EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

8 October 2013

Case No. 3

Association for the Protection of All Children (APPROACH) Ltd v. Slovenia
Complaint No. 95/2013

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 26 September 2013

REPUBLIC OF SLOVENIA
MINISTRY OF LABOUR, FAMILY
SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES

Opinion of the Republic of Slovenia
on the basis of the first paragraph of Article 7 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints

The Association for the Protection of All Children (APPROACH) Ltd
v. Slovenia
Complaint No. 95/2013

Ljubljana, 26 September 2013

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I. Introduction

1. The European Social Charter (revised) (hereinafter: RESC) was adopted by the Council of Europe in 1996. The Republic of Slovenia signed the RESC on 11 October 1997; the act on ratification was adopted by the National Assembly of the Republic of Slovenia on 11 March 1999 (Official Gazette of the Republic of Slovenia - MP, no. 7/99). The charter was ratified on 7 May 1999 and entered into force on 1 July 1999. In addition to the ratification of the RESC, the Republic of Slovenia also assumed responsibility for monitoring the commitments in the RESC as per the procedure determined by the Additional Protocol to the European Social Charter, which regulates the system of collective complaints (hereinafter: Additional Protocol).

2. The Association for the Protection of All Children - APPROACH (hereinafter: APPROACH) is an international non-governmental organisation based in UK which has the right to submit collective complaints as per Article 1b of the Additional Protocol.

3. On 4 February 2013, APPROACH submitted a collective complaint against Slovenia in accordance with Article 5 of the Additional Protocol. As per Article 5 of the Additional Protocol, the Secretary General informed Slovenia on this matter and forwarded the collective complaint to the European Committee of Social Rights (committee of independent experts).

4. APPROACH claimed that Slovenia violated Article 17 of the RESC:

   - because Slovenian legislation supposedly does not explicitly and efficiently prohibit the corporal punishment of children in families and other settings, and
   - because Slovenia supposedly has failed to act with due diligence to eliminate such punishment in practice.

5. At the request of the European Committee of Social Rights as per Article 6 of the Additional Protocol, the Government of the Republic of Slovenia adopted the Opinion of the Republic of Slovenia at its 7th regular session of 25 April 2013 on the basis of Article 6 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints in the process of establishing the admissibility of the collective complaint by APPROACH against Slovenia. The Opinion stated that APPROACH had the right to submit a complaint; however, the Government of the Republic of Slovenia believes that the current national legislation provides for children's protection against violence, negligence and exploitation as stipulated in Article 17 of the RESC, and that Slovenia exercises due diligence in this regard.

6. At its 265th session on 1 and 2 July 2013, the European Committee of Social Rights decided that the collective complaint submitted by APPROACH against Slovenia was admissible.

7. The Government of the Republic of Slovenia rejects in their entirety the complaints of APPROACH on the alleged violation of Article 17 of the RESC. Substantiation is provided in the continuation.

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II. Decision of the European Committee of Social Rights on the admissibility of the collective complaint

1. As a committee of independent experts in the process of discussing a collective complaint, the European Committee of Social Rights decided at its 265th session on 1 and 2 July 2013 as per the first paragraph of Article 7 of the Additional Protocol that the collective complaint submitted by APPROACH against Slovenia was admissible.

2. The Committee asked the Government of the Republic of Slovenia to provide an opinion on the content of the collective complaint by APPROACH against Slovenia by 27 September 2013.

3. At its 265th session on 1 and 2 July 2013, the European Committee of Social Rights decided on the admissibility of a total of seven collective complaints that APPROACH had submitted against the signatory states to the RESC the national legislations of which do not expressly prohibit the corporal punishment of children. The Committee established that all collective complaints were admissible. As per the first paragraph of Article 7, all signatory states may submit opinions in all cases of collective complaints.

III. Main complaints from the collective complaint of APPROACH and counter-argumentation

1. Complaint on the alleged violation of Article 17 of the RESC because Slovenian legislation supposedly does not explicitly and efficiently prohibit the corporal punishment of children in family and other environments.

The Government of the Republic of Slovenia believes that national legislation does provide children with protection against violence, negligence and exploitation as determined in Article 17 of the RESC in their families and other settings.

Children's rights are systemically protected by the highest legal acts of the Republic of Slovenia. **The Constitution of the Republic of Slovenia** determines that children enjoy special protection and care, and enjoy human rights and fundamental freedoms consistent with their age and maturity (Article 56 of the Constitution of the Republic of Slovenia). The aforementioned Article of the Constitution of the Republic of Slovenia also guarantees children special protection against economic, social, physical, mental and other exploitation and abuse, which clearly demonstrates that the Republic of Slovenia has fully incorporated the provisions of the **United Nations' Convention on the Rights of the Child**, which, in Article 19, instructs State Parties to take appropriate measures to protect the child from all forms of violence.

The Republic of Slovenia succeeded the UN Convention on the Rights of the Child by the Notification of succession in respect of United Nations Conventions Act (Official Gazette of the SFRJ-MP, no. 35/92), the Convention was published in the Official Gazette of the SFR Yugoslavia - MP, no. 15/90. On this legal basis Slovenia implements the provision of Article 19 of the Convention which requires State Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of violence. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes as well as other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of child maltreatment and, as appropriate, for judicial involvement.

1.1 Prohibition of physical violence in the family

On the basis of the aforementioned commitment, the Republic of Slovenia took suitable legislative measures, i.e. a general commitment to comprehensive care for children's best interests in a marriage, which regulates family relations; special legal protection and protection for children in order

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to prevent family violence; determined violence in the family, and the neglect and maltreatment of children as criminal offences, and it also established various social programmes (provided under Point 2). The explicit prohibition of corporal punishment and other forms of degrading treatment is also regulated in the Republic of Slovenia by the new Family Code (hereinafter: DZak), which the National Assembly of the Republic of Slovenia passed on 16 June 2011, but which was rejected in a legislative referendum on 25 March 2013 due to other systemic solutions.

The Marriage and Family Relations Act (Official Gazette of the Republic of Slovenia, nos. 69/04 – official consolidated text 1, 101/07 – Constitutional Court Decision, 122/07 – Constitutional Court Decision; hereinafter: ZZZDR) in Article 5a defines the child's best interests. It stipulates that parents, other persons, state authorities and bearers of public authority must act in a child's best interests in all activities and procedures affecting the child. Parents act in the child's best interests if they satisfy their material, emotional and psycho-social needs by treatment that is accepted and approved by society, and which manifests their concern and responsibility for the child, taking account of their personality and wishes.

The prevention of domestic violence and provision of sufficient safety and assistance for victims is the main purpose of the **Family Violence Prevention Act (ZPND)**[1] (Official Gazette of the Republic of Slovenia, no. 16/2008). A minor or a child enjoys special protection as per the ZPND. Physical violence is defined as "any use of physical force that causes pain, fear or shame to the family member, regardless of whether injuries are inflicted" (the second paragraph of Article 3 of the ZPND). Family members include relatives, foster carers, guardians and other persons living in a common household.

The ZPND also defines the obligation to report. In cases when it is detected that a child is a victim of violence, all authorities and organisations, non-governmental organisations, expert healthcare staff, personnel working in institutional care and educational institutions, as well as any individual, are obliged to report violence to a social work centre, the police or prosecution service regardless of the rules on confidentiality in individual fields.

According to the ZPND, children are a specially protected category because all the competent authorities, when they encounter violence against children, must act particularly quickly and efficiently, and thus the Act specifically determines that violence against children is constituted by their mere presence in a situation in which violence is committed against other family members. The Act also envisages various types of victim care and protection (restraining order, surrendering a flat etc.) and cooperation with the perpetrator, with the provisions for penalties being defined in the criminal law (either as minor offences or as criminal offences). If corporal punishment is severe or frequent, the act may be qualified as family violence under the ZPND; otherwise, the competent social work centre or court can take a breach of this provision into consideration by imposing a possible restriction of parental rights, or as it is now known, parental care.

Regardless of the motive, violence against a child (i.e. not only for the purpose of punishment) is considered a criminal offence as per the Criminal Code (Official Gazette of the Republic of Slovenia, no. 50/12-UPB2; hereinafter: KZ). Penal provisions enable the sanctioning of various types of violence against children with regard to how these are inflicted (e.g. maltreatment, cruel treatment, compelling a child to undertake a harmful practice or work, mendicancy, all types and forms of sexual abuse, etc.) and in the case of prohibited consequences (e.g. infliction of physical injury, disability, encouragement to suicide and death), regardless of the type of guilt (negligence or intent). The anticipated sanction for such offences is imprisonment for up to 5 years.

The Government of the Republic of Slovenia believes that the Constitution of the Republic of Slovenia, the Marriage and Family Relations Act, the Family Violence Prevention Act and the Criminal Code suitably provide for the protection of children against physical violence in home environment. According to the Government of the Republic of Slovenia, the explicit prohibition of corporal punishment is not and cannot be sufficient protection from violence against children. The systemic arrangement of the prevention of violence against children in the Republic of Slovenia encompasses a wider spectrum of arrangements to prohibit violence against children, including the prohibition of physical violence regardless of the motive.

[1] Family Violence Prevention Act (Official Gazette of the Republic of Slovenia, no. 16/08)

1.2 Prohibition of physical violence in educational institutions

In educational institutions in the Republic of Slovenia, the corporal punishment of children, pupils, secondary school students and other participants in the educational process is prohibited and is sanctioned by suspension on the basis of Article 16 of the **School Inspection Act** (Official Gazette of the Republic of Slovenia, no. 114/05). This Act regulates the organisation, field of supervision and jurisdiction of school inspections in order to ensure **compliance with the law and thus the protection of the rights of pre-school children, pupils, apprentices, secondary school students, students** and participants in adult education and expert workers.

Inter alia, the School Inspection Act determines the obligation and right to establish that corporal punishment of children has occurred. In Article 16, suspension (temporary prohibition of further work) is defined as a sanction if reasonable grounds for suspicion arise from the facts established during the supervision of work of expert school workers that a worker, head teacher, director, assistant, head of a school unit or a subsidiary has committed a violation in the form of physical violence against a child or a participant in education.

The **Organization and Financing of Education Act** (Official Gazette of the Republic of Slovenia, nos. 16/07 – official consolidated text, 36/08, 58/09, 64/09 – amended, 20/11, 40/12 – ZUJF and 57/12 – ZPCP-2D) stipulates *inter alia* in Article 2 that the objectives of the educational system in the Republic of Slovenia include:
- guaranteeing optimum development to individuals regardless of their sex, social and cultural background, religion, national origin and physical and mental handicaps;
- educating for mutual tolerance; developing an awareness of the equality of men and women's rights; respect for human diversity and mutual cooperation; **respect for children's and human rights and fundamental freedoms**; and fostering equal opportunities for both sexes and thereby the capacity to live in a democratic society,
- fostering **awareness of the integrity of the individual**,
- educating for sustainable development and active participation in a democratic society, which includes a deeper understanding of, and responsible relation with, oneself, one's health, other people, one's culture and other cultures, the natural and social environment and future generations.

The Elementary School Act (Official Gazette of the Republic of Slovenia, nos. 102/07, 107/10, 87/11, 40/12 – ZUJF and 63/13) stipulates the educational function of a school in Chapter IV.B, which derives from the assumption that the realisation of the educational function is the responsibility of a school, which must operate in accordance with the rules of the profession and applicable legal acts. According to the existing legal system, elementary schools have educational plans. Their educational measures are autonomously defined in their rules on the code of conduct (internal legal act). The procedure for issuing educational reprimands is regulated by legislation.

The two regulations on secondary schools include an explicit prohibition of physical violence and determine sanctions for violations. These regulations are: the Rules on the School Order in the Secondary Schools (Official Gazette of the Republic of Slovenia, no. 60/10) and the Rules on residence in halls of residence for secondary school students (Official Gazette of the Republic of Slovenia, no. 97/2006).

The Rules on the School Order in the Secondary Schools stipulate in Article 2 that a secondary school student has the right to safety and protection from all forms of violence; Article 4 stipulates that psychological and physical violence is prohibited in school; Article 18 stipulates that psychological and physical violence is the most severe violation, for which a reprimand by the faculty, conditional expulsion or expulsion from school may be issued as per Article 21.

The Rules on residence in halls of residence for secondary school students determines in Article 29 that a secondary school student has the right to privacy and personal safety and to safety and protection from all forms of violence; Article 35 stipulates that verbal, psychological, physical and sexual violence is the most severe violation, for which a reprimand or expulsion from the hall of residence may be issued as per Article 39.

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The conduct of employees in public educational institutions and private educational institutions which implement publicly established programmes when detecting violence against children in a family, forms of assistance for children who are victims of violence in educational institutions, and cooperation of representatives of educational institutions with state authorities, public service providers and holders of public authority is defined in the **Rules on the Treatment of Domestic Violence for Educational Institutions** (Official Gazette of the Republic of Slovenia, no. 104/09), which was adopted on the basis of the Family Violence Prevention Act (Official Gazette of the Republic of Slovenia, no. 16/08). The education of expert workers and employees in educational institutions on the implementation of these Rules has been implemented throughout Slovenia. Due to more efficient cooperation between educational institutions, relevant social work centres and the police in detecting and preventing domestic violence, an agreement relating to the implementation of tasks for the protection of children deriving from the Family Violence Prevention Act is currently in the adoption phase. The agreement is expected to be concluded at the end of September 2013.

The Government of the Republic of Slovenia believes that protection of children against physical violence in educational institutions is suitably provided for by the Constitution of the Republic of Slovenia, the School Inspection Act, the Organization and Financing of Education Act, the Elementary School Act, executive acts and the Criminal Code. National legislation on education, i.e. the Rules on the code of conduct in secondary schools, explicitly prohibits physical and psychological violence. The provisions of other regulations indirectly prohibit any form of violence in educational institutions and provide relevant sanctions. The systemic arrangement of the prevention of violence against children in the Republic of Slovenia encompasses a wider spectrum of arrangements to prohibit violence against children, including the prohibition of physical violence, regardless of motive.

2. **Complaint on the alleged violation of Article 17, because Slovenia has supposedly failed to act with due diligence to eliminate corporal punishment in practice.**

The Government of Slovenia absolutely rejects the complaint that it has failed to act with due diligence to eliminate corporal punishment in practice. The Government of the Republic of Slovenia is certain that **the existing national legislation does enable the protection of children against violence, negligence and exploitation as stipulated in Article 17 of the RESC and as seen from the preceding point**, and that measures intended to raise awareness and the recognition of all forms of violence in society and the development of social skills among the broader public are more efficient in preventing the corporal punishment of children in practice than explicit prohibitions in the legislation. The corporal punishment of children in the Republic of Slovenia is one of the executive forms of the criminal offence of domestic violence described in more detail under Point V.

Since 2003, when the Republic of Slovenia received the first conclusion of non -conformity from the European Committee of Social Rights relating to the implementation of Article 17 of the European Social Charter (revised) until the present, the Government of the Republic of Slovenia passed and implemented the following **measures to prevent physical violence in practice**:

2.1 Domestic environment

Financing family centre programmes
The family centres which began operating in 2009 are important for encouraging a family-friendly environment, balancing professional and family life and realising the policy of equal opportunities. They also constitute an important improvement and the pluralisation of private sector services.
The family centres provide users with free services, as the objective of the fund provider is to raise the awareness of as many people as possible on the importance of a family-friendly environment, positive family practices between partners and between parents and children. The programme incorporates the following contents, which must receive equal attention, i.e.:

- family education (preparation for the arrival of a new family member and education on positive parenting),
- improvement of communication in the family,
- programmes for the personal growth of children and adolescents,
- programmes for the creative use of leisure time and intergenerational socialising,

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- organised occasional child-minding service,
- implementation of holiday activities for children,
- preparation for cohabitation.

Co-financing the TOM helpline
Since 1990, the Slovenian Association of Friends of Youth has operated a toll-free **TOM helpline** for children and adolescents in distress, where the young receive necessary information and advice. The TOM helpline is thus intended for children and adolescents who face the challenges and traps of growing up in the period of childhood and adolescence and also for those who feel endangered and have any kind of problems or issues.

Co-financing the organisation (Slovenian Association of Friends of Youth – ZPMS) within which operate the National Commission for Children's Rights and the Forum against the Corporal Punishment of Children in the Family
The Commission for Children's Rights operates within the Slovenian Association of Friends of Youth, which was renamed the National Commission for Children's Rights at the ZPMS at the beginning of 2008. In its work, it advocates the implementation of children's rights which derive from the UN Declaration on the Rights of the Child (adopted and declared by the UN General Assembly on 20 November 1959), the UN Convention on the Rights of the Child (adopted by the UN General Assembly with Resolution 44/25 on 20 November 1989), the European Convention on the Exercise of Children's Rights (ratified by the National Assembly on 1 October 1999) and other documents regulating the rights of children and adolescents.
Experts on children's rights work voluntarily in the Commission, including volunteers from various towns around the country, who directly monitor the realisation of children's rights in the environment in which they live.

On the initiative of the Commission for Children's Rights, the **national network TOM – helpline** for children and adolescents began operating in 1990. **Children's Parliaments** were also organised on the initiative of the Commission and have been held since 1990. **The Forum against the Corporal Punishment of Children in the Family** was also organised within the framework of the National Commission for Children's Rights.

Co-financing, financing and/or the implementation of activities to prevent violence by enhancing awareness of the broader public:

- the publication *Youth without Corporal Punishment for Our Children* (edited by Pavle Kornhauser) was issued in 2007 and also published in English with the help of the relevant ministries in 2009;

- preparation of brochures on the prevention of violence:

- Brochure on recognising violence for all elementary school pupils,
- Information for persons who have experienced violence (victims),
- Information for persons who inflict violence (offenders),
- Restraining order measure (offenders).

- media activities to reduce violence of adults towards children and inter-peer violence implemented by the Police.

2.2 Educational institutions

The Ministry of Education and Sport adopted the Guidelines for the analysis, prevention and treatment/management of violence in schools (2004), which include examples of good practice when dealing with various types of violence, the principles of addressing violence in school environments and measures proposed. When selecting the best method of recognising and preventing violence, each school is autonomous. The principles and measures addressing violence in schools are recommended. Combining and implementing several measures is also recommended, as it is believed to have a positive effect on preventing and treating/managing violence. Such principles are:

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- incorporating content and competence important for life in the community in curricula documents and their implementation,
- a positive social atmosphere at school (open and qualitative communication),
- qualitative use of time at school i.e. during lessons and other activities,
- responsiveness of a school at all levels,
- inclusion in life at school; participation of pupils and students,
- principles of addressing violence in the school environment,
- care and responsibility regarding the creation of a safe school environment and response to occurrences of violence,
- expert training of school staff,
- cooperation with local authorities (e.g. social work centres, police, legal authorities) and non-governmental organisations and
- inclusion of parents in the life and work of school.

All elementary schools must adopt a school educational plan, which is devised by school staff in cooperation with parents and pupils. The education plan particularly includes:

- educational principles,
- mutually cooperative relationship with parents,
- educational activities. The latter also include so-called proactive (preventive) educational activities which form a school environment in which pupils feel safe, accepted, are successful, creative, self-initiative and free, while observing the limitations set by the community. The activities are based on the qualitative organisation of teaching, mutual respect, responsibility and high expectations in the field of learning and mutual relations. The school is autonomous in planning and implementing proactive educational activities.

Usually, each school includes in its educational plan the principles and measures recommended in the Guidelines for analysis, prevention and treatment/management of violence in schools.

Since 2003, the relevant ministries have financed several target programmes:

Between 2006 and 2008, the **Analysis of violent behaviour** (frequency, forms and development trends) in the Slovenian school environment from 1991 onwards was prepared by the Educational Research Institute, with an emphasis on international comparisons.

The School for Head Teachers conducted the programme **Violence in Schools**: Conceptualisation, Recognition and Models for Prevention and Control.

A study of the emotional aspects of violence was implemented within the framework of the project **Considering emotional aspects in recognising, discussing and preventing violent behaviour at school**.

Two projects on the treatment and prevention of violence (2008-2011) intended for the preparation and implementation of a model to identify and prevent violence within elementary schools (a model that can be used in schools was drafted), and networking of (elementary) schools which applied prevention in this period and which, in addition to expert workers and pupils, also included parents in their work.

In the last three years, several projects intended for the education of expert workers in schools on the subject of interpersonal relations, mediation, harmony, non-violence, educational functioning of a school etc. were organised in the field of **social and civic competences** that were financed particularly from European Structural Funds.

Public institutions in the field of education (the National Education Institute of the Republic of Slovenia – emphasis on counselling; the CPI with the project Punishment in School with a publication which falls within the context of resolving educational questions and violations of school rules in secondary vocational and technical schools, and the School for Head Teachers with networks of learning schools (Strategies for the prevention of violence)) also discussed the prevention of violence.

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The subject of the public procurement '**Co-financing the professional training of professionals in education on identifying and preventing violence between 2010 and 2012**' involved co-financing the training of key expert workers in education when discussing violence in the family, in accordance with the Rules on the Treatment of Domestic Violence for Educational Institutions. The training of professionals in education on the treatment of domestic violence was implemented by the Institute of Criminology until July 2012 (more on the training at http://projekti.inst-krim.si/). The integrated educational programme included all important content for the suitable empowerment of professionals, who share their newly acquired knowledge in the form of training for trainers (TforT) at their educational institutions. With the project '**Professional training of professionals in education in the field of strengthening skills for the prevention of violence'**, Institut za psihološko svetovalne razvojne projekte (Institute for Psychological Counselling Projects) worked on strengthening the skills of expert workers in education for the successful identification and prevention of violence. The project included five training programmes for the implementation of primary prevention programmes:

- informing and actively involving staff in educational institutions so that they understand better the issue of violence, acquire and sharpen skills to identify violence, respond appropriately to violence and offer help to victims of violence,
- equipping and enhancing children's and adolescents' knowledge with important information and skills for self-protection,
- informing and actively involving expert workers in preventive work with families,
- informing and actively involving parents so that they understand better the issue of violence, acquire and sharpen skills to identify violence, respond appropriately to violence and offer help to victims of violence,
- strengthening social networks with the help of volunteers as an important preventive factor.

Both projects implemented free training for expert workers from all parts of Slovenia.

Several publications on the prevention of violence and treatment (in schools and families) have been published recently.

IV. Research on the presence of corporal punishment of children in Slovenia

As part of the project 'Analysis of family violence in Slovenia – prevention proposals and measures' in June 2005, the public opinion poll **'Violence in families'** was conducted on a representative pattern of adult citizens of the Republic of Slovenia. The public opinion poll, financed by the Ministry of Labour, Family and Social Affairs, was prepared for a comprehensive analysis and interpretation of the existing situation and general social climate with regard to questions relating to violence in families in the Republic of Slovenia.

A questionnaire consisting of eight content sets and 67 questions was drafted for the research. The questionnaire was based on a pilot study which served to test certain questions, whereby the survey was designed somewhat more broadly. The results were:

- When asked if they personally knew a family in which **slapping a child** is a normal form of punishment; 7.6 per cent of respondents said that they knew *one such family*. 6.7 per cent of respondents knew *two such families*, and 18.8 per cent knew *more than two such families*. Two-thirds (66.9 per cent) of respondents *did not know* such families personally, and 1.5 per cent either did not know or did not respond to the question.

- 14.7 per cent of respondents personally knew *one family* in which **shouting at a child** is a normal form of communication; 11.4 per cent knew *two such families* and 30 per cent knew

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more than two such families. 43.9 per cent of respondents *did not know* such families and 1.6 per cent either did not know or did not respond to the question.

- 23.9 per cent of respondents found **a smack on the bottom** *(very) frequent* conduct, 25.8 per cent were *undecided.* 50.3 per cent of respondents assessed that such conduct was *not (at all) frequent.* 4.4 per cent did not respond to the question.

- 6.1 per cent of respondents thought that a **smack on the mouth** was *(very) frequent* conduct, 8.0 per cent were *undecided.* 86.0 per cent of respondents thought that such conduct was *not (at all) frequent.* 6.4 per cent did not respond to the question.

- 33.5 per cent of respondents thought that **threats** were *(very) frequent*, 29.6 per cent were *undecided.* 36.9 per cent of respondents thought that *such conduct was not (at all) frequent.* 4.6 per cent of respondents either did not know or did not respond to the question.

- **Shouting** seemed *(very) frequent* to 42.7 per cent of respondents; 31.3 per cent were *undecided;* 26.0 per cent of respondents thought that shouting was *not (at all) frequent.* 3 per cent of respondents either did not know or did not respond to the question.

- 16.9 per cent of respondents thought that the **coercion of children** was *(very) frequent*; 21.4 per cent were *undecided.* 61.8 per cent of respondents thought that such conduct was *not (at all) frequent.* 6.6 per cent of respondents did not respond to the question.

- **Intimidation** seemed *(very) frequent* to 20.7 per cent of respondents; 25.5 per cent were *undecided.* 53.9 per cent of respondents thought intimidation of children was *not (at all) frequent.* 5 per cent of respondents either did not know or did not respond to the question.

V. Case law

In criminal law, the adoption of the new Criminal Code (Official Gazette of the Republic of Slovenia, nos. 55/08, 66/08-amended, 39/09, 91/11, which entered into force on 1 November 2008; hereinafter: KZ-1) saw the addition of the new criminal offence of **Family Violence**[2] (Article 191 of the KZ-1), which refers to all forms of violence in the family or any other permanent living community. As stated in the text of the legal provision, one of the executive forms of the aforementioned criminal offence may also be corporal punishment of children. The KZ-1 also includes a special chapter entitled 'Criminal Offences Against Marriage, Family and Youth' (Articles 188 to 195 of the KZ-1).

As is evident from the case law[3], violence in the family must typically include more permanent treatment of an offender who distorts normal interpersonal relationships in a family to the point that certain family members lack the warmth of a home, a sense of safety, are frightened or in a subordinate position or a position comparable in meaning to this notion due to the offender's conduct. The objective of this article is to protect a family community or a home where a person is supposed to feel safest. In such permanent communities, minor forms of violence affect the victim considerably more than if there is no such specific interpersonal relationship between the victim and the offender. In one specific criminal case, the accused was found guilty of committing three criminal offences of family violence, i.e. against his granddaughter, whom he violently grabbed under the left armpit and on the right leg, then pushed her and wanted to throw her on the ground, but did not succeed; he then grabbed her by both wrists and pushed her against the wall, and injured the victim with his nails, causing an abrasion to her palm. As can be understood from the above, the corporal punishment of children is an executive form of family violence.

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[2] Article 191 of the KZ-1: Whoever within a family treats another person badly, beats them, or in any other way treats them painfully or degradingly, threatens with a direct attack on life or limb to eject them from the joint residence or in any other way limits their freedom of movement, stalks them, forces them to work or give up their work, or in any other way puts them in a subordinate position by aggressively limiting their equal rights shall be sentenced to imprisonment for not more than five years.

[3] Judgement of the Supreme Court of the Republic of Slovenia, no. I Ips 815/2010, see Appendix.

The objective of Article 17 of the European Social Charter, more precisely Point 1b: to protect children and young persons against negligence, violence and exploitation is according to the Government of the Republic of Slovenia already enabled by the aforementioned criminal offence of Family Violence under Article 191 of the KZ-1, and also in the criminal offence of **Neglect and Maltreatment of a Child**[4] under Article 192 of the KZ-1. As per this criminal offence, the subject of protection is explicitly (only) a minor, i.e. a person under the age of 18.

As is evident from the case law[5], one executive form of maltreatment is the corporal punishment of children, in this particular case[6] beating a child with a belt. In its reasoning, the court stated that e.g. maltreatment or ill-treatment of a child significantly deviates from parents' duties to, with direct care and their work, provide their children with conditions for healthy growth, harmonious personal development and the ability to lead an independent life. The beating of eight- or ten-year old child with a belt on the bottom or legs in the manner described in the ruling is not only a violation of the basic obligations of a parent to a child, but is also maltreatment of the child, and permits no doubt regarding the correctness of the conclusion of the court of first instance in the contested final judgement on the physical and psychological maltreatment of children in extreme forms.

Furthermore, the corporal punishment of children may also be considered a minor offence if the criminal element is not such as to be considered a criminal offence of family violence under Article 191 of the KZ-1. Thus, Article 6 of the Protection of Public Order Act (Official Gazette of the Republic of Slovenia, no. 70/06; hereinafter: ZJRM-1) regulates the minor offence of **Violent and Audacious Conduct**[7], whereby a punch by another person under the second paragraph is considered an executive form[8]. The fourth paragraph of Article 6 of the ZJRM-1 regulates the qualifying form of this offence[9] within a family or against relatives, as it prescribes a higher fine. However, the case law shows that in most cases the corporal punishment of children is defined as a criminal offence, not a minor offence.

At this point, it must be stressed that if the actual conduct of an offender has elements of a criminal offence of family violence under Article 191 of the KZ-1 as well has elements of a minor offence of violent and audacious conduct under Article 6 of the ZJRM-1, the rule on the exclusion of misdemeanour proceedings must be observed as per Article 11a of the Minor Offences Act[10] (Official Gazette of the Republic of Slovenia, nos. 7/03, 86/04, 44/05, 40/06, 115/06, 17/08, 108/09, 9/11, 21/13; hereinafter: ZP-1). The general rule in such cases is that responsibility for more severe forms of conduct excludes responsibility for more lenient conduct. Thus, in compliance with Article 11a of the ZP-1, misdemeanour proceedings are not conducted against, nor are sanctions imposed on, an offender who is found guilty of committing a criminal offence which also has elements of a minor offence. If misdemeanour proceedings are begun first and it is later established that all the elements of a criminal offence exist, the misdemeanour proceedings must be terminated and criminal proceedings instigated. In other words, in a case of corporal punishment of children, legal elements of a criminal offence of family violence under Article 191 of the KZ-1 and the minor offence under Article 6 of the

[4] Article 192 of the KZ-1: A parent, adoptive parent, guardian or other person who seriously breaches his obligation to a child shall be sentenced to imprisonment for not more than three years. A parent, adoptive parent, guardian or other person who forces a child to work excessively or to perform work unsuitable to his age, or who out of greed inures a child to begging or other conduct prejudicial to his proper development, or who tortures him shall be sentenced to imprisonment for not more than five years.

[5] "...from the description of the act in the ruling of the court of first instance and also the grounds of the contested final judgement it is understood that the convicted person committed the criminal offence to the detriment of both of his minor sons in both executive forms (with severe violations of his duties to his children and also by maltreating them – beating the children with a belt),..."

[6] Judgement of the Supreme Court of the Republic of Slovenia, no. I Ips 159/2010, see Appendix.

[7] A person who provokes or encourages someone to fight or acts audaciously, violently, rudely, offensively or in a similar manner or follows someone and with such behaviour makes them feel humiliated, threatened, distressed or afraid, shall receive a fine between 60,000 and 120,000 tolars.

[8] A person who punches another person shall receive a fine between 80,000 and 150,000 tolars.

[9] If minor offences under the preceding paragraphs are committed against a spouse, cohabiting partner or a partner in a registered same-sex partnership, former spouse or cohabiting partner or a partner in a registered same-sex partnership, blood relative in direct line, adoptive parent or adopted child, foster parent or foster child, guardian or a person entrusted to the care of that person or against a person living in the same household with the offender, the offender shall receive a fine between 150,000 and 300,000 tolars.

[10] A person convicted of a criminal offence in criminal proceedings, which also has signs of a minor offence, or, due to such offence, a criminal complaint against him is dismissed due to a settlement or suspended prosecution, is not subject to misdemeanour proceedings, and sanctions for minor offences are not imposed.

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ZJRM-1 may be present, whereby prosecution for a criminal offence has 'precedence', so that misdemeanour proceedings are not instigated until after the final ruling in criminal proceedings[11].

In conclusion, it must be noted that a child who is a victim of corporal punishment as a criminal offence of family violence as per Article 191 of the KZ-1 is entitled to compensation under the Crime Victim Compensation Act (Official Gazette of the Republic of Slovenia, nos. 101/05 and 86/10; hereinafter: ZOZKD), which regulates the right to compensation of victims of intentionally committed violent offences directly from the state instead of the offender if the legislative conditions are met. According to the ZOZKD, a child may request compensation on the basis of an assumption that the offender will not be able to pay compensation, because the second paragraph of Article 7 of the ZOZKD explicitly includes the assumption of inability to pay[12] if the beneficiary is a child (under the age of 18 at the time when the offence is committed), a disabled person or a victim of family violence.

As explained above, the corporal punishment of children is subject to criminal protection, which is fully regulated by legislation on criminal and minor offences and is enforced comprehensively in the practice of the courts; thus the Government of the Republic of Slovenia affirms that the legislative basis for the protection of children against corporal punishment is ensured in a suitable manner as anticipated in the RESC.

VI. Conclusion

The Government of the Republic of Slovenia is certain that the applicable national legislation ensures children protection against violence, negligence or exploitation as determined in Article 17 of the RESC, and that Slovenia applies due diligence in this field. It is evident from the case law that the corporal punishment of children is an executive form of the criminal offence of family violence. The Government of the Republic of Slovenia believes that it fully meets the requirements of Article 17 of the RESC.

The Government of the Republic of Slovenia believes that the explicit prohibition of corporal punishment in national legislation is not and cannot fully protect children against violence. The systemic arrangement of prevention of violence against children in the Republic of Slovenia encompasses a wider spectrum of arrangements to prohibit such violence, including the prohibition of physical violence, regardless of motive.

The Government of the Republic of Slovenia believes that the Constitution of the Republic of Slovenia, the Marriage and Family Relations Act, the Family Violence Prevention Act and the Criminal Code provide suitable protection for children against physical violence in the home environment (see Point III.1).

The Government of the Republic of Slovenia believes that indirect and direct prohibitions of corporal punishment in the national legislation which regulates education provide suitable protection of children against physical violence in educational institutions (see Point III.1).

The Government of the Republic of Slovenia believes that **measures intended to raise awareness and recognition of all forms of violence in society and the development of social skills in the broader public**, in addition to the suitable systemic arrangement of children's rights, are more efficient in preventing the corporal punishment of children in practice than the explicit prohibitions in the legislation. The Government of the Republic of Slovenia puts this opinion into practice by means of the activities detailed under Point III.2.

The Government of the Republic of Slovenia believes that the objective of Article 17 of the European Social Charter (revised), more precisely Point 1b: to protect children and young persons against

[11] More in Dr Liljana Selišek: *Nasilje v družini - razmerje med prekrškom in kaznivim dejanjem* (Family Violence – relationship between a minor offence and a criminal offence), Pravna praksa No. 4, page 19, 2009, on 29 January 2009.

[12] It is assumed that the offender is not able to pay compensation in the following cases:
- if the offender remains unknown within three months of the detection or notification of the offence and has not been discovered before the commission's decision or if the offender cannot be prosecuted;
- if the beneficiary is a child, a disabled person or a victim of family violence;
- if a national transboundary case is concerned.

negligence, violence and exploitation, is ensured with the implementation of the Criminal Code, i.e. with the aforementioned criminal offence of **Family Violence** under Article 191 of the KZ-1, and the criminal offence of **Neglect and Maltreatment of a Child**[13] under Article 192 of the KZ-1. The subject of protection from this criminal offence is explicitly (only) a minor i.e. a person under the age of 18, and those who fail in their obligations to a minor are considered parents, adoptive parents, guardians or other persons, which covers all environments in which children move.

The Government of the Republic of Slovenia stresses that it is understood from the case law that the corporal punishment of children in Slovenia is defined as an executive form of the criminal offence of family violence.

VII. APPENDIX: Examples of case law

1. Judgement of the Supreme Court of the Republic of Slovenia, no. I Ips 815/2010,
2. Judgement of the Supreme Court of the Republic of Slovenia, no. I Ips 159/2010.

Ana Vodičar, M.A.
Acting Director General for Family Affairs
HEAD OF THE DELEGATION ACTING AS THE AGENT FOR THE GOVERNMENT OF SLOVENIA

Ljubljana, 26 September 2013

[13] Article 192 of the KZ-1: A parent, adoptive parent, guardian or other person who seriously breaches his obligations to a child shall be sentenced to imprisonment for not more than three years. A parent, adoptive parent, guardian or other person who forces a child to work excessively or to perform work unsuitable to his age, or who out of greed inures a child to begging or other conduct prejudicial to his proper development, or who tortures him shall be sentenced to imprisonment for not more than five years.

APPENDIX 1

Vrhovno sodišče
Kazenski oddelek

Sodba I Ips 815/2010-192

ECLI:SI:VSRS:2011:I.IPS.815.2010.192

VRHOVNO SODIŠČE
REPUBLIKE SLOVENIJE

Evidenčna številka: VS2005505
Datum odločbe: 02.03.2011
Opravilna številka II.stopnje: VSM III Kp 815/2010
Področje: KAZENSKO PROCESNO PRAVO - KAZENSKO MATERIALNO PRAVO
Institut: kršitev kazenskega zakona - nasilje v družini - bistvene kršitve določb kazenskega postopka - zakonski znaki kaznivega dejanja - ogrožanje varnosti - pravna opredelitev - predlog za pregon - spravljanje v podrejen položaj
Zveza:
ZKP člen 53, 372, 372-4.
KZ-1 člen 135, 135/1, 135/2, 191, 191/1, 296.

Jedro

Pri kaznivem dejanju nasilja v družini mora iti praviloma za neko trajnejše ravnanje storilca, ki poruši normalne medosebne odnose v družini tako, da ostanejo določeni družinski člani brez topline doma, brez občutka varnosti, da so prestrašeni ipd., oziroma so ravno zaradi obdolženčevega ravnanja spravljeni v podrejen položaj oziroma v položaj, ki je temu pojmu po vsebini primerljiv.

Izrek

I. Zahtevi za varstvo zakonitosti se ugodi, pravnomočna sodba se v pravni opredelitvi in odločbi o kazenski sankciji spremeni tako, da se

obsojenega S. V. spozna za krivega storitve treh kaznivih dejanj ogrožanja varnosti po prvem odstavku 135. člena v zvezi s tretjim odstavkom 29. člena Kazenskega zakonika in se mu

po členih 57 in 58 Kazenskega zakonika izreče

pogojna obsodba,

v kateri se mu za vsako od dejanj po prvem odstavku 135. člena Kazenskega zakonika določi kazen 2 (dva) meseca zapora,

nakar se mu na podlagi 2. točke drugega odstavka 53. člena določi enotna kazen

5 (pet) mesecev zapora,

ki pa ne bo izrečena, če obsojenec v preizkusni dobi treh let ne bo storil novega kaznivega dejanja.

II. Sicer se zahteva za varstvo zakonitosti zavrne.

Obrazložitev

1. Z uvodoma navedeno sodbo Okrožnega sodišča v Mariboru je bil S. V. spoznan za krivega storitve kaznivega dejanja nasilja v družini po prvem odstavku 191. člena v zvezi s tretjim odstavkom 29. člena Kazenskega zakonika (v nadaljevanju KZ-1) ter dveh kaznivih dejanj nasilja v družini po tretjem v zvezi s prvim odstavkom 191. člena v zvezi s tretjim odstavkom 29. člena KZ-1. Za navedena kazniva dejanja mu je sodišče določilo kazni dva meseca, štiri mesece in dva meseca zapora ter mu zatem na podlagi 2. točke drugega odstavka 53. člena KZ-1 izreklo enotno kazen sedem mesecev zapora, v katero mu je vštelo pripor od 4. 1. 2010 od 19.15 ure dalje. Višje sodišče v Mariboru je pritožbo obtoženčeve zagovornice zavrnilo kot neutemeljeno in potrdilo sodbo sodišča prve stopnje. Obe sodišči sta mu naložili plačilo stroškov kazenskega postopka.

2. Zoper navedeno pravnomočno sodno odločbo je vložila obsojenčeva zagovornica zahtevo za varstvo zakonitosti zaradi kršitve kazenskega zakona iz 1. točke prvega odstavka 420. člena Zakona o kazenskem postopku (v nadaljevanju ZKP), zaradi bistvenih kršitev določb kazenskega postopka iz prvega odstavka 371. člena ZKP (2. točka prvega odstavka 420. člena ZKP) ter zaradi drugih kršitev določb kazenskega postopka, ki so vplivale na zakonitost izpodbijane sodne odločbe (3. točka prvega odstavka 420. člena ZKP). Vrhovnemu sodišču predlaga, da zahtevi za varstvo zakonitosti ugodi, izpodbijani sodbi razveljavi ter zadevo vrne v novo sojenje sodišču prve stopnje.

3. V odgovoru na zahtevo, podanem na podlagi drugega odstavka 423. člena ZKP, vrhovni državni tožilec meni, da zahteva za varstvo zakonitosti ni utemeljena. Obsojenec je namreč s tremi oškodovankami grdo in ponižujoče ravnal in to dlje časa in bil pri tem zelo vztrajen, s tem pa je povzročil dalj časa trajajočo vznemirjenost, prestrašenost in ogroženost. To pa pomeni, da je spravljal oškodovanke v ponižujoč in podrejen položaj. Zato je pravna kvalifikacija po mnenju vrhovnega državnega tožilca pravilna. Prav tako je pravilna odločitev sodišča, da je s svojim ravnanjem izpolnil tri kazniva dejanja, saj gre za tri samostojne kriminalne količine. Obsojencu je sodilo tudi stvarno pristojno sodišče, utemeljeno pa so bili zavrnjeni dokazni predlogi, ki jih je predlagala obramba. Nadaljnje izvajanje dokazov je namreč zaradi jasnosti zadeve odveč, kar je prvostopenjsko sodišče tudi ustrezno obrazložilo. Očitek kršitve 11. točke prvega odstavka 371. člena ZKP pa v zahtevi ni obrazložen, temveč se trditve zahteve nanašajo zgolj na zmotno in nepopolno ugotovljeno dejansko stanje. Primernost izrečene kazenske sankcije, kar prav tako uveljavlja zagovornica v zahtevi, pa ne more biti predmet presoje v zvezi z odločanjem o zahtevi za varstvo zakonitosti.

4. O odgovoru vrhovnega državnega tožilca na vloženo zahtevo za varstvo zakonitosti je podala zagovornica obsojenca izjavo, v kateri vztraja na navedbah zahteve.

5. Zahteva za varstvo zakonitosti je delno utemeljena.

6. Kršitev kazenskega zakona iz 1. točke prvega odstavka 372. člena ZKP vidi vložnica v tem, da dejanja, kot so opisana v izreku sodbe sodišča prve stopnje, ne vsebujejo vseh zakonskih znakov kaznivega dejanja nasilja v družini. Meni namreč, da glede na zakonsko besedilo „grdo ravna, ga pretepa, preganja, omejuje, zalezuje, prisiljuje, ga spravlja...“ zakon očitno zahteva neko trajnejše oziroma večkratno ravnanje storilca, ne more pa biti inkriminiran po tem členu enkraten eksces.

7. Kaznivo dejanje nasilja v družini po prvem odstavku 191. člena KZ-1 stori, kdor v družinski skupnosti z drugim grdo ravna, ga pretepa ali drugače boleče in ponižujoče ravna, ga z grožnjo z neposrednim napadom na

življenje ali telo preganja iz skupnega prebivališča ali mu omejuje svobodo gibanja, ga zalezuje, ga prisiljuje k delu ali opuščanju dela ali ga kako drugače z nasilnim omejevanjem njegovih enakih pravic spravlja v skupnosti v podrejen položaj. Tretji odstavek ščiti še osebe, ki sicer v trenutku kaznivega dejanja ne živijo več v družinski skupnosti s storilcem, so pa z njim živeli v družinski ali drugi trajnejši skupnosti, ki je sicer že razpadla, je pa dejanje s to skupnostjo povezano. Kaznivo dejanje je uvrščeno med kazniva dejanja zoper zakonsko zvezo, družino in otroke, smisel oziroma cilj zaščite tega člena pa je družinska skupnost oziroma dom, kjer naj bi se človek počutil najbolj varnega, zaradi česar je tudi kazen, ki je predpisana za to kaznivo dejanje, višja kot kazen, ki je predpisana za kaznivo dejanje nasilništva po 296. člena KZ-1, čeprav so izvršitvena ravnanja podobna. V taki trajnejši skupnosti se namreč tudi lažje oblike nasilja bolj intenzivno odražajo na oškodovancu, kot če takšnega specifičnega medsebojnega odnosa med žrtvijo in storilci ni. Kaznivo dejanje je opredeljeno z več alternativno določenimi načini storitve, ki pomenijo bodisi napad na življenje in telo, varnost oziroma pravico do doma ali pa je ogrožena osebna svoboda oziroma človekovo dostojanstvo. Storilčevo ravnanje mora biti takšne narave, da spravi žrtev v podrejen položaj. Kot je bilo že pojasnjeno v odločbah Vrhovnega sodišča (npr. I Ips 194/2009), besedne zveze „spravljanje v podrejen položaj“ ni mogoče razumeti zgolj kot neko ciljno ravnanje, s katerim si ena oseba podreja drugo tako, da ta upošteva njeno voljo oziroma zahteve, ampak tudi ravnanje, ko izvajanje nasilja žrtev spravi v ponižujoč, inferioren položaj oziroma položaj, ko postane žrtev objekt izvajanja nasilja, ki se mu niti ne more izogniti. Žrtev ne ravna več kot svoboden človek, ampak se zmeraj podreja drugemu. Takšen položaj storilec ustvari, ko pri žrtvah povzroči nemoč, strah, vznemirjenje in podobno večje intenzivnosti in trajanja. Že iz navedenega ter dejstva, da so glagoli, ki pomenijo način izvršitve tega kaznivega dejanja, kot na to opravičeno opozarja vložnica v zahtevi, v zakonu navedeni v obliki glagolov trajanja, oziroma v nedovršniku, nedvoumno izhaja, da gre praviloma za neko trajnejše ravnanje storilca, ne pa za enkratno ogrozitev ali grdo ravnanje.

8. V konkretni kazenski zadevi je bil obsojenec spoznan za krivega storitve treh kaznivih dejanj nasilja v družini, in sicer storjenega

zoper vnukinjo J. V., katero je močno prijel v predelu leve pazduhe in za desno nogo ter jo začel potiskati in jo želel vreči po tleh, kar pa mu ni uspelo, nakar jo je prijel za zapestje obeh rok in jo potisnil ob steno, ob tem pa je oškodovanko z nohti poškodoval, tako da je utrpela odrgnino dlani,

zoper ženo G. V., kateri je dejal, da naj zgine in da če bo držala s hčerko, jo bo ubil, pri tem pa jo je še potisnil,

J. V., hčerki I. V. in G. V. pa je tudi grozil, da jih bo vse pobil, vnukinji J. V. pa je še dejal, da je kurba;

pri tem pa je bila zaradi neopredeljene organske motenosti, osebnosti in vedenja, zaradi možganske poškodbe – F 7,9 in akutnega alkoholnega opoja – F 10,2 njegova zmožnost razumeti pomen svojega dejanja in imeti v oblasti svoje ravnanje bistveno zmanjšana.

9. Opis torej vsebuje enkratno ekscesno ravnanje obsojenca, ki ga je sodišče opredelilo glede oškodovane J. V. kot grdo ravnanje, torej boleče in ponižujoče ravnanje z oškodovanko, glede vseh treh pa je presodilo, da pomenijo njegove izjave, da jih bo vse pobil in jih pri tem naganjal iz hiše, resno grožnjo z napadom na telo. Vse navedeno, torej grdo ravnanje, grožnjo z neposrednim napadom na telo ter ponižujoče ravnanje (žalitev vnukinje) pa je ocenilo kot takšno ravnanje, ki je imelo za posledice spravljanje oškodovank v podrejen položaj. S slednjim pa se, kot rečeno, ne strinja zagovornica v zahtevi. Presoditi je torej potrebno, ali ravnanje, kot je opisano v izreku sodbe in utemeljeno v obrazložitvi, res takšen enkratni eksces, ki bi imel za oškodovanke prepovedane posledice, kot jih zahteva kvalifikacija po 191. členu KZ.

10. Kot je bilo že pojasnjeno, mora pri kaznivem dejanju nasilja v družini iti praviloma za neko trajnejše ravnanje storilca, ki poruši normalne medosebne odnose v družini tako, da ostanejo določeni družinski člani brez topline doma, brez občutka varnosti, so prestrašeni ipd., oziroma so ravno zaradi obdolženčevega ravnanja spravljeni v podrejen položaj oziroma v položaj, ki je temu pojmu po vsebini primerljiv, čeprav sicer

ni mogoče izključiti, da bi tudi enkraten izjemen eksces lahko imel hude posledice za družinske člane, kar pa se seveda presoja v vsakem konkretnem primeru posebej (npr. izrazito izživljanje z nasiljem oziroma ravnanje storilca, ki kaže na nasilje nad družinskimi člani zaradi nasilja). Te okoliščine pa morajo biti ne samo ugotovljene v obrazložitvi, temveč morajo biti navedene tudi v izreku sodbe, saj se sicer opis dejanja, kjer se storilcu očita kaznivo dejanje po 191. členu KZ-1 (ali 296. členu KZ-1), ne bi v ničemer razlikoval od opisa kaznivega dejanja po členu 135 KZ-1. V konkretni kazenski zadevi, kot izhaja iz izreka sodbe in ugotovitev v obrazložitvi, je obsojenec grdo ravnal z J. V. po tem, ko je prišlo med njim in njegovo hčerko I. V. do prepira. K njima je pristopila oškodovana J. V., ki je bila prva, ki je zagrozila obsojencu, naj gre iz hiše in ga pri tem odrinila, šele nato jo je obsojenec močno prijel za predel leve pazduhe. Nobenega dvoma sicer ni, da je obsojenec tedaj neprimerno ravnal z vnukinjo oziroma z njo grdo ravnal, kakor tudi ne, da je bila grožnja z umorom resna, kot to ugotavljata obe sodišči in je oškodovanke vznemirila. Vendar pa po presoji Vrhovnega sodišča njegovo enkratno ravnanje, kot izhaja iz opisa v izreku sodbe, ni takšne narave, da bi bile oškodovanke spravljene v podrejen položaj ali da bi lahko kot posledica njegovega ravnanja sklepali, da so postale objekt njegovega nasilja. Takšnih okoliščin, kot rečeno v opisu očitka v izreku, ni. Iz obrazložitve sodbe pa nadalje izhaja, da je bila J. V. tista, ki je obsojenca zaklenila v hišo tako, da ne bi pobegnil pred policisti, ki jih je poklicala. Skupaj z obsojencem so tako v istem prostoru policiste počakale tudi oškodovanke. Ugotovljeno pa je tudi bilo, da gre za dlje časa trajajoč spor med obsojencem in vnukinjo in v zvezi s tem tudi za njeno nenaklonjenost do obsojenca. Ravnanje vinjenega in po poškodbi psihično motenega obsojenca ni bilo etično, ne pravilno in tudi ne zakonito, vendar pa ne dosega tiste ravni ogrožanja oziroma grdega ravnanja, kot ga za kvalifikacijo ravnanja za kaznivo dejanje nasilja v družini zahteva prvi odstavek 191. člena KZ. Vse oškodovanke sicer povedo, da se je mož, oče oziroma ded po poškodbi glave precej spremenil, vendar iz izpovedb nobene ne izhaja, da bi bile zaradi dejanja, kot je opisano, spravljene v ponižujoč oziroma inferioren položaj v odnosu do obsojenca.

11. Vrhovno sodišče je glede na navedeno zahtevi za varstvo zakonitosti v tem delu ugodilo in v izreku opisano ravnanje opredelilo kot tri kazniva dejanja ogrožanja varnosti po prvem odstavku 135. člena v zvezi z 29. členom KZ-1. Gre namreč za osebna kazniva dejanja, storjena proti trem oškodovankam, zaradi česar je potrebno obsojenčevo ravnanje opredeliti kot tri ravnanja, ne pa kot eno kaznivo dejanje, kot na to opozarja zagovornica v zahtevi. S tem, ko je sodišče prve stopnje ocenilo, da gre za tri kazniva dejanja in ne za dve kaznivi dejanji, kot je bilo očitano v obtožnici, pa tudi ni prekoračilo obtožbe, saj na kvalifikacijo kaznivih dejanj v obtožnici ni vezano. Vezano je na osebo, ki je obtožena, in na dejanje, ki je predmet obtožbe, obsežene v vloženi oziroma na glavni obravnavi spremenjeni ali razširjeni obtožnici (354. člen ZKP).

12. Glede na spremenjeno kvalifikacijo in ob upoštevanju vseh okoliščin obravnavanega primera (obsojenčeva bolezen, dejstvo, da je prišel v hišo, kjer so stanovale hči in vnukinji z dobrimi nameni zakuriti v hiši – nasprotno ni bilo dokazano) ter samo težo kaznivih dejanj, mu je Vrhovno sodišče izreklo kazensko sankcijo opominjevalne narave, to je pogojno obsodbo, v kateri mu je določilo kazen za vsako od dejanj v skladu s predpisanimi, ki je primerna teži kaznivega dejanja ter stopnji njegove kazenske odgovornosti, ter mu je zatem po pravilih o steku določilo ustrezno enotno kazen ter relativno dolgo preizkusno dobo, kar naj obsojenca odvrača od izvrševanja kaznivih dejanj.

13. Procesne kršitve, ki jih uveljavlja zagovornica v zahtevi, niso podane. Kaznivo dejanje ogrožanja varnosti se preganja na predlog oškodovanca (drugi odstavek 135. člena KZ-1). Če je oškodovanec sam podal kazensko ovadbo, se šteje, da je s tem podal tudi predlog za pregon (drugi odstavek 53. člena ZKP). V konkretni kazenski zadevi so vse tri oškodovanke podale ovadbo oziroma predlog za pregon. Iz kazenske ovadbe Policijske postaje Slovenska Bistrica izhaja, da jo je G. V. podala dne 4. 1. 2010, J. in I. V. pa dne 5. 1. 2010, tako da so procesne predpostavke za pregon v tej kazenski zadevi izpolnjene.

14. Na neutemeljene pomisleke zagovornice v zvezi s stvarno pristojnostjo je odgovorilo že pritožbeno sodišče. Glede na to, da se je obsojencu očitala storitev kaznivega dejanja po prvem odstavku 191. člena KZ-1, za katero je zagrožena kazen do pet let zapora in je sodišče njegovo ravnanje tudi tako opredelilo, je za obravnavanje celotne kriminalne količine, ki se očita obtožencu, bilo pristojno okrožno sodišče. Sicer pa

četudi bi okrožno sodišče med glavno obravnavo spoznalo, da je za sojenje pristojno okrajno sodišče, ne bi poslalo zadeve temu sodišču, temveč bi samo izvedlo postopek in izdalo odločbo (drugi odstavek 36. člena ZKP).

15. Glede na spremenjeno kvalifikacijo obravnavanih kaznivih dejanj zaslišanje predlaganih prič I. K., A. in T. Š. ter ponovnega zaslišanja M. D., ki naj bi pripovedovali o razmerah v obsojenčevi družini, ni pravno relevantno. Priče namreč o obravnavanem dogodku ne bi vedele ničesar povedati, siceršnje razmere v družini pa na obstoj ali neobstoj kaznivih dejanj po spremenjeni kvalifikaciji ne bi mogle v ničemer vplivati.

16. Zaradi po mnenju vložnika zahteve neprimerne kazenske sankcije zahteve za varstvo zakonitosti ni dopustno vlagati. Odločba o kazenski sankciji se sme izpodbijati le, če je z izrekom te kazenske sankcije kršen zakon.

17. Vrhovno sodišče je glede na vse navedeno zahtevi za varstvo zakonitosti delno ugodilo in kazniva dejanja, za katera je bil obsojenec spoznan za kriva, pravno opredelilo kot kazniva dejanja ogrožanja varnosti po prvem odstavku 135. člena KZ-1, storjena v stanju bistveno zmanjšane prištevnosti ter mu za to izreklo pogojno obsodbo, sicer je zahtevo zavrnilo kot neutemeljeno.

Datum zadnje spremembe: 03.10.2011

APPENDIX II

Vrhovno sodišče
Kazenski oddelek

Sodba I Ips 159/2010

ECLI:SI:VSRS:2011:I.IPS.159.2010

VRHOVNO SODIŠČE
REPUBLIKE SLOVENIJE

Evidenčna številka: VS2005681
Datum odločbe: 13.04.2011
Opravilna številka II.stopnje: VSL V Kp 88/2010
Področje: KAZENSKO PROCESNO PRAVO - KAZENSKO MATERIALNO PRAVO
Institut: bistvene kršitve določb kazenskega postopka - razlogi o odločilnih dejstvih - nedovoljen dokaz - izvajanje dokazov v korist obdolženca - pravice obrambe - privilegirana priča - zaslišanje privilegirane priče - zaslišanje mladoletnega oškodovanca - zahteva obdolženca za zaslišanje - kršitev kazenskega zakona - zanemarjanje otroka in surovo ravnanje - zakonski znaki kaznivega dejanja
Zveza: ZKP člen 236, 236/1-5, 236/5, 237, 371, 371/1-8, 371/1-11,

□□ 371/2, 395, 395/1.

□□ KZ-1 člen 192, 92/1, 192/2.

Jedro

Učiteljici obsojenčevih otrok nista privilegirani priči iz razloga 5. točke prvega odstavka 236. člena ZKP, saj o dejstvih nista izvedeli od obsojenca, ampak od mladoletnih oškodovancev, kot učiteljici pa sta v primerih iz tretjega odstavka 65. člena ZKP bili dolžni zaupne podatke posredovati pristojnim organom.

Izrek

I. Zahteva za varstvo zakonitosti se zavrne.

II. Obsojenec je dolžan plačati sodno takso.

Obrazložitev

A.

1. Okrožno sodišče v Ljubljani je s sodbo z dne 16. 11. 2009 pod točko II izreka spoznalo obsojenega J. Ž. za krivega storitve dveh kaznivih dejanj zanemarjanja otroka in surovega ravnanja po drugem in prvem odstavku 192. člena Kazenskega zakonika (KZ-1). Izreklo mu je pogojno obsodbo z varstvenim nadzorstvom, v kateri mu je za vsako kaznivo dejanje določilo kazen deset mesecev zapora in zatem določilo enotno kazen eno leto in šest mesecev zapora, ki pa ne bo izrečena, če v preizkusni dobi štirih let ne bo storil novega kaznivega dejanja; določilo mu je tudi ukrep varstvenega nadzorstva v obliki pomoči in nadzora za čas dveh let, ob katerem mu je odredilo še navodilo, da se udeleži treninga nenasilne komunikacije. Oprostilo ga je plačila

stroškov postopka. Z isto sodbo je sodišče pod točko I izreka iz razloga po 1. točki 357. člena Zakona o kazenskem postopku (ZKP), zoper obdolženca zavrnilo obtožbo zaradi kaznivega dejanja spolnega napada na osebo mlajšo od petnajst let po tretjem in prvem odstavku 173. člena KZ-1, ter odločilo, da stroški tega dela postopka obremenjujejo proračun. Višje sodišče v Ljubljani je s sodbo z dne 13. 5. 2010 pritožbo obsojenčeve zagovornice zavrnilo kot neutemeljeno in potrdilo sodbo sodišča prve stopnje; obsojencu pa v plačilo naložilo stroške pritožbenega postopka.

2. Zoper obsodilni del navedene pravnomočne sodbe je obsojenčeva zagovornica pravočasno dne 2. 7. 2010 vložila zahtevo za varstvo zakonitosti zaradi bistvenih kršitev določb kazenskega postopka iz 8. in 11. točke prvega odstavka 371. člena ZKP, kršitve 237. člena ZKP in kršitve kazenskega zakona. Vrhovnemu sodišču je predlagala, da zahtevi ugodi in izpodbijano pravnomočno sodbo razveljavi ter zadevo vrne sodišču prve stopnje v novo sojenje.

3. Vrhovna državna tožilka v odgovoru na zahtevo, podanem dne 30. 7. 2010, predlaga zavrnitev zahteve. V odgovoru navaja, da je zagovornica predlog za zaslišanje oškodovancev vezala na njuno sposobnost pričanja, izvedenka pa je ocenila, da otroka nista sposobna pričati. Obsojenec zaslišanja oškodovancev ni nikoli predlagal. Zato mu niso bile kršene pravice do obrambe. Z navedbami o nasprotjih med mnenjem izvedenke B. in klinične psihologinje Ž. ter izpovedjo posameznih prič, pa zahteva za varstvo zakonitosti izpodbija dokazno oceno.

4. Z odgovorom državne tožilke je bila obsojenčeva zagovornica seznanjena dne 23. 8. 2010, ter se o njem izjavila z vlogo z dne 30. 8. 2010. Obsojencu sodno pismo z odgovorom državne tožilke ni bilo vročeno, ker kljub poskušanim vročitvam dne 17. 8. in 18. 8. 2010 ter obvestilu pošte, sodnega pisma ni dvignil in je bilo dne 6. 9. 2010 vrnjeno sodišču.

B. - 1

5. Glede na vsebino zahteve za varstvo zakonitosti Vrhovno sodišče uvodoma poudarja:

da je to izredno pravno sredstvo mogoče vložiti le iz razlogov, navedenih v 1. do 3. točki prvega odstavka 420. člena ZKP, in sicer zaradi kršitve kazenskega zakona, zaradi bistvenih kršitev določb kazenskega postopka iz prvega odstavka 371. člena ZKP in zaradi drugih kršitev kazenskega postopka, če so te vplivale na zakonitost sodne odločbe (v tem primeru mora vložnik zahteve torej izkazati ne le kršitev, ampak tudi njen vpliv na to, da je odločba nezakonita);

da je kot razlog za vložitev zahteve izrecno izključeno uveljavljanje zmotne ali nepopolne ugotovitve dejanskega stanja (drugi odstavek 420. člena ZKP), torej navajanje pomislekov, da odločilna dejstva – tako materialno kot procesnopravno relevantna dejstva, na katerih neposredno temelji uporaba materialnega ali procesnega zakona, niso bila pravilno ali v celoti ugotovljena;

da se pri odločanju o zahtevi za varstvo zakonitosti sodišče omeji samo na preizkus tistih kršitev zakona, na katere se sklicuje vložnik v zahtevi (prvi odstavek 424. člena ZKP) in katere vložnik konkretizira tako, da je mogoč preizkus njihove utemeljenosti;

da je Vrhovno sodišče glede zaslišanja privilegiranih mladoletnih prič v svojih odločbah že presodilo, da določbe tretjega odstavka 236. člena ZKP ni mogoče razlagati tako, da bi sodišče vedno ko to zahteva obdolženec, mladoletno pričo moralo zaslišati (sodba I Ips 382/2007 z dne 15. 1. 2009, Vrhovno sodišče Republike Slovenije, Kazenski oddelek, Zbirka odločb 2007 – 2010, Založba GV, Ljubljana 2010), ter da s tem, ko sodišče ni zaslišalo mladoletnih oškodovancev (obsojenčevih otrok), ki glede na svojo starost in duševno razvitost nista mogla razumeti pomena pravice da nista dolžna pričati in je tak dokazni predlog obsojenčevega zagovornika zavrnilo, ni prekršilo pravic obrambe, saj zaslišanja obeh mladoletnih otrok ni zahteval obsojenec sam (sodba I Ips 403/2007 z dne 24. 4. 2008, Vrhovno sodišče Republike Slovenije,

Kazenski oddelek, Zbirka odločb 2007 – 2010, Založba GV, Ljubljana 2010).

B. - 2

6. Neutemeljeno zagovornica v zahtevi za varstvo zakonitosti kršitev kazenskega zakona nakazuje z navedbami, da naklep, niti razlogi zanj v sodbah za kaznivo dejanje po prvem in drugem odstavku 192. člena KZ-1 niso podani, da celo izvedenka B. ni našla znakov zanemarjanja pri otrocih, kar predstavlja odsotnost zakonskih znakov za temeljno obliko kaznivega dejanja po 192. členu KZ-1, zato je pojmovno nemogoče očitati obsojencu kvalificirano obliko kaznivega dejanja po drugem odstavku in da bi sodišče moralo, glede na to, da sodba očita obsojencu da je kaznivo dejanje začel izvrševati junija 2008, uporabiti takrat veljavni kazenski zakonik, ki je milejši od sedaj veljavnega.

7. Kaznivo dejanje zanemarjanja otroka in surovega ravnanja po prvem odstavku 192. člena KZ-1 storijo starši, skrbnik, rejnik ali druga oseba, ki hudo krši svoje dolžnosti do otroka; kaznivo dejanje po drugem odstavku istega člena pa isti subjekti storijo, če silijo otroka k pretiranemu delu ali k delu, ki ni primerno njegovi starosti, ali ga iz koristoljubnosti navajajo k beračenju ali drugim dejanjem, ki so škodljiva za otrokov razvoj, ali z otrokom surovo ravnajo, ali ga trpinčijo. Ne le da iz opisa dejanja v izreku sodbe sodišča prve stopnje in tudi razlogov izpodbijane pravnomočne sodbe izhaja, da je obsojenec kaznivo dejanje na škodo svojih dveh mladoletnih sinov storil v obeh izvršitvenih oblikah (tako s hudo kršitvijo svojih dolžnosti do otrok, kot tudi s surovim ravnanjem z njima – pretepanjem otrok s pasom), temveč je tudi zmotno stališče zagovornice v zahtevi, da bi odsotnost znakov za temeljno obliko kaznivega dejanja po 192. členu KZ-1 onemogočala očitek izvršitvene oblike kaznivega dejanja iz drugega odstavka istega člena. V drugem odstavku 192. člena KZ-1 določno navedena izvršitvena dejanja storilca (npr. surovo ravnanje z otrokom ali trpinčenje) namreč bistveno odstopajo od dolžnosti staršev, da z neposredno skrbjo in svojim delom otrokom omogočijo razmere za zdravo rast, skladen osebnostni razvoj in usposobitev za samostojno življenje. Pretepanje osemletnih, oziroma desetletnih otrok s pasom po zadnjici in nogah, na način kot izhaja iz opisa dejanja v izreku sodbe, ni le kršitev osnovnih dolžnosti starša do otroka, temveč je surovo ravnanje z otrokom in ne dopušča dvoma v pravilnost zaključka sodišča prve stopnje v izpodbijani pravnomočni sodbi o fizičnem in psihičnem maltretiranju otrok v grobi obliki. V delu, kjer pa zagovornica navaja, da naklep obsojenca ni podan ter da izvedenka ni našla znakov zanemarjanja otrok, zaradi česar obsojencu ni mogoče očitati kvalificirane oblike kaznivega dejanja, zagovornica v zahtevi zatrjuje drugače, kot izhaja iz dejanskih ugotovitev sodišča v izpodbijani pravnomočni sodbi. Zatrjevanje, ki izhaja iz nasprotne dokazne ocene in drugačnih zaključkov od tistih, ki jih je sodišče sprejelo v izpodbijani pravnomočni sodbi, pa pomeni z zahtevo za varstvo zakonitosti nedopustno izpodbijanje dejanskega stanja.

8. Zmotno je stališče zagovornice v zahtevi za varstvo zakonitosti, da bi sodišče moralo glede na čas storitve kaznivih dejanj uporabiti določbo kazenskega zakonika, veljavnega v času, ko je obsojenec pričel izvrševati kaznivi dejanji (junij 2008), ne pa KZ-1. Vrhovno sodišče soglaša s presojo sodišča druge stopnje, ki je enako pritožbeno navedbo zagovornice obrazloženo zavrnilo (stran 6 sodbe sodišča druge stopnje). Ker iz opisa obsojencu očitanih kaznivih dejanj izhaja, da ju je storil v času od junija 2008 do aprila 2009, je sodišče v izpodbijani pravnomočni sodbi pravilno uporabilo določbe KZ-1, ki je stopil v veljavo s 1. 11. 2008 in obsojenčevo ravnanje opredelilo po 192. členu KZ-1.

9. Zagovornica v zahtevi za varstvo zakonitosti neutemeljeno uveljavlja bistveno kršitev določb kazenskega postopka iz 8. točke prvega odstavka 371. člena ZKP in kršitev 237. člena ZKP. V zahtevi navaja, da ker sodišče prve stopnje učiteljici T. T. in M. Z. ni poučilo o pravni dobroti skladno z določbo 5. točke prvega odstavka 236. člena ZKP v povezavi z drugim odstavkom 236. člena ZKP, na njuni izpovedi ne bi smelo opreti sodbe. Enako kršitev določb kazenskega postopka je zagovornica uveljavljala v pritožbi zoper sodbo sodišča prve stopnje, in jo je sodišče druge stopnje obrazloženo zavrnilo (stran 2 – 3 sodbe).

10. Določba 236. člena ZKP omogoča oprostitev pričevanja, ki jo lahko izkoristijo v tem členu navedene osebe. Pravna dobrota oprostitve dolžnosti pričevanja je določena v korist navedenih oseb in ne obdolženca.

Če bi bile namreč dolžne pričati, bi te osebe, zaradi tesnih družinskih vezi (sorodniki) ali posebnega razmerja zaupnosti (verski spovednik, odvetnik, zdravnik) lahko prišle v položaj, da bi morale izpovedovati v škodo obdolženca, na katerega jih veže takšno razmerje. Gre torej za privilegij, dan v korist oseb, navedenih v 236. členu ZKP, da ne bi prišle v položaj, ko bi morale izpovedovati v škodo obdolženca, na katerega jih veže določeno razmerje.

11. Iz navedb zagovornice v zahtevi za varstvo zakonitosti ne izhaja, da bi v zahtevi za varstvo zakonitosti navedeni učiteljici obsojenčevih otrok, z obsojencem vezala razmerja ali vezi iz 1. do 4. točke prvega odstavka 236. člena ZKP. Zmotno pa je stališče zagovornice, da sta učiteljici otrok privilegirani priči iz razloga 5. točke prvega odstavka 236. člena ZKP, torej da sta kot učiteljici otrok oproščeni dolžnosti pričanja o dejstvih, za katera sta izvedeli (od otrok) pri opravljanju svojega poklica. Zagovornica povsem prezre, da učiteljici o dejstvih nista izvedeli od obsojenca, ampak od mladoletnih oškodovancev in da sta imenovani priči kot učiteljici v primerih iz tretjega odstavka 65. člena ZKP (torej tudi pri kaznivem dejanju zanemarjanja otroka in surovega ravnanja) bili dolžni zaupne podatke posredovati pristojnim organom. Zato s tem, ko je sodišče svojo dokazno oceno oprlo (tudi) na njuni izpovedbi, ni prekršilo določbe 8. točke 371. člena ZKP, saj njuni izpovedbi nista dokaz, na katerega se po določbah Zakona o kazenskem postopku sodba ne more opirati.

12. Zagovornica v zahtevi za varstvo zakonitosti uveljavlja kršitev pravice do obrambe z navedbo, da je sodišče prve stopnje oprlo razloge sodbe izključno na izjave mladoletnih oškodovancev, ki sta jih povedala T. in Z., dokaz z zaslišanjem mladoletnih oškodovancev pa se ni izvedel. V zahtevi navaja, da je obramba zahtevala zaslišanje obeh mladoletnih oškodovancev tako v preiskavi, kot v ugovoru zoper obtožnico. Zato ne drži trditev pritožbenega sodišča, da obsojenec ni nikoli predlagal zaslišanja obremenilnih prič – mladoletnih otrok. Sodišče svoje dokazne presoje ne bi smelo opreti na izpovedbe prič T. T. in M. Z. o tem, kar sta jima mladoletna oškodovanca povedala, saj obsojenec ni mogel uveljaviti dokaza z zaslišanjem mladoletnih otrok, ker je izvedenka B. ocenila, da otroka nista sposobna pričati.

13. Navedbam zagovornice v zahtevi, da je „obramba zahtevala zaslišanje obeh mladoletnih oškodovancev tako v preiskavi, kot v ugovoru zoper obtožnico“, Vrhovno sodišče ne more pritrditi. Zagovornica je v preiskavi dne 22. 5. 2009 predlagala „postavitev izvedenca pedopsihologa za oba otroka, ki bo odgovoril na vprašanje, ali sta sposobna otroka pričati, ali razumeta dolžnost govoriti resnico, ali lahko razumeta, da v primeru da govorita neresnico, je to lahko kaznivo dejanje in ali lahko razumeta pomen odpovedi pričanju. Po odgovoru izvedenca bo obramba predlagala zaslišanje obeh otrok, v kolikor bo izvedenec ugotovil, da sta sposobna za pričanje“ (list. št. 162). Takega (pogojnega) predloga zagovornice nikakor ni moč šteti kot predlog za izvedbo dokaza z zaslišanjem mladoletnih oškodovancev. Izvedensko mnenje psihološke stroke za mladoletna oškodovanca, iz katerega izhaja, da dečka nista sposobna pričanja pred sodiščem, je bilo zagovornici vročeno 20. 7. 2009, do konca preiskave zagovornica predloga za zaslišanje oškodovancev ni podala. Navedbe zagovornice, da je v ugovoru zoper obtožnico, vloženo dne 27. 7. 2009, zahtevala zaslišanje mladoletnih otrok, v podatkih spisa (ugovoru zagovornice zoper obtožnico – list. št. 290 – 291) nimajo opore, saj ugovor takega predloga ne vsebuje. Ker zagovornica zaslišanja mladoletnih oškodovancev sploh ni predlagala, saj takšnega dokaznega predloga ni vložila, niti ni tega nikoli v postopku pred sodiščem prve stopnje zahteval obsojenec (skladno z določbo tretjega odstavka 236. člena ZKP lahko takšno zahtevo poda le obsojenec osebno), je neutemeljen očitek v zahtevi za varstvo zakonitosti o kršitvi pravice do obrambe zaradi neizvedbe s strani obrambe predlaganega dokaza.

14. Sodišče prve stopnje mladoletnih oškodovancev v postopku ni zaslišalo. Kot izhaja iz razlogov sodbe, je opirajoč se na izvedensko mnenje izvedenke Z. B. in izpoved priče B. Ž. zaključilo, da otroka nista sposobna pričati pred sodiščem. Obsojenec zaslišanja oškodovancev – svojih mladoletnih otrok ni zahteval, in temu vložnica v zahtevi za varstvo zakonitosti ne oporeka. Zato so neutemeljene navedbe v zahtevi za varstvo zakonitosti, da obsojenec (ki izvedbe dokaza z zaslišanjem svojih otrok sploh ni predlagal) ni mogel uveljaviti pravice do zaslišanja obremenilnih prič.

15. Zagovornica v zahtevi uveljavlja kršitev določb kazenskega postopka iz 11. točke prvega odstavka 371.

člena ZKP ker da izpodbijana pravnomočna sodba nima razlogov o odločilnih dejstvih oziroma so ti razlogi nejasni. Vrhovno sodišče ugotavlja, da težišče navedb zagovornice v zahtevi za varstvo zakonitosti predstavlja nestrinjanje obrambe z dokazno oceno, ki sta jo v zvezi z obsojencu očitanima kaznivima dejanjema zanemarjanja otroka in surovega ravnanja v izpodbijani pravnomočni sodbi sprejeli sodišči. Sodišče prve stopnje, ki je izvedlo podroben in obširen dokazni postopek, je v obrazložitvi sodbe povzelo vsebino obsojenčevega zagovora, ki fizičnega kaznovanja otrok ni zanikal, in se opredelilo do vseh dejstev in okoliščin, ki so odločilne za presojo obsojenčevega ravnanja. Iz razlogov sodbe sodišča prve stopnje je razvidno, da je sodišče po izvedenem dokaznem postopku, ob kritični presoji zagovora, izpovedb priče B. Ž. (iz svetovalnega centra za mladostnike in otroke), šolske logopedinje M. Z., šolske psihologinje E. G., učiteljic T. T. in B. B., zdravnic M. O. in S. J., izvedenskega mnenja izvedenke Z. B. ter listinske dokumentacije zaključilo, da so v ravnanju obsojenca, ki je oba svoja otroka pogosto pretepal s pasom, vsi znaki očitanih mu kaznivih dejanj, saj takšno pretepanje otrok presega običajne vzgojne metode pri otrocih (sodba sodišča prve stopnje, stran 3 – 10). Tem razlogom je ob zavrnitvi pritožbe obsojenčeve zagovornice pritrdilo tudi sodišče druge stopnje (sodba sodišča druge stopnje, stran 3 – 6), ko je presodilo, da je sodišče prve stopnje izvedlo vse potrebne dokaze, pravilno ugotovilo dejansko stanje in s potrebno gotovostjo zaključilo, da sta obsojencu obravnavani kaznivi dejanji v celoti dokazani.

16. Neutemeljeno zagovornica v zahtevi za varstvo zakonitosti z obširnimi navedbami, da sodišče druge stopnje ni odgovorilo na pritožbene navedbe obrambe glede nasprotij med mnenjem izvedenke B. in pričevanjem klinične psihologinje Ž., nakazuje bistveno kršitev določb kazenskega postopka iz prvega odstavka 395. člena ZKP, ki nalaga sodišču druge stopnje, da v obrazložitvi svoje odločbe presodi navedbe prič. Istočasno pa zagovornica v zahtevi za varstvo zakonitosti navaja, da je glede nasprotij med mnenjem izvedenke B. in izpovedbo klinične psihologinje „pritožbeno sodišče odgovorilo, da ni našlo razhajanj med njima“ ter da „obe sodišči sprejemata mnenje izvedenke B. in ne najdeta bistvenih nasprotij med njenim in izpovedbo B. Ž.“. Že iz teh navedb v zahtevi je očitno, da zagovornica s temi navedbami izpodbija dokazno oceno sodišča v izpodbijani pravnomočni sodbi in ne uveljavlja kršitve določb kazenskega postopka po prvem odstavku 395. člena ZKP, ki se presoja v okviru 3. točke prvega odstavka 420. člena ZKP, za katero pa vložnica v zahtevi niti ne zatrjuje, da je vplivala na zakonitost sodbe.

17. Zatrjevane kršitve po prvem odstavku 420. člena ZKP niso podane, poleg tega pa je zahteva za varstvo zakonitosti vložena tudi iz razloga zmotne ugotovitve dejanskega stanja, kar ni dovoljeno. Zato je Vrhovno sodišče zahtevo obsojenčeve zagovornice za varstvo zakonitosti zavrnilo kot neutemeljeno (425. člen ZKP).

18. Izrek o stroških, nastalih v postopku s tem izrednim pravnim sredstvom, temelji na določilu 98. a člena v zvezi s prvim odstavkom 95. člena ZKP. Ker zagovornica z zahtevo za varstvo zakonitosti ni uspela, je obsojenec dolžan plačati sodno takso kot strošek postopka, nastal s tem izrednim pravnim sredstvom. Sodno takso bo s posebnim plačilnim nalogom odmerilo sodišče prve stopnje.

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