DOI 10.52468/2542-1514.2023.7(4).116-125

QUALIFICATION OF A CRIME JOINTLY COMMITTED WITH A CRIMINALLY UNLIAIBLE PERSON

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Article info
Received –
2023 June 08
Accepted –
2023 October 10
Available online –
2023 December 20

Keywords
Complicity, criminal liability, subject of a crime, perpetrator, group, group way of committing a crime

The subject. The qualification's problem of a crime jointly committed by two or more people, only one of whom is criminally liable, is ambiguously resolved. It is shown that there is a case law tendency to bring into the scope of criminal liability all of people, who have participated in committing a crime together, as accomplices and co-perpetrators. However, it does not correspond to the main theory of complicity, according to which a group of perpetrators being a form of complicity consists exclusively of criminally liable offenders. And, moreover, there is a plenty of sentences, in which courts confirm that a criminally unliaible person is not able to be one of accomplices and co-perpetrators, as a consequence another offender is individually responsible for committing a crime.
The goal of the study is to determine whether joint commission of a crime by two or more people, only one of whom is criminally liable, constitutes complicity and a group of perpetrators. General (analysis, synthesis) and private scientific (formal-dogmatic, historical-legal) methods are used to achieve the goal.
The main results. In case law qualification of joint commission of a crime by two or more people, only one of whom is criminally liable, has gone through several stages in its development and directly depended on a type of the crime. Regional case law often does not coincide with the position of the Supreme Court of the Russian Federation. There are three main theories in criminal law science, according to which joint commission of a crime by some people, only one of whom is criminally liable: (a) forms both complicity and a group; (b) does not form either complicity or a group; (c) forms a group without signs of complicity.
Conclusion. Joint commission of a crime by two or more people, only one of whom is criminally liable, constitutes a group of perpetrators without signs of complicity. The interpretation dividing complicity and a group of perpetrators into two different institutions allows to take into account a group way of committing a crime as a feature of the objective side and define criminally liable offenders.

ISSN 2658-4050 (Online)

1. Introduction[1]

The participation of several persons in the commission of a crime has generated many controversial issues in criminal law doctrine and case law, one of which is the qualification of the joint commission of a crime with a person, who is not subject to criminal liability due to the failure to reach the age of criminal liability (Art. 20 of the Criminal Code of the Russian Federation (hereinafter referred to as the CrC RF), insanity (Part 1, Art. 21 of the CrC RF), irresistible physical coercion (Part 1, Art. 40 of the CrC RF) and other reasons, provided for by the criminal law.

In case law and investigative practice, the qualification of the joint commission of a crime by two or more persons, only one of whom is criminally liable, was not uniform. In some cases, *the Supreme Court of the Russian Federation* (hereinafter referred to as the SC RF) either recognized the presence of complicity or confirmed its absence, and the acts of the person, who is able to bear *criminal liability* (hereinafter referred to as the *subject*), were qualified as committed in a group or individually in regard to the type of crimes.

Such inconsistency is due, in particular, to different interpretations of criminal law norms on complicity [1, p. 165; 2, p. 183-185; 3, p. 211], the reason of which is the inexpediency of the literal application of criminal law norms that do not ensure a fair decision [4, p. 171-174]. But "situations when diametrically opposite decisions are made in similar cases or on the same occasion," according to the correct remark of M.P. Kleymenov, "cause serious concern" [5, p. 281].

The goal of the study is to determine whether the joint commission of a crime by two or more persons, only one of whom is criminally liable, constitutes complicity (Art. 32 of the CrC RF) and a group in criminal law meaning (Art. 35 of the CrC RF).

The research is based on a universal method of cognition in the form of historical materialism, general scientific (generalization, analysis, synthesis) and private scientific (formal dogmatic, historical and legal) methods are used.

2. Qualification of the joint commission of a crime with a criminally unliaible person in case law of different crimes' categories

In the Resolution of the Plenum of the SC RF dated January 27, 1999 No. 1 "On judicial practice in cases of murder (Art. 105 of the CrC RF)" there are no rules for qualifying a murder in which two or more persons, only one of whom is subject to criminal liability, jointly participated. Nevertheless, in such cases[2] of murder, the SC RF confirmed the presence of both complicity and a group.

Thus, P. was found guilty of murder committed by a group of perpetrators with an insane B. (Clause "g", Part 2, Art. 105 of the CrC RF). The Presidium of the SC RF pointed out that *murder is recognized as committed by a group of perpetrators when two or more offenders, acting together with intent aimed at committing murder, directly participated in the process of depriving the victim of life, regardless of the fact that some of the participants in the crime were not prosecuted due to their insanity*[3].

Note that in the early 2000s. the SC RF also made diametrically opposite decisions[4]. For example, the murder committed by S. together with the insane M. was requalified from Clause "g", Part 2 of Art. 105 of the CrC RF to Part 1 of Art. 105 of the CrC RF[5].

According to Paragraph 2, Clause 9 of the Resolution of the Plenum of the SC RF dated April 22, 1992 No. 4 "On judicial practice in cases of rape" rape is considered to have been committed by a group of perpetrators if two or more offenders, only

[1] Hereinafter regulatory legal acts and court's acts are provided under the SPS "ConsultantPlus" and "Garant", unless otherwise specified.

[2] Determinations of the SC RF dated July 9, 2003 in case No. 6-kp003-17; dated November 24, 2005 in case No. 66-o05-110; dated October 29, 2008 in case No. 81-O08-87; dated May 17, 2018 in case No. 31-APU18-4; dated On April 25, 2019, in case No. 4-APU19-10.

[3] Review of judicial practice of the SC RF for the 3rd quarter of 2004 (Resolution of the Presidium of the SC RF in case No. 604P04pr). Bulletin of the Supreme Court of the Russian Federation. 2005. № 4.

[4] Review of the cassation practice of the Judicial Board for Criminal Cases of the SC RF for 2003. Bulletin of the Supreme Court of the Russian Federation. 2004. No. 9.

[5] Determination of the SC RF dated May 15, 2003 in case No. 79-o03-1.

ISSN 2542-1514 (Print)

one of whom is subject to criminal liability, participated in its implementation.

Thus, P. was found guilty of attempted rape of K., committed by a group of perpetrators with an insane person (Part 3, Art. 30, Clause "b", Part 2, Art. 131 of the CrC RF[6]). The court recognized the qualification as correct, since *P.'s intention was to realize and use group efforts to overcome the victim's resistance*[7].

However, in subsequent Resolutions, the Plenum of the SC RF did not included a similar explanation of the qualification rule[8]. However, it did not affect lower courts' case law[9].

In Clause 19 of the Resolution of the Plenum of the SC RF dated March 22, 1966 No. 31 "On judicial practice in cases of mugging and robbery" indicated that mugging and robbery are considered to have been committed by a group of perpetrators by prior agreement if two or more offenders, only one of whom is subject to criminal liability, jointly participated in their implementation.

According to Paragraph 1, Clause 12 of the Resolution of the Plenum of the SC RF dated December 27, 2002 No. 29 "On Judicial practice in cases of theft, mugging and robbery" (hereinafter referred to as Resolution No. 29) a theft, on the *contrary,* is considered to have been committed by a group of perpetrators (a group of perpetrators by prior agreement) if offenders, who may bear criminal liability in accordance with Art. 19 of the CrC of RF, have jointly participated in its implementation The courts have ceased to recognize the absence of a group and, accordingly, complicity in the case of theft committed by two or more offenders, only one of whom is criminally liable.[10] For example, the Supreme Court of the Republic of Tatarstan excluded the qualifying sign of theft by a "group of perpetrators by prior agreement" in connection with its implementation together with a minor Sh.[11] Nevertheless, some courts have recognized the existence of a group in such cases, *since according to the law, a crime is qualified as committed by a group of perpetrators by prior agreement if it involved persons who had agreed in advance to commit it together, regardless of the fact that some of them were not prosecuted due to not reaching the age of criminal liability or because of insanity*[12].

But in this Resolution, the Plenum of the SC RF did not mention the qualification of mugging and robbery in such circumstances. As a result, case law and investigative practice has not developed a unified approach.

So, T. was found guilty of robbery and murder, committed by a group of perpetrators in preliminary agreement with insane G. (Clauses "d", "g", "z", Part 2 of Art. 105, Clause "c", Part 3 of Art. 162 of the CrC RF). The SC RF pointed out that the *recognition of G. as insane does not affect the assessment of T.'s actions and does not exempt him from criminal liability for crimes committed by a group of perpetrators by prior agreement*[13].

Nevertheless, the SC RF made an opposite decision in regarding to Sh., who was found guilty of committing crimes under Clauses "b", "h", Part 2 of Art. 105, Clauses "c", Part 3 of Art. 162 of the CrC RF. The court, having excluded the qualifying sign "by a group of *perpetrators* by prior agreement", indicated that *according to Part 2 of Art. 35 of the CrC RF*, a crime is recognized as committed by a group of perpetrators by prior agreement *if two or more perpetrators jointly participated in the commission of the crime, which by virtue of Art. 19 of the CrC RF are*

[6] The Criminal Code of the Russian Federation dated June 13, 1996

[7] Summary of judicial practice in cases of crimes under Art. 131, 132, 133 of the CrC RF for 2001 and the 1st half of 2002 of the Krasnoyarsk Regional Court.

[8] Resolutions of the Plenum of the SC RF dated June 15, 2004 No. 11; dated December 4, 2014 No. 16.

[9] Sentence of the Samara Regional Court dated May 31, 2011. https://sudact.ru/regular/doc/qQdgvCHhf3xs (date of application: 27.05.2023).

[10] Bulletin of Judicial Practice of the Moscow Regional Court for Civil and Criminal Cases for 2003 dated April 8, 2004; Determination of the Moscow City Court dated November 22, 2010 in case No. 22-14946/2010.

[11] Review of judicial practice of the Supreme Court of the Republic of Tatarstan in criminal cases for the 2nd quarter of 2008.

[12] Determination of the Sverdlovsk Regional Court dated October 22, 2004 in case No. 22-11029/2004.

[13] Determination of the SC RF dated July 9, 2003 in case No. 6-KP003- 17.

ISSN 2658-4050 (Online)

subject to criminal liability[14].

In February 2007 The Plenum of the SC RF in Clause 12 of Resolution No. 29 clarified that not only theft, but also mugging and robbery are considered to have been committed by a group of perpetrators by prior agreement *if persons, who may bear criminal liability in accordance with Art. 19 of the CrC RF, participated in their implementation*. Despite this, case law was characterized by chaotic: if some courts ceased to recognize the presence of a group and, accordingly, complicity, in the case of committing a mugging and robbery by two or more persons, only one of whom is criminally liable[15], then others in similar cases rendered decisions contrary in meaning. For example, the SC RF itself found K. guilty of a robbery committed by a group of perpetrators in preliminary agreement with insane Sh., since *K.'s intention covered the commission of crimes at the suggestion and jointly with Sh., whose actions for K. were outwardly adequate, consistent, purposeful*[16].

In December 2010 The Plenum of the SC RF excluded the explanation contained in Clause 12 of Resolution No. 29, concluding that theft[17], mugging[18] or robbery[19], if two or more persons, only one of whom is subject to criminal liability, participated in their implementation, should be recognized as committed by a group of perpetrators by prior agreement. For example, Ch. was found guilty of committing two thefts by a group of perpetrators in preliminary agreement with insane L. (Clause "a", Part 2 of Art. 158 of the CrC RF) since the *acts forming the objective side of the crimes were performed by Ch. jointly and in preliminary agreement with L., whose actions for Ch. they were adequate, consistent and purposeful, and the consequences in the form of material damage caused were the result of their joint actions; the provisions of Art. 32 and Part 2 of Art. 35 of the CrC RF do not provide for the mandatory presence of sanity and the appropriate age of accomplices in a crime, and the criminal law does not link the possibility of recognizing a crime committed by a group of perpetrators by prior agreement with the presence of such a group is limited to persons subject to criminal liability*.[20] Nevertheless, regional judicial practice continued to demonstrate the non-recognition of complicity and the group in the commission of theft[21], mugging[22] and robbery[23] in these circumstances.

However, the recognition by a group of perpetrators, who jointly committed a crime, only one of whom is criminally liable, was not only perceived by case law and investigative practice, but also projected onto other types of crimes: art. 111[24], 112[25], 126[26], 163[27], 228.1[28], 238[29] of the CrC RF.

[14] Determination of the SC RF dated February 3, 2003 in case No. 9- o02-107.

[15] Resolutions of the Presidium of the Moscow City Court dated December 9, 2010 in case No. 4u/6-8936/10; dated December 24, 2010 in case No. 44u-379/10.

[16] Determination of the SC RF dated February 26, 2010 in case No. 13-010-3.

[17] Determination of the Sixth Court of Cassation of General Jurisdiction dated August 31, 2022 in case No. 77-4723/2022; Determination of the Moscow City Court dated June 27, 2022 in case No. 10-862/2022; Determination of the Ninth Court of Cassation of General Jurisdiction dated December 7, 2020 in case No. 77-1140/2020.

[18] Determination of the Moscow City Court dated April 4, 2011 in case No. 22-3889/11.

[19] Determination of the First Court of Cassation of General Jurisdiction dated January 13, 2021 in case No. 77-7/2021.

[20] Determination of the SC RF dated May 27, 2021 in case No. 75- UDP21-8-K3.

[21] Determination of the Moscow Regional Court dated June 13, 2013 in case No. 22-3857/2013.

[22] Resolution of the Presidium of the Volgograd Regional Court dated May 4, 2011 in case No. 44Y-67/2011.

[23] Bulletin of judicial practice of the Moscow Regional Court for the 1st quarter of 2016; Review of judicial practice in criminal cases of the Presidium of the Nizhny Novgorod Regional Court for the 2nd quarter of 2016; Resolution of the Presidium of the Zabaikalsky Regional Court dated November 21, 2019 in case No. 44u-230-2019.

[24] Determination of the Moscow City Court dated October 7, 2019 in case No. 10-14713/2019; Determination of the Moscow City Court dated December 5, 2016 in case No. 4u4734/2016; Determination of the SC RF dated June 1, 2010 in case No. 81-d10-11; Determination of the Leningrad Regional Court dated August 18, 2011 No. 22-1115/2011.

[25] Determination of the Sixth Court of Cassation of General Jurisdiction dated June 29, 2021 in case No. 77-2835/2021; Sentence of the Traktorozavodsky District Court of the Chelyabinsk Region dated June 26, 2019 in case No. 1-120/2019.

ISSN 2542-1514 (Print)

The generalization of case law allows us to make the following conclusions.

1. The position of the SC RF on the qualification of joint criminal acts of two or more persons, only one of whom is criminally liable, has gone through several stages in its development and directly depended on the type of crime. The metamorphoses in the explanations of the rules for the qualification of theft, mugging and robbery are indicative, with the relative stability of the criminal legal assessment of murder and rape.

2. Regional case law of qualification of joint criminal acts committed by several persons, only one of whom is subject to criminal liability, is not uniform, tends to be inert, does not always take into account the positions of the SC RF

3. Preliminary agreement with criminally unliaible persons, in particular, minors or insanes, is not excluded.

4. The recognition by the courts of the joint commission of criminal acts by two or more persons, only one of whom is criminally liable, as complicity and, accordingly, by a group of perpetrators, as a rule, is justified by the fact that the criminal law does not *directly* link the possibility of confirming complicity with the presence of only persons subject to criminal liability. Thus, the ignorance of the subject about the reasons excluding the criminal liability of another person (a legal mistake) does not affect the qualification of the deed[30], and in these cases the qualifying signs of a "group of offenders", "a group of perpetrators by prior agreement" are imputed to the subject on the basis of joint fulfillment of the objective side of the crime and unilateral subjective connection with persons who are not subject to criminal liability responsibility.

5. The non-recognition by the courts of either complicity or a group in the situations under the research is based on the fact that all persons participating in joint criminal activity must comply with the general requirements of the subject established in Art. 19 of the CrC RF.

6. The most common case law mistakes in the qualification of joint criminal acts of two or more persons, only one of which is subject to criminal liability, are:

- application by analogy of the rule about a mediocre performer[31];
- the use of explanations contained in the resolutions of the Plenum of the SC RF, which worsen the situation of a person or have become invalid[32];
- recognition of the commission of a crime in a group at the same time as both a qualifying sign and an aggravating circumstance (Clause "c", Part 1 of Art. 63 of the CrC RF)[33].

3. Qualification of the joint commission of a crime with a criminally unliaible person in the criminal law doctrine

There is no consensus in the criminal law literature on the key issue for the research's problem: can a group method of committing an offence have an independent meaning *as a sign of the objective side of the crime*?

There are three main theoretical positions, according to which the joint commission of a crime by several persons, only one of whom is criminally liable: a) does not form either complicity or a group; b) forms both complicity and a group; c) forms a group without signs of complicity.

The most common view in the doctrine is that such joint acts do not form either complicity or a group, since complicity in a crime implies the recognition

[26] Determination of the SC RF dated June 23, 2011 in case No. 85- O11-10SP.

[27] Determination of the Supreme Court of the Republic of Bashkortostan dated July 19, 2022 in case No. 22-3775/2022.

[28] Determination of the Moscow City Court dated December 8, 2022 in case No. 10-23225/2022; Determination of the Krasnoyarsk Regional Court dated April 7, 2017 in case No. 22- 598/2017; Determination of the Kamchatka Regional Court dated May 24, 2016 in case No. 22-338/2016.

[29] Sentence of the Sovetsky District Court of the Orenburg region dated April 16, 2015 in case No. 1-152/2015.

[30] Resolution of the Presidium of the SC RF dated December 27, 2000 in case No. 740p99.

[31] Determination of the Pskov Regional Court dated January 24, 2007 in case No. 22-46.

[32] Resolution of the Moscow City Court of May 18, 2011 in case No. 4u4-3223.

[33] Sentence of the Nanai District Court of the Khabarovsk Territory dated March 10, 2020 in case No. 1-20/2020.

of all participants as subjects and the presence of a two-way subjective connection. Complicity (Chapter 7 of the CrC RF) and criminal groups (Art. 35 of the CrC RF) relate to each other as a genus and species [6, p. 208], which is confirmed by their location in the system of criminal law norms (Art. 35 of the CrC RF is included in Chapter 7 of the CrC RF). Accordingly, each of the criminal groups should reflect all the distinctive attributes of complicity – the absence of at least one of the signs excludes both complicity and the criminal group.

Nevertheless, it is necessary to doubt the arguments about the inadmissibility of recognizing a person, who is not criminally liable, as the perpetrator of the act (but, of course, not the subject of the crime): a) the *necessity to qualify a socially dangerous act* committed by such a person, for example, to prescribe compulsory medical measures (Part 2 of Art. 21, Clause "a", Part 1 of Art. 97 of the CrC RF) with mandatory indication of *information about the method of committing the act*, in particular, about the group (Clause 2, Part 2 of Art. 434 of the Criminal Procedure Code of the Russian Federation); b) the possibility of dividing into a separate criminal case *against one of the persons* who committed a socially dangerous act being insane (Art. 436 of the Criminal Procedure Code of the Russian Federation).

Recognition of a person as an actual co-perpetrator of an act allows confirming the existence of an actual group, although the absence of a legally significant mutual conditional subjective connection between the actual co-perpetrators obviously excludes complicity in a crime.

Scientists, who recognize complicity in such cases and, accordingly, the presence of a group, point out the following arguments:

- the use of the category "persons" in the definition of "complicity" fixed in Art. 32 of the CrC RF allows them to be understood either subjects or criminally unliaible persons [7, p. 33; 8, p. 13; 9, p. 22; 10, p. 49];
- the absence of a mutual conditional subjective connection is not an obstacle to the formation of complicity: it is enough for the subject to realize the joint commission of a crime with a person, who is not criminally liable [7, p. 33; 8, p. 13; 10, p. 49; 11, p. 204];
- the qualification of what the subject has done does not depend on the legal status of the criminally unliaible person [8, p. 13; 10, p. 48; 11, p. 204];
- the criminal legal assessment of a socially dangerous act of a person who is not subject to criminal liability carried out according to the object and objective side of the crime makes it possible to recognize him as a co-perpetrator [8, pp. 13-14; 11, pp. 204; 12, p. 7].

However, such a justification, according to many legal scholars, contradicts criminal law, and the act of the subject of the crime should be recognized as committed individually, since:

- an extended interpretation of the category of "persons" used in the definition of "complicity" is unacceptable, since persons, who are not subject to criminal liability, do not meet the requirements of the subject and commit not a crime, but a socially dangerous act [6, p. 55; 13, p. 95, 101, 104; 14, p. 61-62; 15, p. 82-83; 16 31; 17, p. 344; 18, p. 90-91; 19, p. 59; 20, p. 47-48; 21, p. 86]; moreover, such an extended interpretation contradicts the principle of legality (Art. 3 of the CrC RF), since it represents the application of criminal law by analogy [17, p. 344; 18, p. 90];
- unilateral subjective connection excludes complicity in a crime: it is necessary to coincide the will of the subjects who carry out the objective side of the crime [14, pp. 62-63; 15, pp. 81; 16, pp. 31-32; 17, pp. 346, 348-351; 20, pp. 47; 21, pp. 83-84].

In our opinion, a more balanced approach is followed by scientists who believe that the joint commission of a crime by several persons, only one of whom is criminally liable, *forms a group of perpetrators, but without signs of complicity* [22, pp. 17-18; 23, pp. 137; 24, pp. 96-97; 25, pp. 73; 26, p. 60, 64].

The joint implementation of the objective side and the need to take into account the interests of the victim, facilitate the method of committing a crime and the increased public danger of criminal encroachment determine the recognition of the crime committed in the group [23, p. 137; 26, p. 46-50]. The absence of a two-way subjective

ISSN 2542-1514 (Print)

connection between the persons excludes complicity in the crime.

Nevertheless, we note that the commission of a crime by a group of perpetrators should not be identified with the group method as a sign of the objective side of the crime [22, pp. 17-18; 25, pp. 66, 72; 26, p. 61]. The possibility of bringing into the scope of criminal liability at least one of the actual perpetrators and the presence of at least a legally significant unilateral subjective connection between them [26, p. 61], which makes it possible to distinguish situations of accidental coincidence of independent criminal activity of several persons, are distinctive features of a criminal group.

Scientists, who do not recognize the presence of a group in such cases, note, in particular, that the broad interpretation of criminal groups raises questions about the need for a different systematization of criminal law norms, since in the article (clause, part) a Special Part of the CrC RF will reflect the qualifying feature, which is now included only in the chapter on complicity in a crime, but at the same time is not a form of complicity [14, p. 63; 19, p. 61]. In the latter, we stand in solidarity. The forms of complicity referred to in the doctrine are nothing more than coperpetration, which reflects the joint criminal activity of several actual perpetrators. "When all the perpetrators commit a crime provided for in the disposition of the criminal law," according to the correct remark of M.D. Shargorodskii, – there is no complicity, because all the persons are perpetrators, but in case of complicity, when several persons jointly perform the corpus delicti, it is necessary to study the issue from the point of view of the institution of complicity" [27, p. 313]. This interpretation of the criminal law norms on complicity makes it possible to define complicity and a criminal group as independent forms of joint criminal activity.

4. Conclusion

1. The joint commission of a crime by two or more persons, only one of whom is subject to criminal liability, does not constitute complicity in a crime.
2. Such a joint act forms a group of perpetrators without signs of complicity.
3. A criminal group is a coperpetration that is not a form of complicity and assumes the possibility of bringing into the scope of criminal liability even one of several actual perpetrators and the presence of at least a legally significant unilateral subjective connection between them.

ISSN 2658-4050 (Online)

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