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Szymon Tarapata
Jagiellonian University in Kraków, Poland
ORCID: 0000-0002-4095-8892
szymon.tarapata@uj.edu.pl

The Meaning of the Likelihood of Severe Penalty Being Imposed upon the Accused in Making a Decision on Pre-trial Detention

Znaczenie grożącej oskarżonemu surowej kary w podejmowaniu decyzji w przedmiocie tymczasowego aresztowania

ABSTRACT

This article is of a scientific nature, that employs a dogmatic method. The aim of the study is to establish the status and function of the severity of penalty under Article 258 § 2 of the Code of Criminal Procedure (hereinafter: the CCP) in making decisions on the application of pre-trial detention. This issue is controversial both in doctrine and jurisprudence. The text presents a new approach that Article 258 § 2 of the CCP does not set out a specific premise for the imposition of pre-trial detention. This provision cannot express an independent criterion for imposing the most severe preventive measure as Article 258 § 2 of the CCP is of auxiliary character. It expresses an auxiliary criterion for determining whether the special premises for imposing pre-trial detention under Article 258 § 2 of the CCP have been realized. The proposals contained in the article are intended to facilitate the interpretation of national provisions on coercive measures and to facilitate their application in the practice of the judiciary. The article indicates the factors that are important in assessing whether the likelihood of imposing severe punishment crystalizes the risk of fleeing, hiding or obstructing justice. For the application of pre-trial detention there may be arguments, i.a., pertaining to the nature of the offense alleged. In this context, it should be important whether the potential perpetrator is charged with a crime with a use of violence or threat thereof. His posture in the course of criminal proceedings so far is also not without significance. It may be, however, that the likelihood of imposing severe penalty may give rise to the fear of obstruction of justice even in a situation where the accused, who knew about the pending criminal case, did not take any unlawful action. Nevertheless, the correct posture of the accused in the course of criminal proceedings will often be a significant factor against the use of pre-trial detention.

Keywords: pre-trial detention; severe penalty; coercive measures; Code of Criminal Procedure

CORRESPONDENCE ADDRESS: Szymon Tarapata, PhD, Dr. habil. Associate Professor, Jagiellonian University in Kraków, Faculty of Law and Administration, Department of Criminal Law, Olszewskiego 2, 31-007 Cracow, Poland.

INTRODUCTION

In the literature and jurisprudence, there has been a dispute for years about the meaning of the structure provided for in Article 258 § 2 of the Code of Criminal Procedure (hereinafter: the CCP). This provision regulates that "if the accused is accused of committing a crime or a misdemeanor punishable by a maximum term of imprisonment of at least 8 years, or when the court of first instance sentenced him to imprisonment for a term of not less than 3 years, the need to impose pre-trial detention in order to secure the proper course of the proceedings may be justified by the likelihood of a severe penalty for the accused".[1]

Most frequently it is emphasized that Article 258 § 2 of the CCP expresses a specific premise for applying pre-trial detention. However, there are large discrepancies in the assessment of the nature of this premise. There is a difference of opinion on this issue even within panels of the same courts. For example, in the decision of the Court of Appeal in Kraków of 3 July 2019,[2] it was indicated that "it is unacceptable to state that Article 258 § 2 of the CPP, which mentions the likelihood of imposing a severe penalty upon the accused, could constitute an independent premise for pre-trial detention. It is impossible to assume that the mere threat of a severe penalty carries elements of a real threat of the suspect interfering with the proper course of the proceedings and, at the will of the legislator, introducing

[1] Article 258 § 2 of the CCP has undergone some changes since the coming into force of the currently applicable criminal procedural act. Until 30 June 2015, this provision was exactly as it is today. On 1 July 2015, the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and certain other acts (Journal of Laws 2013, item 1247) came into force, pursuant to which Article 258 § 2 of the CCP was given the following wording: "Towards an accused who has been charged with a serious crime or a crime punishable by a maximum period of imprisonment of at least 8 years, or whom the court of first instance has sentenced to imprisonment of more than 3 years, the threat of obstruction of the proper course of proceedings, referred to in § 1, justifying the imposition of a preventive measure, may also result from the severity of the punishment likely to be imposed upon the accused". This regulation was in force until 15 April 2016. Then the Act of 11 March 2016 amending the Act – Code of Criminal Procedure and certain other acts (Journal of Laws 2016, item 437) came into force, which restored the previous state. One should share view that the indicated amendments did not in fact introduce any normative change to Article 258 § 2 of the CCP (see D. Zając, *Zagrożenie karą jako przesłanka stosowania tymczasowego aresztowania*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2018, no. 4, p. 10, 31). It should be remarked, however, that some authors note that the increase in the number of people temporarily arrested in Poland coincided with the aforementioned change in the wording of Article 258 § 2 of the CCP, which came into force on 15 April 2016 (see W. Hermeliński, B. Nita-Światłowska, *Tymczasowe aresztowanie ze względu na grożącą oskarżonemu surową karę*, "Palestra" 2018, no. 6, pp. 15–16).

[2] II AKz 303/19, LEX no. 2757824. See also decision of the Supreme Court of 12 March 2009, WZ 15/09, LEX no. 503668; H. Gajewska-Kraczkowska, *Rozważania nad polską praktyką aresztową – od sprawy Adama Kauczora do ustawy nowelizacyjnej z dnia 27 września 2013 r.*, "Wojskowy Przegląd Prawniczy" 2015, no. 1, p. 12; W. Hermeliński, B. Nita-Światłowska, *op. cit.*, p. 16.

a presumption that it is necessary to secure it. If such a presumption were to be assumed, then 'defence' against the application of an isolative preventive measure in the event that the accused is facing severe penalty would require that it be rebutted with counter-evidence showing a negative circumstance. This, in turn, would not be acceptable in the light of Articles 2 and 41 of the Constitution of the Republic of Poland, which, after all, by the will of the constitution-maker, is directly applicable (Article 8 of the Constitution of the Republic of Poland)".

However, the Court of Appeal in Kraków in its decision of 11 July 2019,[3] expressed the following view: "The premise of Article 258 § 2 of the CCP is an independent and sufficient basis for the application of pre-trial detention, and it does not have to be accompanied by other, specified in Article 258 §§ 1 and 3 of the CCP, premises for pre-trial detention".

The latter position is currently dominant in jurisprudence.[4] A question should be asked whether any of the presented approaches above are correct, and if so, which one. A more general issue is also worth considering, namely whether Article 258 § 2 of the CCP encompasses any premise of imposing pre-trial detention, and if not, what is the status of this provision. These are the issues that this text discusses.

THE LIKELIHOOD OF IMPOSING A SEVERE PENALTY AS AN INDEPENDENT PREMISE OF PRE-TRIAL DETENTION – CRITICISM

At this point, it is worth to set out, in general terms, the view which boils down to the claim that Article 258 § 2 of the CCP establishes an independent special premise of pre-trial detention and to remind what this thesis is supposed to mean. In this context, it is pointed out that under Article 258 § 2 of the CCP there is a legal presumption that if the accused (or the suspect) faces severe penalty, then the risk of obstruction of justice on his part crystalizes.[5] In such cases, in order to apply pre-trial detention, it is not necessary to prove the existence of the premises specified in Article 258 § 1 of the CCP.[6] It can be assumed in advance that the accused (suspect), faced with the prospect of serving a severe sentence, will be

[3] II AKz 366/19, LEX no. 2757825. The independent nature of the condition under Article 258 § 2 of the CCP was also favoured by D. Świecki, *Komentarz do art. 258*, [in:] *Kodeks postępowania karnego*, vol. 1: *Komentarz aktualizowany*, ed. D. Świecki, Warszawa 2020, thesis 22; R.A. Stefański, *Komentarz do art. 258*, [in:] *Kodeks postępowania karnego. Komentarz*, Warszawa 2019, thesis 9.

[4] For example, see decision of the Supreme Court of 20 February 2020, KZ 6/20, LEX no. 2785121; decision of the Court of Appeal in Kraków of 27 May 2019, II AKz 279/19, LEX no. 2757816.

[5] D. Zając, *op. cit.*, p. 8.

[6] For example, see decision of the Court of Appeal in Wrocław of 5 January 2012, II AKz 4/12, LEX no. 1108804.

strongly tempted to undertake unlawful actions aimed at avoiding criminal liability or reducing its scope. It is indicated, however, that this presumption is rebuttable. It can be argued that in the reality of a particular case there is no real threat that the accused (suspect) will make any attempts to unlawfully influence the course of criminal proceedings pending against him.

Supporters of the thesis about the independent nature of the premise specified in Article 258 § 2 of the CCP emphasize that the accuracy of such approach was determined by the resolution of the Supreme Court in the panel of 7 judges of 19 January 2012.[7] It indicated that "the grounds for applying pre-trial detention, as defined in Article 258 § 2 of the CCP, provided that the premises set out in Article 249 § 1 and Article 257 § 1 of the CCP are met and in the absence of negative premises specified in Article 259 §§ 1 and 2 of the CCP, constitute independent specific premises for the imposition of this preventive measure".[8]

Substantiating the cited viewpoint, it was raised above all that if one were to assume that for the purpose of applying pre-trial detention pursuant to Article 258 § 2 of the CCP it was necessary to prove the existence of a justified thread of obstruction of justice or a justified fear of fleeing, hiding of the accused or other unlawful obstruction of criminal proceedings (i.e., a premise for the application of pre-trial detention specified in Article 258 § 1 of the CCP), then § 2 would turn out to be unnecessary. Such an interpretation would be in blatant contradiction to

[7] I KZP 18/11, LEX no. 1102081.

[8] The statements contained in this resolution have also been upheld in other judgments and decisions (for example, see decision of the Supreme Court of 26 February 2019, II KK 178/18, LEX no. 2625401). However, the opinion has been expressed in the literature that such understanding of Article 258 § 2 of the CCP, which was presented in this resolution, does not meet the proportionality test under Article 31 (3) of the Polish Constitution and breaches the requirement to define the principles of limitation and deprivation of personal liberty in a statute, expressed in Article 41 (1) of the Polish Constitution, as well as the principle of correct legislation resulting from Article 2 of the Polish Constitution. See J. Skorupka, *O niekonstytucyjności art. 258 § 2 k.p.k.*, "Państwo i Prawo" 2018, no. 3, pp. 5–18. See also idem, *Glosa do uchwały SN z dnia 19 stycznia 2012 r., I KZP 18/11*, "Orzecznictwo Sądów Polskich" 2012, no. 7–8, pp. 546–549; idem, *Tymczasowe aresztowanie w praktyce stosowania prawa*, "Palestra" 2021, no. 1, pp. 19–22; W. Hermeliński, B. Nita-Światłowska, *op. cit.*, p. 18; M. Drewicz, *Glosa do uchwały Sądu Najwyższego z 19 stycznia 2012 r., sygn. I KZP 18/11*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2012, no. 3, pp. 165–179; A. Woźniak, *Glosa do uchwały Sądu Najwyższego z 19 stycznia 2012 r., sygn. I KZP 18/11*, "Orzecznictwo Sądów Polskich" 2013, no. 6, pp. 462–466. However, it should be noted that some representatives of the doctrine approved the resolution I KZP 18/11. See D. Drajewicz, *Glosa do uchwały SN z dnia 19 stycznia 2019 r., I KZP 18/11*, "Prokuratura i Prawo" 2013, no. 10, pp. 181–186; M. Kornak, *Glosa do uchwały SN z dnia 19 stycznia 2012 r., I KZP 18/11*, LEX/el. 2012; J. Machlańska, *Glosa do uchwały SN z dnia 19 stycznia 2019 r., I KZP 18/11*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2013, no. 2, pp. 157–168. See also a review of positions on this issue in R.A. Stefański, *Przegląd uchwał Izb Karnej, Wojskowej Sądu Najwyższego w zakresie postępowania karnego za 2012 r.*, "Ius Novum" 2013, no. 2, pp. 189–192 and the literature referred to therein.

the prohibition of interpretation of *per non est*. So if the legislator provided for in Article 258 § 2 of the CCP an additional criterion for the application of pre-trial detention, and at the same time no provision implies the necessity to jointly apply the conditions set out in §§ 1 and 2, severe penalty for the accused, in the circumstances described in Article 258 § 2 of the CCP, may constitute an independent special premise. It was added that such a view is consistent with the regulations contained in the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights.

When analyzing the entire justification of the resolution I KZP 18/11, it is hard not to get the impression that some of the statements contained therein are incoherent. First of all, it is worth noting that the Supreme Court, accepting the view that Article 258 § 2 of the CCP establishes a stand-alone premise for the application of pre-trial detention, stipulated that the use of this isolation measure is possible only when the features specified in Article 249 § 1 of the CCP and Article 257 § 1 of the CCP and the negative criteria from Article 259 §§ 1 and 2 of the CCP are met. It seems that the cited reasoning should be subjected to a deeper assessment.

It is not surprising that when the negative criteria of Article 259 § 2 of the CCP are realized, the conditions of Article 258 § 2 of the CCP cannot be met. Since, on the basis of the circumstances of the case, it can be predicted that the court will impose a penalty of deprivation of liberty with a conditional suspension of its execution or a lighter penalty on the accused, or that the period of pre-trial detention will exceed the estimated duration of the penalty of deprivation of liberty without conditional suspension, then the perpetrator is not at risk of being imposed with a severe penalty. In such cases, the conditions set out in Article 258 § 2 of the CCP cannot be realized.

However, it is possible to realize the criteria stipulated for in Article 258 § 2 of the CCP while meeting the negative premises listed in Article 259 § 1 of the CCP. In such a situation, there is a collision between two legal values that must be resolved. The interests of the criminal proceedings will be on one scale, and the values of security for the life or health of the accused or the subsistence of his closest relatives on the other. The Supreme Court stated that the latter of these goods should be given priority.

Much more intriguing is the thesis of the Supreme Court that realization of conditions set out in Article 258 § 1 of the CCP can only take place when the general condition of applying any preventive measures under Article 249 § 1 of the CCP and the minimization directive of Article 257 § 1 of the CCP are realized.[9] A question must be asked as to what significant practical consequences may arise from such a statement. In this context, it must first of all be pointed out that in Article 249 § 1 of the CCP and Article 257 § 1 of the CCP a transfer of the proportionality test

[9] Zob. W. Hermeliński, B. Nita-Światłowska, *op. cit.*, s. 14.

from the Polish Constitution to a statute can be traced, which is adopted for the purposes of criminal cases. It assumes that the use of any coercive measures, and above all, pre-trail detention, becomes permissible only if it is to pursue a constitutionally permissible goal, is necessary and not too intense (proportionality).[10] It is therefore about the fulfillment of three premises in the form of purposefulness, necessity, and proportionality *sensu stricto*.

The premise of purposefulness was fully embodied in Article 249 § 1 of the CCP. This provision explicitly states that any preventive measures may be applied only to secure the proper course of criminal proceedings. On the other hand, the premise of proportionality in the strict sense is partially reflected in Article 257 § 1 of the CCP, which provides that pre-trial detention is not to be applied if another preventive measure is sufficient. It is worth noticing that in Article 251 § 3 of the CCP *in fine*, the legislator imposed an obligation on the adjudicating court to explain, in the statement of reasons of the decision on the application of an isolative measure, why the application of the non-isolative measure was found to be insufficient. On the other hand, the premise of necessity, which can be construed from Article 2 and Article 31 (3) of the Polish Constitution, also must, under Article 8 (2) of the Polish Constitution, be a necessary condition for using pre-trail detention.[11] It also results indirectly from Article 253 § 1 of the CCP, which stipulates that a preventive measure should be repealed or changed if there are reasons substantiating the repeal or change. The reason justifying the repeal of pre-trial detention is certainly the fact that its application is no longer necessary to secure the proper course of criminal proceedings.

THE SIGNIFICANCE OF THE LIKELIHOOD OF IMPOSING SEVERE PUNISHMENT IN THE PROCEDURE OF APPLYING PRE-TRIAL DETENTION – OWN POSITION

The above brief reminder of the conditions arising from the constitutional test of proportionality is important primarily for one reason. It appears important from the perspective of the question of when the use of pre-trial detention ceases to be necessary to secure the proper course of criminal proceedings. It is obvious that

[10] Judgment of the Constitutional Tribunal of 25 February 1999, SK 23/98, LEX no. 36178. See also M. Szydło, [in:] *Konstytucja RP*, vol. 1: *Komentarz. Art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, pp. 791–807; P. Cychosz, *Konstytucyjny standard prawa karnego materialnego w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2017, pp. 418–426.

[11] See, i.a., J. Skorupka, *Konstytucyjny i konwencyjny standard tymczasowego aresztowania*, "Państwo i Prawo" 2007, no. 7, pp. 57–58. See also M. Bielski, *Stosowanie środków zapobiegawczych w świetle konstytucyjnej zasady proporcjonalności*, [in:] *Prawo karne wobec Konstytucji*, eds. M. Pająk, R. Zawłocki, Warszawa 2018, pp. 117–127.

such a necessity is non-existent either when, in the realities of a specific case, there is no fear of obstruction of justice at all, or when the risk of it can be effectively neutralized with the help of a non-isolative preventive measure. Meanwhile, any situation that is not mentioned in Article 258 § 1 of the CCP cannot be called obstruction of justice. This provision is extremely capacious. After all, the legislator clearly indicated that the manifestations of obstruction of justice are flight, hiding, the possibility of persuading other people to provide false testimony, adding at the same time that "another unlawful way of obstructing criminal proceedings" may also be obstruction of justice. The latter expression suggests that the catalog of behaviors potentially destabilizing criminal proceedings is in fact open. It can cover an infinite number of situations.[12] However, most importantly since the court, when ruling on the application of pre-trial detention, is obliged to establish the fulfillment the general conditions of Article 249 § 1 of the CCP and to apply the proportionality test under Article 31 (3) of the Polish Constitution and Article 257 § 1 of the CCP, it must necessarily examine whether the accused is likely to obstruct justice. The application of an isolative measure of coercion in proceedings is necessary only when the perpetrator may make unlawful efforts to destabilize criminal proceedings.

The statements expressed in the previous paragraph must lead to the conclusion that Article 258 § 1 of the CCP is only a clarification of what already results from Article 249 § 1 of the CCP and Article 31 (3) of the Polish Constitution. Article 249 § 1 of the CCP constitutes a pre-range provision in relation to the premises for the use of preventive measures referred to in Article 258 of the CCP. Therefore, it is impossible to apply pre-trial detention without at the same time demonstrating the fear of fraud on the part of the accused. This leads to the conclusion that Article 258 § 2 of the CCP, contrary to the express position expressed in resolution I KZP 18/11, by no means can it constitute an independent condition for the application of pre-trial detention. This provision is only of a clarifying nature. It seems that the legislator decided to introduce it in order to make the regulations on preventive measures as precise as possible and thus facilitate their application in practice. It was certainly not the intention of the legislator to ensure that the courts would apply a detention measure in a way that distorts the meaning of pre-trial detention.

Bearing in mind the above findings, it is time to answer the question of the status and the function of Article 258 § 2 of the CCP. Does it express a specific, but not independent, premise for the application of pre-trial detention, or is the role of this

[12] The accuracy of this statement is perfectly demonstrated by the thesis contained in the decision of the Court of Appeal in Kraków of 27 August 2018 (II AKz 432/18, LEX no. 2633158), in which it was stated: "Securing evidence is not the only purpose of applying preventive measures. Criminal proceedings may be hindered in various ways, at each stage, not only by influencing the evidence, but also by actions that may be considered unlawful procedural obstruction (simulating diseases, not responding to summons, etc.). Undertaking this type of action by the suspect appears to be real since the premise of the likelihood of imposing severe penalty also came true".

provision different still? What is the purpose of Article 258 § 2 of the CCP, since in order to apply pre-trial detention anyway it is necessary to prove the existence of a risk that the suspect (accused) may try to unlawfully influence the course of the proceedings against him? Why, then, the practitioner obtains an information from the legislator that the need to apply pre-trial detention may result from the likelihood of imposing a severe punishment upon the accused? It is obvious, after all, that the agent applying the law cannot ignore Article 258 § 2 of the CCP. For if this provision was to be completely ignored in the process of interpretation, it would stand in contradiction with the rule that treating a fragment of a legal text as *per non est* is not allowed. Article 258 § 2 of the CCP must, therefore, contain some normative content, which, moreover, is not currently contested neither by the jurisprudence nor by the literature. However, the provision may only serve to construe a directive that is consistent with the constitutional regulations.

It is significant that Article 258 § 2 of the CCP is just behind the premise for the application of pre-trial detention, which speaks of manifestations of unlawful torpedoing of criminal proceedings. The linguistic layer of Article 258 § 2 of the CCP suggests that its placement in the code is not incidental. It is specifically that part of the provision cited, in which it was mentioned that "the need to apply pre-trial detention in order to secure the proper course of the proceedings may be substantiated by the likelihood of imposing a severe penalty upon the accused". The implementation of the objective of securing the proper course of proceedings makes sense only when there is any threat of destabilization of the proceedings on the part of the alleged perpetrator. It is this perspective that should be taken into account when interpreting Article 258 § 2 of the CCP. When interpreting this provision, it must be taken into account that it must be related to a specific condition expressed in Article 258 § 1 of the CCP for the application of pre-trial detention in the form of threat of unlawful obstruction of criminal proceedings by the suspect or the accused. Moreover, also Article 258 § 4 of the CCP requires an evaluation of the regulation of Article 258 § 2 of the CCP from the perspective of the possible intensification of the likelihood described therein (i.e., imposing a severe penalty) for the proper course of the proceedings. Article 258 § 2 of the CCP cannot, therefore, be of independent character. The literature even states that this provision does not express any specific condition for applying pre-trial detention at all. In this context, it is noted that "the presentation of a charge of a crime or a specific offense and the severity of the punishment that may be imposed upon the accused are only circumstances (facts) justifying the presumption of threat of unlawful obstruction of the proceedings by the accused (…). In other words, the threat of unlawful obstruction of the proceedings is to arise from the fact that the accused is faced with a serious penalty. The premise justifying the application of a preventive measure, including pre-trial detention, is therefore not the fact that the accused has been charged with a specific crime or is faced with a serious penalty, but the fear that he

or she will unlawfully obstruct the proper course of the proceedings. Hence, when the accused is likely to face a severe penalty as a consequence of being accused of committing a crime or an offense or being sentenced by the court of first instance to imprisonment referred to in Article 258 § 2 of the CCP, there is a presumption of unlawful influence on the proper course of the proceedings by him. The charge and sentencing referred to in Article 258 § 2 of the CCP are only facts creating the presumption mentioned. In this sense, they do not constitute premises for pre-trial detention. The application of the aforementioned measure will be admissible only when, as a result of the charges or conviction, there is a justified threat of unlawful obstruction of the proper course of the proceedings by the accused. Included in Article 258 § 2 of the CCP the presumption *in concreto* may be rebutted by establishing that, despite the severe penalty that may be imposed on the accused, there is no threat of unlawful obstruction of the criminal proceedings by him".[13]

The concept according to which Article 258 § 2 of the CCP does not express any specific condition for the application of pre-trial detention is fully convincing.[14] It is consistent with the thesis supported in this text that in order to apply an isolative preventive measure, it is necessary to demonstrate that the alleged perpetrator poses a threat of unlawfully influencing the course of criminal proceedings. One needs to agree with J. Skorupka that adopting the opposite conclusion (i.e., that pre-trial detention may be applied in a situation where there is no real fear of procedural fraud) would make pre-trial detention an anticipation of the upcoming punishment for the accused, and consequently this measure would not be preventive in nature but repressive.[15] It would transform that isolative instrument into a tool that would in fact serve to secure the implementation of the severe sanction expected in the future, and not to secure the proper course of the proceedings.[16] Such an undesirable

[13] J. Skorupka, *Komentarz do art. 258*, [in:] *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, thesis 10. See also decision of the Court of Appeal in Gdańsk of 11 December 2018, II AKz 654/18, LEX no. 2692006; decision of the Court of Appeal in Kraków of 19 May 2016, II AKz 168/16, LEX no. 2155401.

[14] It must be said that it is impossible to reconcile the theses that on the one hand "it is not the very possibility of a severe penalty that justifies the pre-trail detention of the accused, but the resulting threat that, assuming that such a penalty will be imposed, the accused may take steps to destabilize the proper course of the proceedings", and on the other hand that Article 258 § 2 of the CCP constitutes a self-standing condition for the application of pre-trial detention. These two theses were approved, e.g., in the decision of the Court of Appeal in Kraków of 11 October 2017, II AKz 389/17, LEX no. 2536076.

[15] J. Skorupka, *O niekonstytucyjności…*, pp. 9–10. The fact that pre-trial detention cannot be an anticipation of punishment and cannot be treated as a means of rapid repression is commonly accepted. For example, see W. Hermeliński, B. Nita-Światłowska, *op. cit.*, p. 14.

[16] See judgment of the Constitutional Tribunal of 7 October 2008, P 30/07, LEX no. 671629. This judgment questioned the constitutionality of the solution consisting in recognizing the charge of committing a hooligan offense as an independent condition for the application of pre-trial detention. It stated, first of all, that "the use by the legislator in Article 517c §§ 1 and 4 of the CCP of the

result can be easily avoided by interpreting the provisions on pre-trial detention in line with the Polish Constitution. For this reason, in order to reconstruct the norm of competence allowing the court to apply a pre-trial isolation measure, it is necessary to refer to the constitutional provisions embodying the test of proportionality.[17] As already mentioned, such a procedure requires an answer to the question whether, *in concreto*, there is such a threat of unlawful influence on the course of criminal proceedings, which justifies the use of pre-trial detention. As a part of the answer, it is important to consider the impact of the potential severe penalty on the likelihood of attempts to obstruct the course of justice.

It should be assumed that Article 258 § 2 of the CCP provides an indication of how to prove the existence of threats to the proper conduct of the criminal case. This provision is therefore ancillary to the conditions set out in Article 249 § 1 and Article 258 § 1 of the CCP. Article 258 § 2 of the CCP is used to determine when the conditions described in Article 249 § 1 and Article 258 § 1 of the CCP are met. Some attention should be devoted to the scheme of proving that the likelihood of imposing severe penalty may raise apprehensions of attempts to obstruct the course of justice.

words 'applies' and 'constitutes an independent basis for application' may not exclude the primacy of the general guarantee standard specified in Article 249 § 1 of the CCP. The overriding goal of the regulation, that is, to capture and judge the suspect efficiently, can also be achieved in relation to the perpetrators of acts of 'hooligan nature' using methods already existing in the criminal procedure. In each case of a hooligan offense, the court may apply a preventive measure only when it is necessary 'in order to secure the proper course of the criminal proceedings' and 'when the collected evidence indicates a high probability that the accused committed the crime'. It is ruled by independent judges. Defined in Article 517c §§ 1 and 4 of the CCP inherent prerequisite for applying a preventive measure may turn it into a non-legal repressive measure. As a result, the Constitutional Tribunal deems the controlled regulation to be contrary to the constitutional principle of proportionality, as expressed in Article 31 (3) of the Polish Constitution, and is inconsistent with the systemic regulation of the CCP on the application of preventive measures and procedural guarantees in favour of the persons to whom these measures are applied. The mere fact of committing an act of a hooligan nature does not allow for the assumption that the accused will undertake unlawful actions that obstruct the proceedings, and the disrespectful attitude to the legal order shown by the person who committed the act of hooliganism does not have to – although it may – entail further violations in practice of the legal order by unlawful conduct of the accused in the course of proceedings consisting in evading court or obstructing the course of justice. Only a court adjudicating in a particular case has the power to assess the existence of these circumstances".

[17] M. Bielski, *op. cit.*, pp. 120–127. See also A. Bator, *Bezpośrednie stosowanie Konstytucji Rzeczpospolitej Polskiej*, "Państwo i Prawo" 2006, no. 10, p. 98.

FACTORS THAT CAUSE THE LIKELIHOOD OF IMPOSING SEVERE PENALTY TO INDICATE THE LEGITIMACY OF APPLYING PRE-TRIAL DETENTION

When making a decision about pre-trial detention forecasts must be relied on. At the time of issuing the decision on the application of an isolative coercive measure, it is not possible to state for sure whether the suspect or the accused will try to unlawfully influence the course of the criminal proceedings. A decision to apply pre-trial detention must therefore necessarily be based on a greater or lesser probability. Its level is to be determined by a judge.

Of course, it may happen that the pre-trial detention decision is to some extent based on diagnostic elements. This will happen when in the case it is possible to collect specific evidence showing, for example, that the suspect or the accused, in order to avoid criminal liability, was destroying documents, persuaded the co-suspect (co-accused) to present a false version of the events to law enforcement authorities or intimidated witnesses. Then the conclusion about the necessity to use an isolative coercive measure to secure the proper course of the proceedings can be derived from the already committed obstruction of justice.[18] After all, it is rational to reason that since the suspect has already tried to obstruct the course of justice, it can be assumed that he may do it again. The committed obstruction must necessarily drastically weaken the confidence in the alleged perpetrator.

The jurisprudence rightly emphasizes that the threat of obstruction of justice should not be abstract, but must be real and result from the evidence gathered in the case.[19] The question arises as to whether this reality can be ascertained when there is no evidence in the case file that the accused or the suspect has already unlawfully influenced the course of the proceedings against him. The case law provides a negative answer.[20] It is assumed that "the condition for establishing a threat of obstructing the course of justice as a condition for pre-trial detention is not a finding

[18] For example, see decision of the Court of Appeal in Katowice of 17 July 2018, II AKz 488/18, LEX no. 2615545; decision of the Court of Appeal in Katowice of 14 February 2018, II AKz 90/18, LEX no. 2518023.

[19] Such an approach was adopted in the decision of the Court of Appeal in Katowice of 9 November 2016 (II AKz 576/16, LEX no. 2242178), which emphasized that "the mere acquaintance of the suspect with witnesses or co-suspects does not raise the threat that he will take steps to persuade them to give false testimony or otherwise unlawfully obstruct criminal proceedings. The concern referred to in the disposition of Article 258 § 1 (2) of the CCP, and as a rule must be justified by specific circumstances indicating its existence, and above all by the suspect's earlier behaviour, undertaken for the very purpose, as well as by the behavior of other persons, and its existence cannot be derived only from the hypothetical presumption that the suspect is likely to undertake such activities". See also decision of the Court of Appeal in Katowice of 7 May 2014, II AKz 275/14, LEX no. 15373691.

[20] For example, see decision of the Court of Appeal in Kraków of 26 January 2018, II AKz 26/18, LEX no. 2609993; decision of the Court of Appeal in Kraków of 29 December 2015, II AKz 479/15,

that obstruction has been committed. The court is to investigate whether the suspect can behave in this way, and not whether he has already done so".[21]

It is not difficult to agree with the quoted view. Its accuracy can be easily demonstrated by referring, e.g., to a situation in which the perpetrator is caught red-handed, attempted murder, and then arrested. It is obvious that in such situations the suspect (accused), for objective reasons, did not have a convenient opportunity to obstruct. This does not mean, of course, that the threat thereof does not exist. Thanks to the quick reaction of law enforcement agencies, this threat was immediately neutralized. The requirement that in order to apply pre-trial detention it would be extremely dangerous. Its acceptance would necessitate in waiting for the perpetrator to take the first step towards destabilizing the criminal proceedings. Needless to say, this approach may prove troublesome. After all, the use of pre-trial detention is intended to deprive the perpetrator of the chance to make any attempts to unlawfully influence the criminal case against him.

On the other hand, it may happen that the alleged perpetrator is free, already having knowledge of the criminal proceedings actually or potentially pending against him.[22] During this time, however, he does not make any attempts to unlawfully influence the course of the case and does not apply procedural obstruction and responds to each request of the authorities. Such an attitude of the suspect or accused person may be a strong indication that there is no threat to the interests of the justice system on his part. Since the alleged perpetrator has repeatedly had the chance to unlawfully influence the course of criminal proceedings or evade responsibility, but did not use them, the threat of such events becomes abstract, or even illusory.[23]

LEX no. 2062875; decision of the Court of Appeal in Katowice of 30 July 2014, II AKz 466/14, LEX no. 1616052.

[21] Decision of the Court of Appeal in Kraków of 26 January 2018, II AKz 26/18, LEX no. 2609993; decision of the Court of Appeal in Kraków of 29 December 2015, II AKz 479/15, LEX no. 2062875; decision of the Court of Appeal in Kraków of 27 March 2013, II AKz 97/13, LEX no. 1321956; decision of the Court of Appeal in Kraków of 18 February 2010, II AKz 50/10, LEX no. 584383.

[22] It will take place, in particular, when he or she has already been questioned as a witness in a given case. Of course, it will not always be the case that if a person did not commit procedural obstruction prior to the charges being brought against him or her, he or she will certainly not pursue them after obtaining suspect status. The crystallization of this risk will depend on the circumstances of particular case. There is no doubt, however, that the lack of attempts of obstruction before being presented with charges, with the future suspect's knowledge of pending criminal proceedings focused on his crime, is an important factor that cannot be ignored.

[23] For this reason, it is necessary to refer to the decision of the Court of Appeal in Katowice of 20 January 2016 (II AKz 19/16, LEX no. 2023124), in which it is indicated: "From Article 258 § 2 of the CCP it clearly follows that the likelihood of imposition of a severe penalty may indicate the existence of a threat of obstructing the proper course of the proceedings referred to in Article 258 § 1 of the CCP. Therefore, having found a likelihood of imposing a severe penalty, the court may apply

The assessment of whether an isolative coercive measure should be used in a given situation is naturally made from an *ex ante* perspective. Its purpose is to state that if the pre-trial detention was not applied, then there would be a real threat of destabilization of the criminal proceedings. One may ask, which does it mean that the threat of the suspect (accused) unlawfully influencing the course of the proceedings is not to be abstract, but must be real. In this context, a thought arises that the court cannot assume that virtually every case may be destabilized by a potential perpetrator. This is because where criminal proceedings are pending, theoretically, they can be unlawfully influenced. After all, it cannot be assumed that every proceeding can be obstructed and, on this basis, make preventive decisions that significantly restrict constitutionally protected rights or freedoms of an individual. The decision on pre-trial detention should undoubtedly be based on something more than the assumption that "anything may happen", and therefore it should be based on a rational belief that – in the light of the evidence gathered in the case – the probability of unlawfully influencing the course of the proceedings is high, and certainly so high that it is difficult to ignore it and go on.

Of course, it is impossible to list all the factors that may justify isolating a suspect or accused person. These can certainly include such elements as, e.g., the nature of the charges,[24] the current attitude and characteristics of the suspect (accused), his possible affiliation to a criminal group, potential relations between the suspect and victims and witnesses (or the attitude towards the victim and witnesses), the number and the type of evidence collected and still to be gathered, the suspect's (or accused's) personal, family and property situation or their temporary or permanent residence in Poland.[25] It seems that one of such factors is precisely the circumstances described in Article 258 § 2 of the CCP.

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the above-mentioned preventive measure, even if the evidence does not show that the accused has made any attempts to destabilize the course of the proceedings, be it by trying to obstruct or by hiding or escaping. The only source of concern in this respect is the likelihood of imposing severe penalty alone". This thesis will not be particularly accurate when the period of the alleged perpetrator being free was long, and at that time he did not give reasons to believe that he may destabilize criminal proceedings or evade justice.

[24] It is about such features of the alleged act that may reasonably lead to a belief that the suspect will unlawfully influence the course of the proceedings. It will be, e.g., a suspicion of a violent crime or a threat of its use, activity in an organized criminal group, some of whose members are still at large, etc. These features should be precisely indicated in the decision on the application of pre-trial detention.

[25] Decision of the Court of Appeal in Katowice of 16 February 2018, II AKa 14/18, LEX no. 2490238; decision of the Court of Appeal in Kraków of 15 September 2017, II AKz 353/17, LEX no. 2521584; judgment of the ECtHR of 10 March 2015, 34322/10, *Rambiert v. Poland*, LEX no. 1652022. In the opinion of the European Court of Human Rights, the court should not assess the risk of the defendant going into hiding or escaping only on the basis of the severity of the possible judgment, as in this respect it is first of all to take into account the characteristics of the accused, his morality, characteristics, ties with the state in which he is accused, and his international contacts

The legislator, drafting Article 258 § 2 of the CCP, rightly assumed that, statistically, it is often the case that if a given person is threatened with severe punishment, the greater the probability that he or she may attempt to unlawfully influence the course of the proceedings. The more severe the impending sanction, the more this fear potentially worsens. This belief is, in a sense, based on the knowledge of human nature. After all, it is known that a person is endowed with an instinct of self-preservation. If he is in danger of a specific ailment, his natural tendency is that he will defend himself against it. Man's tendency to defend himself by all means against the threatening dangers is nothing unusual. A severe punishment can be such a danger. The perspective of its imposition has the potential to influence the perpetrator's motivation to increase the tendency to make decisions about unlawful actions aimed at avoiding or minimizing criminal liability.[26] Of course, this assumption takes into account only certain statistical rules and indications of life experience.[27]

(W. Hermeliński, B. Nita-Światłowska, *op. cit.*, p. 19 and the case law referred to therein). See more on the circumstances that may be important in the context of determining the existence of a threat of obstruction in A. Kiełtyka, *Antycypacja bezprawnego utrudniania postępowania karnego jako przesłanka tymczasowego aresztowania*, "Prokurator" 2003, no. 2, pp. 72–83. On the other hand, the legally relevant reasons for the application of pre-trial detention cannot include "developmental nature of the case" and the so-called "multithreading of the case", failure to arrest all members of the criminal group to which the suspect or accused was to belong, and the fact that new (possible) evidence may have an adverse effect on the assessment of the alleged perpetrator's behavior. It is also indicated that the fear of procedural obstruction may not be derived from the use of rights falling within the limits of the right to defence by the suspect, i.e. even refusing to admit guilt, changing testimony or not indicating accomplices. See decision of the Court of Appeal in Wrocław of 19 October 2005, II AKz 453/05, OSA 2006, no. 3, item 15; decision of the Court of Appeal in Katowice of 28 December 2005, II AKz 777/05, KZS 2006, no. 4, item 84; decision of the Court of Appeal in Lublin of 6 May 2009, II AKz 261/09, KZS 2009, no. 9, item 84; decision of the Supreme Court of 11 October 1980, II KZ 180/08, OSNKW 1981, no. 3, item 17; decision of the Supreme Court of 26 November 2003, WZ 59/03, OSNwSK 2003, no. 1, item 2541. See a broader list of circumstances that should or may not be taken into account when applying pre-trial detention in J. Skorupka, *Komentarz*..., theses 7–16.

[26] D. Zając, *op. cit.*, p. 15. "The current wording of Article 258 § 2 of the CCP is the result of a pessimistic vision of man in the eyes of the legislator. The accused is a rational being, choosing adequate means to achieve his goals, who, striving to maximize his own satisfaction, minimizes circumstances that could make him unpleasant. It is a kind of *homo oeconomicus*. The accused, having a choice of expecting to be detected and held criminally responsible or obstructing the pending proceedings by covering up traces, bribing/intimidating witnesses, or finally hiding, will choose the latter option (as rational), until there is a mechanism that would effectively make unlawful influencing the course of action proceedings unprofitable or impossible for him. The severity of the punishment for the accused is a circumstance that causes the accused to be more likely to attempt to undermine the course of the trial. The higher the punishment, the greater, by model, the determination to paralyze the proceedings and the stronger measures should be used to prevent such actions of the accused" (E. Grzęda, *Przesłanka tymczasowego aresztowania z art. 258 § 2 k.p.k.*, "Czasopismo Prawa Karnego i Nauk Penalnych 2015, no. 3, pp. 154–155).

[27] The latter were referred to by the Court of Appeal in Kraków in the decision of 27 May 2019 (II AKz 279/19, LEX no. 2757816), pointing out that "the condition for applying pre-trial detention

These in turn have it to themselves that they are burdened with a greater or lesser error. For this reason, Article 258 § 2 of the CCP is indicative. The likelihood of imposing a severe penalty is an indication that should be taken into account when formulating a prognostication whether the suspect or accused may pose a threat to the proper course of criminal proceedings. The jurisprudence emphasizes that the figure described in Article 258 § 2 of the CCP expresses the presumption, which is, however, *praesumptio iuris tantum*, since it can be rebutted.[28] The relevance of such a point of view depends on how this presumption is understood. Perhaps such a determination of the status of Article 258 § 2 of the CCP cannot be considered fortunate. It suggests that in the event of a likelihood of imposing a severe penalty, the court may, using evidentiary simplifications, assume in advance the existence of a threat of flight, hiding or obstruction, if the accused/suspect does not pay attention to evidence that would allow to question such a point of view (or presents the court with such evidence). However, it is not so. It is obvious, after all, that not every generally observable regularity will be adequate to a given situation. In the realities of a particular proceeding, there may be circumstances that will determine that – despite the threat of severe punishment – on the part of the suspect or the accused there is no high probability of attempting to destabilize the proceeding. It is the task of the criminal court to investigate whether such a situation exists. It should therefore be stated that Article 258 § 2 of the CCP does not constitute any presumption, but indicates only one of many factors, which may or may not be relevant in the context of the assessment of whether the suspect or accused person is related to one of the threats listed in Article 258 § 1 of the CCP. Article 258 § 2 of the CCP, therefore, does not constitute any condition for applying pre-trial detention.

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under Article 258 § 2 of the CCP is independent in nature. When the rational legislator appoints it as an independent premise for the application of the most severe preventive measure, described in a separate provision, it is no longer necessary to additionally establish other grounds for pre-trial detention together with it or to separately demonstrate the accuracy of the fear of 'obstruction of the proceedings'. The provision of Article 258 § 2 of the CCP establishes the presumption of the need to secure the proper course of the proceedings in the event of the fulfillment of the condition described therein. According to the legislator's view, a perpetrator facing severe penalty is inclined to obstruct criminal proceedings against him, which, moreover, is in full accordance with the extensive jurisprudence of the Court". See also judgment of the Court of Appeal in Katowice of 3 December 2015, II AKa 449/15, LEX no. 2023117. It is also worth mentioning here that "in criminal proceedings, procedural decisions are based primarily on the inductive probability consisting in generalizations supported by the principles of science and life experience" (M. Żbikowska, *Prawdopodobieństwo w procesie karnym*, "Państwo i Prawo" 2018, z. 3, s. 81). This mechanism consists in the fact that the court, knowing that if people are threatened with severe consequences, are turning to various, not necessarily lawful, ways to avoid them and will become convinced that it is highly probable that the prospect of imposing a severe sanction may contribute to generating unlawful behavior on the part of a potential perpetrator.

[28] See decision of the Court of Appeal in Katowice of 20 November 2018, II AKz 925/18, LEX no. 2691442.

It only indicates the factor that should be taken into account when determining that the conditions listed in Article 258 § 1 of the CCP are met.

The perspective presented in the jurisprudence of the European Court of Human Rights is also worth mentioning. It indicates, i.a., that the suspicion of committing serious crimes may justify the existence on the part of the authorities of the belief that there is a threat to the proper course of criminal proceedings. However, it is also raised that the severity of the penalty is an important element in the assessment of the risk of absconding or relapsing into crime. However, the burden of the charges and the prospect of a severe sentence cannot justify long periods of pre-trial detention.[29] Therefore, it is impossible to agree with the thesis that from the point of view of Article 258 § 2 of the CCP only two alternative circumstances are relevant: high probability of realizing the elements of a crime punishable by imprisonment of at least 8 years and high probability of imposing an imprisonment sentence of not less than 3 years.[30] Article 258 § 2 of the CCP must be interpreted in the light of the legal value in the form of the interest of the administration of justice. This value may be affected only when the suspect or accused unlawfully influences the course of criminal proceedings. It is in the light of this risk that it is necessary to consider whether the factor indicated in Article 258 § 2 of the CCP has a significant importance on case-by-case basis. Only then can it be determined whether the application of pre-trial detention is necessary for the proper course of the proceedings. It is therefore necessary to come to the conclusion that the direct application of both the Polish Constitution and international agreements, including, in particular, the standard resulting from Article 5 (1) (c) of the European Convention of Human Rights, means that someone cannot be arrested only due to the fact that he or she is likely to face severe punishment.[31]

The presented reasoning was also confirmed in the decision of the Constitutional Tribunal of 17 July 2019.[32] It criticized such an interpretation of Article 258 § 2 of the CCP, under which this provision would be regarded as an independent condition for the application of pre-trial detention and as a regulation establishing

[29] Judgment of the ECtHR of 19 July 2018, 52683/15, *Zagalski v. Polska*, LEX No. 2592220; judgment of the ECtHR of 5 July 2018, 43924/12, *Zieliński v. Polska*, LEX no. 2511462; decision of the ECtHR of 20 February 2018, 19445/10, *Lejk v. Polska*, LEX no. 2456377; decision of the ECtHR of 6 February 2018, 25875/11, *Lipnicki v. Polska*, LEX no. 2447257; W. Hermeliński, B. Nita-Światłowska, *op. cit.*, p. 18.

[30] D. Zając, *op. cit.*, p. 22.

[31] W. Hermeliński, B. Nita-Światłowska, *op. cit.*, pp. 14–23.

[32] S 3/19, LEX no. 2712693. This position, however, due to the fact that it was issued in a panel composed of, i.a., persons who were not effectively appointed to the position of the Constitutional Tribunal judges, cannot be treated as a valid judgment of the Constitutional Tribunal within the meaning of the Polish Constitution. In it, the Sejm of the Republic of Poland was notified of the existence of shortcomings in the law, concerning, i.a., applying pre-trial detention due to the severity of the punishment faced by the accused.

an irrebuttable presumption that the perspective of a severe penalty raises the fear of unlawfully influencing the course of criminal proceedings. It added that "the Constitutional Tribunal noted that in the doctrine and jurisprudence attempts are made to interpret Article 258 § 2 of the CCP to solve the above problems, with the use of general rules for the application of pre-trial detention, in particular Article 249 § 1, Article 253 § 1 and Article 258 § 4 of the CCP, as well as constitutional and convention norms (…). However, they are not of general nature and have not yet led to the development of an acceptable interpretation of this provision, which would properly balance the need to protect the rights of the accused and the interests of the proceedings against him. The Constitutional Tribunal decided that such clarification of the content of Article 258 § 2 of the CCP, so that it realizes the protective function assumed by the legislator without raising the doubts discussed above. In particular, a solution would be desirable that would recognize the severity of the likely sentence as a factor increasing the probability of obstructing the proceedings (especially at its initial stage), but not sufficient as an independent basis for applying pre-trial detention in the absence of real and specific concerns about taking such actions".

In the light of the considerations presented so far, it should be stated that the proof that the course of the criminal case is not endangered, despite the likelihood of imposing severe penalty, does not have to be carried out by the suspect or the accused or his defence lawyer.[33] Gathering such evidence is the duty of the court deciding upon the application of pre-trial detention.[34] It should consider whether the reality of a given case suggests that the likelihood of severe penalty being imposed may very likely push the defendant to act contrary to the interests of the justice system. The method of examining this issue will depend on the specificity and reality of a given procedure. The method of examining the strength of circumstances indicated in Article 258 § 2 of the CCP must be different, as a rule, when a violent offense is being investigated, and differently in an economic criminal case. If, for example, the proceedings concern an act of breach of trust qualified under Article 296 § 3 of the Penal Code, resulting in a multi-million loss, and the documents necessary

[33] Differently: D. Zając, *op. cit.*, p. 27.

[34] In the decision of the Supreme Court of 26 November 2014 (II KK 83/14, LEX no. 1646952), it was indicated: "The likelihood of imposing a severe punishment gives rise to a presumption that persons suspected of committing a crime or accused of committing a crime may attempt unlawful actions destabilizing the proper course of proceedings. Due to the fact that indicated in Article 258 § 2 of the CCP, the statement is a legal presumption, it is not necessary to prove whether the accused has already taken specific steps in this direction in the past". In the context of this judgment, it should be pointed out that the deciding court must take into account, ex officio, circumstances which indicate that, despite the likelihood of imposing a severe penalty, there are no threats to the course of the criminal case. See also M. Warchoł, *Domniemania przy tymczasowym aresztowaniu*, [in:] *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana*, ed. T. Grzegorczyk, Warszawa 2011, p. 292.

for the case have already been collected, the witnesses have been interviewed, and the alleged perpetrator has a permanent residence in the country and leads a stable family life, then the likelihood of imposing a severe penalty does not give rise to a real fear of unlawful torpedoing proceedings. A similar conclusion must be adopted when, admittedly, the procedural authority has not yet examined all the evidence, but it is of such a type that the suspect or accused person cannot have any influence on it. For example, the practice of pointing to the argument that the application of this measure is necessary in order to await the opinion of a statutory auditor, whose task is to determine the exact amount of damage caused by a suspect or accused person, should be considered incorrect. The probability that the alleged perpetrator will be able to unlawfully influence an expert is usually negligible, or even close to zero. Of course, when deciding on pre-trial detention, the court should consider whether any threats to the proper course of the proceedings could not be neutralized or eliminated by applying non-isolative preventive measures. If such possibility arises, pre-trial detention may not be applied.

When assessing whether the likelihood of imposing a severe penalty gives rise to the risk of hiding, absconding or obstructing, the court should take into account the capacities of the alleged perpetrator to destabilize the criminal proceedings or to evade justice. This method of assessment was presented in the decision of the Court of Appeal in Kraków of 13 February 2019:[35] "Before his arrest, the suspect was a 'mobile' person; he permanently lived in Germany, worked there, and also ran a business in other European countries. Taking into account his 'mobility', experience and professional possibilities as well as the ability to function outside Poland, when he is facing severe punishment, this justifies the fear of his escape and hiding (Article 258 § 1 (1) in conjunction with Article 258 § 2 of the CCP)".

There is no doubt that the risk that the likelihood of imposition of severe penalty on a suspect or accused person may motivate him to destabilize the proceedings is a gradable factor and may evolve in the course of the case (weaken or intensify).[36] The level of this risk should obviously be taken into account by the court, which

[35] II AKz 69/19, LEX no. 2707058. See also decision of the Court of Appeal in Katowice of 28 October 2015, II AKz 604/15, LEX no. 1959455.

[36] See decision of the Court of Appeal in Kraków of 1 February 2019, II AKz 31/19, LEX no. 2718715. See also judgment of the ECtHR of 18 October 2018, 15333/16, *Burża v. Polska*, LEX no. 2594447; decision of the Supreme Court of 28 November 2017, WZ 21/17, LEX no. 2401843. It is also rightly emphasized that the conditions specified in Article 258 § 2 of the CCP are met when the probability of a severe penalty being imposed is not only abstract but real. The accuracy of this thesis is obvious, for instance, because the prospect of serving a sentence above average influences the motivational processes of the alleged perpetrator, most often when the sanction may turn out to be severe (D. Zając, *op. cit.*, p. 16). Presumption under Article 258 § 2 of the CCP will be realized only when the prognostication made by the court shows that – in the light of the statutory principles and directives of sentencing – if the suspect or accused person is convicted, there is a real probability that he will be sentenced to imprisonment of at least 3 years (*ibidem*, p. 20).

results directly from Article 258 § 4 of the CCP. As a rule, the greater the progress in gathering evidence, the lesser the threat of unlawfully influencing the course of the proceedings resulting from the likelihood of imposing a severe penalty.[37] However, it may happen that in a specific case such a regularity does not occur. This applies in particular to a situation where the perpetrator is facing a sentence of life imprisonment. The prospect of spending the whole life in a prison may make the alleged perpetrator believe that "there is not much to lose" and he must avoid criminal liability at all costs, among others by escaping, hiding, influencing witnesses and creating false evidence.

CONCLUSIONS

To sum up, the considerations so far have proved that Article 258 § 2 of the CCP does not express a special premise of application of pre-trial detention at all. First of all, this provision cannot become an independent criterion for the application of an isolative coercive measure.[38] The application of pre-trial detention always requires evidence to prove that it is necessary in the reality of a given case. Such a necessity occurs only when there is a real risk of unlawful obstruction of criminal proceedings by the suspect or the accused. The likelihood of imposing a severe penalty may or may not be a significant factor indicating that such a risk exists. The more negative consequences a person is faced with, the greater the tendency to defend against them is – including unlawful means – taking into account statistical rules and life experience. One can claim that even if the legislator had not introduced Article 258 § 2 of the CCP, the prospect of imposing a severe penalty would still be taken into account in assessing whether, in the reality of a specific case, it is necessary to apply pre-trial detention to secure the proper course of the proceedings. The main function of this provision is to arbitrarily determine what should be understood by such a severe sanction, which may constitute a strong incentive to engage in unlawful behaviour destabilizing criminal proceedings. Article 258 § 2 of the CCP expresses an indication that should be taken into account in the process of determining whether the conditions of Article 258 § 1 of the CCP are met. In the reality of a particular case, however, it may be that there are other circumstances neutralizing the force of the factor in the form of a severe penalty. The court should check ex officio whether they are present. Therefore, it is legitimate to say that there is no absolute necessity to remove Article 258 § 2 of

[37] See decision of the Court of Appeal in Kraków of 6 March 2018, II AKz 107/18, LEX no. 2574274.

[38] See also decision of the Court of Appeal in Kraków of 6 March 2018, II AKz 104/18, LEX no. 2574269.

the CCP. This provision can be interpreted in such a way as to make the detention practice rational, and the constitutional and convention guarantees the accused is entitled to are fully secured. However, it is impossible to resist the impression that the wording of Article 258 § 2 of the CCP, which was in force in the period from 1 July 2015 to 14 June 2016, reflected much better the essence of the structure described in that regulation. So it would be better to reinstate it.

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ABSTRAKT

Niniejszy artykuł ma charakter naukowy. Zastosowano w nim metodę dogmatyczną. Celem jest ustalenie statusu i funkcji grożącej surowej kary z art. 258 § 2 Kodeksu postępowania karnego (dalej: k.p.k.) w podejmowaniu decyzji w przedmiocie stosowania tymczasowego aresztowania. Kwestia ta jest sporna zarówno w doktrynie, jak i w orzecznictwie. W tekście zaprezentowano nowy pogląd, że w art. 258 § 2 k.p.k. nie została wyrażona szczególna przesłanka stosowania tymczasowego aresztowania. Przepis ten nie może wyrażać samodzielnego kryterium orzekania o izolacyjnym środku zapobiegawczym. Art. 258 § 2 k.p.k. ma charakter służebny. Wyraża on kryterium pomocnicze służące do ustalenia, czy spełnione zostały przesłanki szczególne stosowania tymczasowego aresztowania z art. 258 § 1 k.p.k. Wnioski zawarte w tekście mają za zadanie ułatwić wykładnię krajowych przepisów dotyczących środków przymusu procesowego oraz ułatwić ich stosowanie w praktyce wymiaru sprawiedliwości. W artykule wskazano na czynniki, które mają znaczenie w czasie oceny, czy grożąca surowa kara aktualizuje obawę ucieczki, ukrycia się lub matactwa procesowego. Za stosowaniem tymczasowego aresztowania może przemawiać m.in. charakter czynu zarzuconego oskarżonemu. W tym kontekście istotne powinno być to, czy potencjalny sprawca stoi pod zarzutem przestępstwa popełnionego z użyciem przemocy lub groźbą jej użycia. Nie bez znaczenia jest też jego dotychczasowa postawa w toku postępowania karnego. Może być jednak tak, że grożąca surowa kara może rodzić obawę matactwa nawet w sytuacji, gdy oskarżony, który wiedział o toczącej się sprawie karnej, nie podejmował żadnych bezprawnych działań. Niemniej prawidłowa postawa oskarżonego w toku postępowania karnego często będzie istotną okolicznością przemawiającą przeciwko stosowaniu tymczasowego aresztowania.

Słowa kluczowe: tymczasowe aresztowanie; grożąca surowa kara; środki przymusu; Kodeks postępowania karnego