owing to violation of the right to protection of the defendant (defendants) because of his (their) failure to provide with the lawyer whom he (they) did not refuse (refused) at hearing of the case in this instance ;

5) cancel all previous court decisions and send the case to the Prosecutor in identifying violations under article 237 of the code of criminal procedure.

The most interesting example I. charged with possession of weapons and complicity in the murder of the latter, because of pre-trial cooperation agreement, was convicted separately from his three accomplices in the felony murder rules Chapter 40.1 of the criminal procedure code of the Russian Federation. In the case of the aggravated murder of these three accomplices in the Amur regional court with the participation of jurors, all three were acquitted and the court of appeal upheld their acquittal. Because of the contradiction between the two judgments And. and he filed a Supervisory complaint about the review of his case in terms of conviction for complicity in the murder. As a result of this review in the supervision of the case with the abolition of previous decisions against I. was sent to the appropriate Prosecutor on the grounds of violations of paragraph 1 of part 1 of Article 237 of the Code of Criminal Procedure.

6) to amend the sentence, ruling or decision of the court. For example, the Presidium of the armed forces of the Russian Federation excluded from the conviction of the Moscow regional court with the participation of a jury qualifying signs of premeditated murder in order to conceal the crime and the person known to the perpetrator is in a helpless state, because the murder was committed in order to seize property, ie. out of selfish motives, there is no proof of intent to kill for the purpose of concealing the crime, the dream of the victim to the circumstances in which it may not provide active resistance to the offender or to evade attacks, does not apply [14, p. 420 - 421].

According to the Supervisory complaint of the convicted M., the Presidium of the armed forces of the Russian Federation excluded from the sentence of the Krasnodar regional court with the participation of a jury an indication of the presence in the actions of M. dangerous relapse of crimes, citing the fact that convictions obtained under age, for recidivism are not taken into account. A similar situation was in the case of P., convicted by the Tambov regional court with the participation of a jury, where in the Supervisory appeal of the convict and the Supervisory representation of the Deputy Prosecutor General of the Russian Federation in the court's verdict and cassation determination, a colony of strict regime was appointed instead of a colony, since the previous courts did not take into account the changes, according to which the crimes under the previous sentence were classified as serious .

A similar situation was also in the case of four defendants in the same court, when the actions of all four were mistakenly recognized as a particularly dangerous relapse with serving a sentence in a colony of special regime, followed by partial satisfaction of two Supervisory complaints and the Supervisory idea of reducing the punishment and excluding the sign of a particularly dangerous relapse, since new crimes were committed by the defendants during the consideration of their cassation (now appeal) complaints before the entry into force of the first sentence .

In the case on charges of G., convicted on Article 105 of the Criminal code of the Volgograd regional court with the participation of jurors to 15 years of imprisonment, the Supervisory authority commuted the sentence to 13 years and 3 months due to incorrect assessment by the courts of the first and second instance mitigating circumstances affecting the maximum

In the case of brothers D. Supervisory authority reduced the term designated a long term of imprisonment for the most serious crimes due to a wrong application of the concept of multiple offenses for the wording of the relevant article of the General part of the criminal code in 2003 (which resulted in qualification of actions of the defendants including two articles of the criminal code on assault) indicating that in this case was to apply the wording on the aggregate 1996. and episodes this robbery covered by a single crime .

In one of the criminal cases, the Supervisory authority reduced the sentence from 19 to 18 years of imprisonment for reasons of unaccounted extenuating circumstances, reclassification of one of the articles of the criminal code to the wording that does not provide for punishment in the form of imprisonment, the exclusion of the sign of "violence" in one of the accused articles of the criminal code .

In the case of K., convicted by the Primorsky regional court with the participation of jurors by 12 years of imprisonment for extortion and kidnapping of a person with aggravating qualifying circumstances, the Supervisory authority released K. from punishment for extortion in the form of 8 years of imprisonment in connection with the expiration of the Statute of limitations of criminal prosecution for this crime, leaving unchanged the conviction in terms of kidnapping with aggravating qualifying circumstances with a penalty of 7 years of imprisonment.

In cases of a decision of the Presidium of the Supreme Soviet of the Russian Federation of the decisions stipulated by items 2 – 7 of part 1 of Article 412. 11 the court of Supervisory instance must specify the specific reason for the cancellation or modification of the court decision (part 2 of article 412. 11 of the CCP). Details of the Supervisory instance court resolution similar to the details of the appeal decision. The decision of the court of cassation instance is signed by the entire composition of the court, and the decision of the Supervisory court - by the Chairman of the Presidium. The decision of the court shall be attached to the criminal case together with the Supervisory complaint or submission, which gave rise to the initiation of Supervisory proceedings, the decision of the judge of the court of Supervisory instance, in the proceedings of which the Supervisory complaint or submission was.

Due to the fact that the Supervisory proceedings – an exceptional stage of the process, in Art. 412.12 the Code of Criminal Procedure establishes the limits of the rights of the court of Supervisory instance. First, when considering a criminal case as a Supervisory court, although it considers the case within the arguments of the Supervisory complaint or submission, but is not bound by the arguments of the Supervisory complaint or submission and has the right to check all the proceedings in the criminal case in full in the interests of legality. Secondly, if several persons have been convicted in a criminal case, and a Supervisory complaint or submission has been brought by only one of them or against some of them, the court of Supervisory instance has the right to examine the criminal case against all convicted persons. Third, when a criminal case is examined under supervision, the sentence imposed on the convicted person may be reduced (or returned for reinforcement) or the criminal law on a less serious crime may be applied.

5. Conclusions.

First, it is necessary to Express at least an opinion (a wish to the Russian legislator) on the need to prohibit the revision of acquittal decisions of courts with the participation of jurors in the stage of Supervisory proceedings in the direction of deterioration, since in fact the prohibition of cancellation of jury decisions that have entered into legal force is a manifestation of real democracy, especially since for a possible revision there is another exceptional stage of the criminal process provided for in Chapter 49 of the code of criminal procedure.

Secondly, understanding the complexity of the implementation of this proposal, it is necessary to raise the question of establishing an exhaustive list of grounds for reviewing the decisions of courts with jury participation in the Supervisory (cassation) proceedings in the direction of worsening the situation of the convict, as provided, for example, by the new CPC of Kazakhstan in part 1 of article 664.

Third, from article 401.6 of the code of criminal procedure, as from article 412. 9 the code of criminal procedure shall exclude such grounds for cancellation or amendment of the effective court decision as the identification of circumstances of non-compliance with the terms of the pre-trial agreement on cooperation provided for in Chapter 40.1 of the code of criminal procedure, leaving the possibility of such in the appeal proceedings.

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