

12. I. Andrejew, *Oceny...*, p. 18–19.

13. Por. na ten temat S. Mika, *Skuteczność kar w wychowaniu*, Warszawa 1969, p. 29 and the following.

14. *Ibidem*, p. 176 and the following.

15. In greater detail compare: R. Krajewski, *Karcenie dzieci. Perspektywa prawna*, Warszawa 2010, p. 122 and the following.

16. Compare: I. Andrejew, *Oceny...*, p. 84. I. Andrejew mentions one more condition, i.e. he claims that castigation should be executed in a way that is customarily accepted in a given society, *ibidem*, p. 84–85.

17. Compare on this subject: E. Czyż, *Prawo, którego nie można egzekwować – wokół postulatów delegalizacji stosowania kar fizycznych wobec dzieci*, Dziecko Krzywdzone 2003, vol. 2, no 2, p. 45–46.

УДК 343 (043.2)

Marta Mozgawa–Saj, Dr.,

Faculty of Law and Administration of UMCS, Lublin, Poland

THE CRIMINAL OFFENCE OF SUBJECTING ANOTHER PERSON TO PRACTICE PROSTITUTION

Introduction. Pursuant to Article 203 of the Polish Penal Code of 1997, Whoever, by force, illegal threat or deceit, or by abusing a relationship of dependence or by taking advantage of a critical situation, subjects another person to practice prostitution shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

This type of offence had no direct equivalent either in the Penal Code of 1932 or in the Penal Code of 1969. The PC of 1932 (in Article 210) penalised only inciting another person into prostitution on a professional basis (which was punishable by up to 5 years of imprisonment and a fine) [1]; similar approach was applied in Article 174 § 1 of the PC of 1969 (who incites another person to practise prostitution shall be punished by imprisonment from one to 10 years) [2].

The definition of prostitute and legal systems for the regulation on prostitution. M. Jasińska defines prostitute as a person who meets the sexual needs of random partners for money or other material goods and without being emotionally involved, with a limited right to choose a client – sexual partner [3]. By contrast, according to M. Antoniszyn and A. Marek "prostitute is a person who practises, on a regular or casual basis, providing sexual services in any form in exchange for material benefits, which constitute the main motive for their action [4]".

The scholarly opinion indicates that professional prostitution is not necessary to consider a person as a prostitute as co-called occasional prostitution is also possible [5].

There is no doubt that prostitution can be both female and male [6]. Four legal systems governing the issue of prostitution (prohibitive, regulative, neo-regulative, abolitionist) are known.

In Poland, prostitution is not punishable, in accordance with the abolitionist Convention of 1950 for the suppression of the traffic in persons and of the exploitation of the prostitution of others (ratified by Poland under the Act of 29 February 1952 [7]), nevertheless the Code of Minor Offences contains Article 142 penalising a prohibited act referred to as *racolage* (consisting in insistent proposing to another person an indecent act [8]), which is sometimes said to have criminalised prostitution "through the side door" [9].

Protected interest. The object of protection is the sexual freedom of a person forced into prostitution [10]. In the literature, there is also an opinion that the object of individual protection is also human dignity [11], and another interesting view, according to which the protected interest is also the freedom to choose a controversial but legal way of acquiring money (earning, practising a "free" occupation, choosing the type of occupation or services provided) [12].

This view has been criticised by E. Czerwonka [13] and B. Błońska [14], who argued that this type of freedom is protected in criminal law by the norm of Article 191 PC (which penalises forcing any kind of behaviour).

The objective side. The essence of the crime under Article 203 PC consists in subjecting another person to prostitution by the perpetrator using violence, illegal threat, deception, taking advantage of a relationship of dependence or critical situation of the victim.

The Polish verb "doprowadzać" ("to subject") means "to give rise to, to lead someone to do something, to cause something, to bring about" [15] and includes the existence of a causal link between the offender's behaviour and taking the actions specified in the operative part of the provision; subjecting assumes that the offender must be the initiating party in this arrangement, causing the injured party to undertake a specific behaviour [16].

The phrase "subjects another person to practise prostitution" means that a person who had not been involved in prostitution started practicing it, or a person who had been involved in prostitution but intended to give it up was forced to continue the practice, using the methods listed in the provision (and not e.g. using mild persuasion) [17].

This apt view is also reflected in the case law of the Supreme Court, which stated in its decision of 30 January 2018, IV KK 478/17 [18], that "the liability for the crime under Article 203 PC shall be borne not only by those who caused the victim to start prostitution, but also those who did not allow the victim to give it up. As far as the means of action of the perpetrator are concerned, their analysis should start with the notion of violence.

Violence in the general sense of the word is such a means of action which, while preventing or overcoming the forced person's resistance, is supposed to either prevent the decision of their will from being made or executed, or, by

pressing the current motivational processes with a severe strain, to set his or her decision towards the direction desired by the perpetrator [19].

An illegal threat is both the threat referred to in Article 190 PC (the so-called "punishable threat" [20]) and the threat of causing criminal proceedings or other proceedings in which an administrative fine may be imposed, as well as the threat of announcement of a message denigrating the person being threatened or his or her closest person (Article 115 § 12 PC) [21], while the deceit does not involve breaking the victim's will, but exerting an influence on the victim, which may consist in misleading or exploiting the victim's mistake in terms of motivational premises, which affect the victim's decision (in narrower terms) or misleading or using a mistake and exploiting it or causing the victim's mistake and thus leading to a state in which the victim could not make or execute the decision of will because his or her decision making or motion apparatus is neutralised (a broader approach) [22]. The statutory criteria of the crime described in Article 203 PC also include the use of the relationship of dependence or critical position.

The relationship of dependence (either permanent or transient) consists in the fact that the interest (material and immaterial) of a dependent person requires him/her to avoid conflicts with a person on whom he/she is dependent when such a conflict threatens his/her interests; the psychological mood of this person makes this person more inclined towards being obedient to the demands or wishes of the person on whom he/she is dependent [23].

This relationship of dependence may result from the operation of law (e.g. guardian and ward- Articles 145-174, 175-177 of the Family and Guardianship Code), from a contract (employer - employee), from a factual situation (e.g. rescuer - rescued person) [24]. As noted by the Supreme Court in the judgement of 6 May 2014, V KK 358/13 [25], the relationship of dependence is a legal or factual relationship that gives one person the opportunity to exert a certain influence, whether direct or indirect, on the legal, social and economic situation and position of another person.

According to the judgement of the Supreme Court of 5 February 2009, II CC 251/08 [26], "critical situation" is a situation where a person in such a situation is subject to a real risk of suffering serious harm or distress, and this risk can be averted by the proper conduct of the perpetrator, while "the subjecting" is a situation involving a violation, by means of inter alia the above method, of the will of the victim against the initiation or continuation of prostitution.

The nature of the offence. The criminal offence under Article 203 is an offence characterised by the occurrence of specific results (and the result is to subject the victim to prostitution).

The perpetration takes place when the prostitution activity begins or is resumed under the influence of the means used by the perpetrator [27]. The crime of forcing to prostitution is a specifically-defined perpetrator offence

(*delictum proprium*) as regards its aspect of taking advantage of the relationship of dependence (because only the perpetrator who is in such a relationship can take advantage of this relationship), while in relation to other features it is a generally-defined perpetrator offence (*delictum commune*) [28].

From the subjective side, the offence is intentional; some authors argue that it can only be committed with direct intent (*dolus directus*) [29], others also allow *dolus eventualis* [30].

Concurrence of legal provisions. There may be a real proper concurrence of provisions of Article 203 and Article 200 § 1 of the Penal Code (when the perpetrator subjected to prostitution a minor under the age of 15).

The cumulative qualification of Article 203 with Article 156 § 1 (or with Article 157 § 1 or § 2) cannot be ruled out, where the method of subjecting to prostitution is violence [31]. If the perpetrator remains in a regular or transient relationship with the forced person, and the forcing takes the form of bullying, a real proper concurrence of the provisions of Article 203 and Article 207 § 1 or § 2 of the Penal Code cannot be ruled out the established scholarly opinion indicates that the provision of Article 203 may be in cumulative qualification under Article 189 § 1-3 of the Penal Code (if the perpetrator deprives the victim of his or her liberty in order to force them to engage in prostitution), as well as under Art. 190a § 1 of the Penal Code (stalking) when the perpetrator wants to achieve the above goal by persistent harassment [32]. One cannot rule out the cumulative qualification under Article 203 with Article 191a § 1 of the Penal Code (dissemination of the image of a naked person [33]), as well as the provisions of Article 197 § 1-4 PC (rape) [34].

Statistics. The analysis of statistical data (concerning misdemeanours under Article 203 PC) for the years 200-2012 by M. Marczewski shows that in this period the number of ascertained crimes ranged from 19 (in 2011) to 63 (in 2002) [35]. The number of suspects did not exceed 40, and women constituted a definite minority (amounting to no more than 11 in 2007).

The number of convictions was small but varied and did not exceed 30 per year (most in 2004 [28 convictions] and in 2008 [26 convictions]). Most often, courts issued immediate custodial sentences (with the exception of 2000-2002, 2007, 2010, when suspended custodial sentences prevailed) [36].

Final remarks. It should be assumed that, as a rule, the current approach to the type of crime under Article 203 PC is correct.

The varied approach by scholars in the field do not significantly affect the practice of applying this provision. The number of ascertained crimes is small (not exceeding 30 cases per year in the last few years), and so there are very rare convictions under Article 203 PC. Although there is undoubtedly a dark number of these crimes, however this apparently is not a criminal act that occurs too often in Polish reality.

Literature

1. On this topic in more detail, cf.: L. Peiper. Komentarz do kodeksu karnego.

Kraków, 1936, pp. 432-433.

2. On this topic in more detail, cf.: M. Siewierski in: J. Bafia, K. Mioduski, M. Siewierski. Kodeks karny. Komentarz. Warszawa, 1977, pp. 442-443.

3. M. Jasińska. Proces społecznego wykołajania młodocianych dziewcząt. Warszawa, 1967, p. 9.

4. M. Antoniszyn, A. Marek. Prostytucja w świetle badań kryminologicznych. Warszawa, 1985, p. 6.

5. K. Imieliński. Manowce seksu. Prostytucja. Łódź, 1990, p. 15.

6. M. Mozgawa, in: Kodeks karny, ed. M. Mozgawa, Warszawa 2019, p. 681.

7. Dz.U. z 1952 r., Nr 41, poz. 278.

8. On this minor offence in more detail, cf. K. Wala. Wykroczenie nieobyczajnego wybryku na tle pozostałych wykroczeń przeciwko obyczajności publicznej. Warszawa, 2019, pp. 305 – 380; M. Mozgawa. Remarks on the minor offence under Article 142 of the Code of Petty Offences, in: Prostytucja, ed. M. Mozgawa, Warszawa, 2014, pp. 117-133.

9. W. Radecki. Jeszcze raz o tzw. Racolage. Gazeta Sądowa i Penitencjarna. 1970, no. 19.

10. Cf. e.g. M. Budyn-Kulik, M. Kulik in: Kodeks karny. Część szczególna, vol. I. Commentary on Articles 117-221, ed. M. Królikowskiego, R. Zawłockiego, Warszawa 2017, p. 797; M. Mozgawa in: Kodeks, p. 680; S. Hypś in: Kodeks karny. Komentarz, ed. A. Grześkowiak, K. Wiak, Warszawa 2019, p. 1087.

11. B. Błońska, Zagadnienie przedmiotu ochrony prawnokarnej w przypadku przestępstw eksploatacji prostytucji, *Studia Iuridica*, 2006, vol. XLVI, p. 56.

12. As proposed by J. Warylewski in: *System Prawa Karnego*, vol. 10, *Przestępstwa przeciwko dobrom indywidualnym*, ed. J. Warylewski, Warszawa 2016, p. 927. As also proposed by P. Kozłowska-Kalisz, K. Nazar-Gutowska, *Doprowadzenie*, p. 100.

13. A. Czerwonka, Przestępstwo zmuszania do prostytucji, *Ius Novum* 2012, no. 1, pp. 65-66.

14. B. Błońska, *Zagadnienie*, p. 56.

15. *Słownik Języka Polskiego PWN*, ed. M. Szymczak, vol. I, Warszawa 1984, p. 430.

16. P. Kozłowska-Kalisz, K. Nazar-Gutowska, *Doprowadzenie innej osoby do uprawiania prostytucji (Article 203 PC)* in: *Prostytucja*, ed. M. Mozgawa, Warszawa 2014, p. 101.

17. J. Warylewski in: *Kodeks karny. Część szczególna*, vol. 1, *Commentary on Articles 117-221*, ed. A. Wąsek, R. Zawłocki, Warszawa 2010, p. 681.

18. Lex no. 2473792

19. T. Hanausek, *Przemoc jako forma działania przestępnego*, Kraków 1966, p. 65.

20. Article 190 § 1 PC: Whoever makes a threat to another person to commit an offence detrimental to that person or detrimental to his next of kin, and if the threat causes in the threatened person a justified fear that it will be carried out shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

21. A declaration that the institution of criminal proceedings, in which an

administrative or pecuniary penalty may be imposed, will be effected if made solely with the purpose of protecting the legal right violated by the offence, shall not constitute a threat (Article 115 § 12 PC).

22. M. Filar, *Przestępstwo zgwałcenia w polskim prawie karnym*, Warszawa – Poznań 1974, p. 105.

23. L. Peiper, *Komentarz*, p. 425.

24. M. Mozgawa in: *Kodeks*, p. 659.

25. LEX no. 1482486

26. LEX no. 486551

27. O. Górniok in: O. Górniok, S. Hoc, M. Kalitowski, S. M. Przyjemski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny. Komentarz*, vol. II, Gdańsk 2005, p. 216.

28. P. Kozłowska-Kalisz, K. Nazar-Gutowska, *Doprowadzenie*, p. 111.

29. As proposed, among others, by M. Berent, M. Filar in: *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2016, p. 1265; M. Mozgawa in: *Kodeks*, p. 681; J. Warylewski in: *System*, p. 935.

30. As stated by, among others: P. Kozłowska-Kalisz, K. Nazar-Gutowska, *Doprowadzenie*, p. 111, M. Budyn-Kulik, M. Kulik in: *Kodeks*, p. 800; S. Hypś in: *Kodeks*, p. 1088.

31. M. Budyn-Kulik, M. Kulik in: *Kodeks*, p. 800; M. Mozgawa in: *Kodeks*, p. 682.

32. M. Mozgawa in: *Kodeks*, p. 682.

33. Where the perpetrator subjects another person to practice prostitution, by taking advantage of the critical situation that may be a result of dissemination of a naked image of this person or an image taken during a sexual activity of that person. Cf. P. Kozłowska-Kalisz, K. Nazar-Gutowska, *Doprowadzenie*, p. 112.

34. As proposed by e.g. M. Mozgawa in: *Kodeks*, p. 682; a different view is presented by J. Warylewski in: *System*, p. 935.

35. In recent years, also the number of ascertained crimes is small: in 2013 – 17, in 2014–30, in 2015 – 22, in 2016 – 25, in 2017 – 28. <http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-6/63504,Zmuszanie-do-prostytucji-art-203.html>

36. M. Marczewski, *Przestępstwa związane z prostytucją w świetle statystyki policyjnej i sądowej*, in: *Prostytucja*, ed. M. Mozgawa, Warszawa 2014, pp. 308–310.

UDC 343.1(043.2)

Rzayev Ramin, PhD student,
Baku State University, Baku, Azerbaijan

PROCEDURAL ASPECTS OF CHANGE OF ACCUSATION IN COURT PROCEEDING

After making a decision on the appointment of a judicial review, the nature of the charge laid down by the general conditions for the exercise of judicial