

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 17 July 2002 No. 13-Π

in the case concerning the review of the constitutionality of certain provisions of Articles 342, 371, 373, 378, 379, 380 and 382 of the Criminal Procedure Code of the RSFSR, Article 41 of the Criminal Code of the RSFSR and Article 36 of the Federal Law “On the Prosecutor’s Office of the Russian Federation” in connection with a request of the Podolsk Town Court of the Moscow Region and in connection with constitutional complaints of a number of citizens.

Moscow, 17 July 2002

The Constitutional Court of the Russian Federation composed of Presiding Judge V. D. Zorkin and Judges M. V. Baglay, Yu. M. Danilov, G. A. Zhilin, S. M. Kazantsev, V. O. Luchin, N. V. Seleznev, O. S. Khokhryakova,

in the attendance of A. Yu. Zhevchenko and S. I. Zaruba; attorneys B. B. Gruzda and L. R. Saikin, representatives of A. K. Nikitin; S. A. Kudashev, judge of the Podolsk Town Court of the Moscow Region; Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation V. V. Lazarev; and Representative of the Council of the Federation Yu. A. Sharandin, President of the Council of the Federation Committee on Constitutional Legislation,

pursuant to Article 125, Section 4 of the Constitution of Russian Federation, Subsection 3, Section 1, Sections 3 and 4 of Article 3, Subsection 3, Section 2 of Article 22, Articles 36, 74, 86, 96, 97, 99, 101, 102 and 104 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of certain provisions of Articles 342, 371, 373, 378, 379, 380 and 382 of the Criminal Procedure Code of the RSFSR, Article 41 of the Criminal Code of the RSFSR and Subsections 1 and 2, Article 36 of the Federal Law “On the Prosecutor’s Office of the Russian Federation”.

The reason for the consideration of the case is a request of the Podolsk Town Court of the Moscow Region and complaints of A. Yu. Zhevchenko, S. I. Zaruba, A. V. Myagkov, A. K. Nikitin, and V. A. Sardo. The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by the applicants are in conformity with the Constitution of the Russian Federation.

Insofar as all the complaints and the request concern essentially the same subject matter and pursuant to Article 48 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the Constitutional Court of the Russian Federation is permitted to consider these applications together.

Having heard the report of Judge-Rapporteur G. A. Zhilin, statements by the parties and their representatives, intervention of P. V. Shishov for the Office of the Prosecutor General of the Russian Federation, invited to participate in the hearing, and having considered the documents and other materials submitted, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. The judgment of acquittal in the case of the applicant A. K. Nikitin entered into force, but was appealed in supervisory instance by the prosecutor, who requested to annul the judgment and to remit the case for further investigation due to incompleteness of the preliminary investigation. The supervisory review court rejected the request, having found that there are no such grounds for annulment of the judgment as prejudice or incompleteness of the preliminary investigation or judicial proceedings in the present case. In his complaint submitted to the Constitutional Court of the Russian Federation A. K. Nikitin asserts that the provisions of Article 379 in conjunction with Subsections 1 and 2 of Article 342 and Section 1 and Subsection 5 (as amended – Subsection 1), Section 2 of Article 371 of the Criminal Procedure Code of the RSFSR, Subsections 1 and 2, Article 36 of the Federal Law “On the Prosecutor’s Office of the Russian Federation” do not conform to Articles 1, 2 (Section 1), 15 (Section 4), 17 (Section 1) 18, 19, 45 (Section 1), 50 (Section 1) and 120 (Section 1) of the Constitution of the Russian Federation to the extent that they allow a court to annul a judgment of acquittal that entered into force upon a prosecutor’s request on grounds related to prejudice and incompleteness of the preliminary investigation or judicial proceedings or on the basis of inconsistency between the facts of the case and the conclusions reached by the court in the judgment.

The applicant V. A. Sardo was acquitted of one of the crimes he was charged with by the preliminary investigation authorities. The supervisory review court referring to grave violation of the criminal procedure law annulled the judgment in that part upon the prosecutor’s request. As follows from the court decision, the violation consisted in incompleteness of judicial proceedings and inconsistency between the facts of the case and the conclusions reached by the court which adopted the judgment. The supervisory review court also indicated that in the course of a new examination the court should take all measures to conduct more complete, comprehensive and objective examination of the case file and to decide on V. A. Sardo’s guilt or innocence on the

basis of the evidence obtained. In his application submitted to the Constitutional Court of the Russian Federation, the applicant asserts that the provisions of Article 371 and 378 of the Criminal Procedure Code of the RSFSR do not conform to Articles 17, 45, 46 and 50 of the Constitution of the Russian Federation to the extent that they allow the supervisory review court to annul a judgment of acquittal that entered into force upon a prosecutor's request and to remand the case for a new trial.

The supervisory review court granted the prosecutor's request and annulled the judgment of acquittal which entered into force in respect of the applicant S. I. Zaruba and remitted the case for further investigation. In his complaint submitted to the Constitutional Court of the Russian Federation, S. I. Zaruba asks to recognize the provisions of Subsection 2, Section 1, Article 378, and Section 3, Article 380 of the Criminal Procedure Code of the RSFSR as non-conforming to Articles 2 and 55 (Section 3) of the Constitution of the Russian Federation to the extent that they allow the supervisory review court to annul a judgment of acquittal and remit the case for further investigation.

The judgment of acquittal of the Podolsk City Court of the Moscow Region rendered in 1994 with respect to D. Yu. Luzgin and S. A. Lukyanov was annulled upon the prosecutor's request in supervisory review proceedings due to incompleteness of the evidence obtained by the investigative authorities, and the case was remitted for further investigation. The judgment of acquittal rendered in the new examination of the case in 1999 was, too, annulled upon the prosecutor's request, and the case was remanded to the same first instance court for a new trial. Having concluded that the applied provision of Section 3, Article 380 of the Criminal Procedure Code of the RSFSR does not conform to Article 50 (Section 1) of the Constitution of the Russian Federation, the Podolsk Town Court of the Moscow Region stayed the criminal proceedings and requested the Constitutional Court of the Russian Federation to review the constitutionality of that provision.

Serving his sentence in a settlement-colony, the applicant A. Yu. Zhevchenko committed a new crime and was sentenced to three years of imprisonment. However, the court, acting in violation of Article 41 of the Criminal Code of the RSFSR in force at the material time, did not join the unserved part of the sentence imposed by the previous conviction to the new sentence. In this connection the supervisory review court annulled the conviction and remanded the case to the first instance court for a new trial. The trial court also sentenced A. Yu. Zhevchenko to three years of imprisonment and joined the one year unserved under the previous conviction to the new term. In his complaint submitted to the Constitutional Court of the Russian Federation, A. Yu. Zhevchenko asserts that the provisions of Article 41 of the Criminal Code of the RSFSR (now Article 70 of the Criminal Code of the Russian Federation), Article 373, Section 3 of

Article 380 and Section 2 of Article 382 of the Criminal Procedure Code of the RSFSR as applied in his case violate his rights guaranteed by Articles 19, 46, 50 and 123 of the Constitution of the Russian Federation.

In his constitutional complaint, A. Yu. Zhevchenko also challenges the constitutionality of Section 2, Article 1, and Article 2 of the Criminal Procedure Code of the RSFSR. However, the provisions of these norms provide for general rules of application of the criminal procedure law valid at the time of the criminal proceedings, and the aims and purposes of the criminal proceedings, which are achieved by all of the rules of the Criminal Procedure Code of the RSFSR. Consequently, they cannot be considered as violating the constitutional rights and freedoms of the applicant. Therefore, this part of the complaint is inadmissible within the meaning of Article 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, and the proceedings to this extent shall be discontinued according to Subsection 2, Section 1, Article 43, and Article 68 of the said Law.

Moreover, A. Yu. Zhevchenko challenges the constitutionality of the provision of Section 5, Article 47 of the Criminal Procedure Code of the RSFSR, which provides that close relatives may act as defense counsel under a court decision or a judge’s ruling. In the applicant’s opinion, this provision permitted to preclude participation of his father, Yu. Yu. Zhevchenko as his defense counsel in supervisory review proceedings.

According to the legal opinion of the Constitutional Court of the Russian Federation expressed in the Judgment of 28 January 1997 in the case concerning the review of the constitutionality of Section 4, Article 47 of the Criminal Procedure Code of the RSFSR, the defendant’s right to an attorney (defense counsel) of his choice from the persons listed in Article 47 of the Criminal Procedure Code of the RSFSR does not provide for participation of any person as a defense counsel in the criminal proceedings. The provision of Section 5, Article 47 of the Criminal Procedure Code of the RSFSR, challenged by A. Yu. Zhevchenko is analogous to and united by the normative content with the provision of Section 4 of the same Article. Therefore, the above-stated legal opinion shall apply to the challenged provision pursuant to Section 2, Article 87 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, which serves as a ground for discontinuing the proceedings in this regard (Subsection 3, Section 1, Article 43, and Article 68 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”). In particular, as regards the decision of the supervisory review court, which prevented participation of the applicant’s father, Yu. Yu. Zhevchenko as defense counsel in the criminal proceedings, pursuant to Article 125 of the Constitution of the Russian Federation and Article 3 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” it cannot be reviewed in constitutional

review proceedings. Such review of lawfulness and reasonableness is *ultra vires* to the Constitutional Court of the Russian Federation, and lies within the competence of superior courts of general jurisdiction.

The cassation court altered the judgment in respect of A. V. Myagkov, qualified his actions under the law on less grave offence and imposed a lesser sentence. However, the supervisory review court annulled the cassation decision and remanded the case to the cassation court for a new examination. In the new proceedings the judgment was annulled and the case was remanded to the first instance court for a new trial. In his complaint submitted to the Constitutional Court of the Russian Federation, A. V. Myagkov asks to review the constitutionality of Article 373 and Section 3, Article 380 of the Criminal Procedure Code of the RSFSR which allow the supervisory review court to revise a judgment which entered into force due to the need to apply the law on more grave offence. Meanwhile, in the present case the cassation decision was annulled and the case was remanded to the cassation court for a new examination on the basis of the court's failure to comply with the requirements of Article 351 of the Criminal Procedure Code of the RSFSR. Under the mentioned Article while annulling or altering the judgment of a trial court the cassation court shall indicate in its decision the Articles violated and the nature of the violation, or why the judgment is unreasonable. Consequently, the provisions challenged by A. V. Myagkov were not applied in his case, therefore, his complaint is inadmissible within the meaning of Article 97 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" and the proceedings in this regard shall be discontinued.

Consequently, the subject-matters of the present proceedings are:

- the normatively united provisions of Subsections 1 and 2, Article 342, Section 1 and Subsection 1, Section 2 of Article 371, Subsection 2, Section 1 of Article 378, Section 1 of Article 379, Section 3 of Article 380 of the Criminal Procedure Code of the RSFSR, and Subsections 1 and 2 of Article 36 of the Federal Law "On the Prosecutor's Office of the Russian Federation" to the extent that they allow a court upon a prosecutor's request to review and annul a judgment of acquittal that entered into force, on grounds related to prejudice and incompleteness of preliminary investigation or judicial proceedings, as well as on the basis of inconsistency between the facts of the case and the conclusions reached by the court in the judgment;

- the normatively united provisions of Article 41 of the Criminal Code of the RSFSR, Article 373, Section 3 of Article 380, and Section 2 of Article 382 of the Criminal Procedure Code of the RSFSR, to the extent that they empower the supervisory review court to annul the conviction within one year after it entered into force, on the ground that the new sentence did not

include the unserved term imposed by the previous conviction, and to remand the case to the first instance court for a new trial in order to remedy the violation.

2. According to the Constitution of the Russian Federation, in the Russian Federation as a rule of law State, an individual, his rights and freedoms are the supreme value, and the recognition, observance and protection of the rights and freedoms of man and citizen shall be a duty of the State; in the Russian Federation, the rights and freedoms of man and citizen are recognized and guaranteed in accordance with generally recognized principles and norms of international law and in accordance with the Constitution; they determine the meaning, contents, and enforcement of laws and are ensured by administration of justice (Articles 1, 2, 17 and 18).

Administration of justice in its very essence may be recognized as such only on condition that it conforms to the requirements of fairness and ensures effective remedy of rights. According to the Constitution of the Russian Federation (Articles 2, 15, 17, 18, 45 and 46), the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6, and Article 3 of Protocol No. 7) and the International Covenant on Civil and Political Rights (Article 14 § 6), a judicial decision shall be reviewed if a new or newly discovered circumstance evidently shows that there has been a judicial mistake.

The Constitution of the Russian Federation, guaranteeing judicial protection of rights and freedoms of man and citizen, provides that everyone shall be guaranteed a right to appeal decisions and actions (inactions) of the bodies of state power, local self-government, public associations and officials in court; and everyone convicted of a crime shall have the right to review of the judgment by a superior court according to the rules prescribed by federal law (Sections 1 and 2, Article 46, Section 3, Article 50). Relying on these principles and in order to establish a mechanism of effective remedy for violated rights, the federal legislator, on the basis of Articles 71 (c) and (o) and 76 (Section 1) of the Constitution of the Russian Federation, determined procedures by which unjust decisions shall be reviewed, in the Criminal Procedure Code of the RSFSR. These procedures include cassation proceedings (when a court reviews a case upon a cassation appeal or request against court judgments, decisions and rulings which have not yet entered into force), and, as a further guarantee of lawfulness and reasonableness of judicial decisions, supervisory review proceedings (when a court reviews court judgments, decisions and rulings which have entered into force (Chapter 30, Articles 371–383)), as well as reopening of a case on newly discovered circumstances (Chapter 31, Articles 384–390).

2.1. In the legal system of the Russian Federation, the institution of supervisory review is based on Article 126 of the Constitution of the Russian Federation, according to which the Supreme Court of the Russian Federation, as the supreme judicial body in criminal cases within the jurisdiction of the courts of general jurisdiction, shall carry out judicial supervision over their

activities according to the procedural forms prescribed by federal law. Supervisory review proceedings are further based on the provisions on supervisory review powers in criminal cases of the Supreme Courts of the Russian Federation and other federal courts of general jurisdiction found in the Federal Constitutional Laws “On the Judicial System of the Russian Federation” and “On Military Courts of the Russian Federation” adopted to specify Articles 126 and 128 of the Constitution of the Russian Federation.

Supervisory review proceedings in criminal cases, within the meaning of Articles 17 (Section 3), 46, 49, 50 (Section 3), 52, 55 (Section 3), 118 and 126 of the Constitution of the Russian Federation, are aimed at rectifying judicial mistakes through review of judgments, decisions and rulings which entered into force, in order to ensure effective protection of constitutional values, first of all, the rights and freedoms of man and citizen, following the principles of fairness, proportionality, and legal security.

2.2. The constitutional nature of the institution of review of judgments, decisions and rulings which entered into force, was previously established by the Constitutional Court of the Russian Federation, in particular in the Judgment of 2 February 1996 in proceedings on the constitutional review of the provisions of Articles 371, 374 and 384 of the Criminal Procedure Code of the RSFSR, Judgment of 6 July 1998 in proceedings on the constitutional review of Section 5, Article 325 of the Criminal Procedure Code of the RSFSR, Judgment of 14 February 2000 in proceedings on the constitutional review of the provisions of Sections 3, 4 and 5, Article 377 of the Criminal Procedure Code of the RSFSR. In this regard the Constitutional Court of the Russian Federation has reached the following conclusions.

In its essence and purpose, a review of judicial decisions that have entered into force (final decisions), and new examination of a case are additional means to ensure just nature of judgments. These reserve means are employed when all other procedural remedies are inapplicable or have been exhausted.

Having provided for consideration of cases on trial and cassation as mandatory stages of judicial proceedings, the legislator also provided for an additional guarantee of everyone’s constitutional right to judicial protection – supervisory review proceedings. The legislator imposed, on the appropriate judicial and prosecution officials, an obligation to file a supervisory review request against adopted judicial decisions if there are grounds for review. The refusal to file a supervisory review request (as well as filing a request) against adopted judicial decisions in itself cannot be considered as violation of the constitutional right to judicial protection since no new decision determining the parties’ rights and obligations is adopted when the decision to file a supervisory review request is made.

Providing a possibility, in criminal procedure legislation, to institute supervisory review proceedings only upon a request of the appropriate state officials (including a prosecutor) in itself does not result in denial of the right to judicial protection for citizens whose rights have been violated by a judicial mistake, since along with supervisory review proceedings the Criminal Procedure Code of the RSFSR provides for an additional remedy – reopening of the case on newly discovered circumstances which were not or could not be discovered earlier, in order to rectify judicial mistakes made in the previous proceedings (Articles 384–390).

The Constitution of the Russian Federation guaranteeing the right to judicial protection does not preclude but, on the contrary, provides for a possibility to rectify a judicial mistake after a case has been decided by a judicial instance which within a specific area of legislation makes final decisions, i.e. when a decision cannot be altered by regular procedures. Such conclusion follows from Article 46 (Section 3) of the Constitution of the Russian Federation which provides that everyone in accordance with international treaties of the Russian Federation shall have the right to address international bodies for protection of human rights and freedoms if all available domestic remedies have been exhausted. This constitutional provision meaning that a decision of international bodies may result in a review of certain cases by the highest courts of the Russian Federation, allows the legislator to determine the latter's powers to reconsider a case in order to alter the previously adopted decision. Consequently, the legislator is empowered to prescribe the same powers for cases where a necessity to alter a judicial decision may be discovered without the involvement of international bodies.

The abovementioned judgments of the Constitutional Court of the Russian Federation and the legal opinions expressed in them remain in force and according to Articles 6 and 79 the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” are generally binding.

3. The provisions of interconnected Subsections 1 and 2 of Article 342, Section 1 and Subsection 1, Section 2 of Article 371, Subsection 2, Section 1 of Article 378, Section 1 of Article 379, Section 3 of Article 380 of the Criminal Procedure Code of the RSFSR, and Subsections 1 and 2, Article 36 of the Federal Law “On the Prosecutor’s Office of the Russian Federation”, which constitute a single normative complex, provide for review and annulment of a judgment of acquittal which has entered into force, upon the prosecutor’s request in supervisory proceedings on the grounds of prejudice or incompleteness of preliminary investigation or judicial proceedings, and on the basis of inconsistency between the facts of the case and the conclusions reached by the court in the judgment.

According to Article 343 of the Criminal Procedure Code of the RSFSR, inquiry, preliminary investigation or judicial proceedings shall be considered prejudicial and incomplete

if the circumstances which could have been significant for adopting a decision, remained uncovered. Inquiry, preliminary investigation and judicial proceedings shall in any event be considered as prejudicial and incomplete if: 1) the persons whose testimony is significant for the case have not been questioned, or expert examination has not been carried out when it is mandatory under the law, or documents or material evidence significant for the case have not been recovered; 2) the circumstances which were referred to in the judicial decision or ruling by which further investigation or new court examination has been ordered, have not been examined; 3) the personal circumstances and identity of the accused person have not been established to a sufficient degree. According to Article 344 of the Criminal Procedure Code of the RSFSR, a judgment shall be considered inconsistent with the factual circumstances of the case if: 1) the conclusions reached by the court are not confirmed by the evidence examined in the hearing, 2) the court failed to take into consideration the circumstances which could have significantly affected the conclusions reached by the court, 3) in case of contradictory evidence significant for the conclusions reached in the judgment the court failed to indicate on which grounds it accepted certain evidence and refuted other, 4) the conclusions reached by the court and stated in the judgment contain significant contradictions which have affected or could have affected the decision on guilt or innocence of the convicted or acquitted person and the correctness of applying the criminal law or imposing a punishment.

As follows from Article 379 taken in conjunction with Articles 342–345, the Criminal Procedure Code of the RSFSR provides for the same grounds for annulment or alteration of a judgment both in supervisory review and cassation proceedings. Thus, the Criminal Procedure Code of the RSFSR does not take into account the fundamental difference between the review of a judicial decision that has entered into force (final decision) and which is being or has been executed (such review is carried out in exceptional cases, especially in respect of a judgment of acquittal), and the cassation review of a judicial decision which has not yet entered into force. Ultimately, this has led to distortions of the constitutional nature of supervisory review proceedings and criteria of admissibility for review and annulment of final judgments predetermined by it.

3.1. According to the universally recognized legal principle *non bis in idem*, the Constitution of the Russian Federation provides that no one may be convicted twice for the same crime (Section 1, Article 50); the International Covenant on Civil and Political Rights provides that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country (Article 14 § 7); and the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that no one shall be tried or punished again in criminal

proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State (Article 4 § 1 Protocol No. 7 as amended by Protocol No. 11).

This prohibition essentially specifies the general legal principle of fairness and aims at ensuring legal security and legal stability. This idea is reflected in the criminal legislation of the Russian Federation. According to Article 6 of the Criminal Code of the Russian Federation, the principle of fairness in criminal law means that no one shall be punished twice for the same crime and that punishment and other legal measures of criminal law imposed on a person who has committed a crime shall be fair, i.e. correspond to the nature and degree of danger of the crime, circumstances of the crime and the personality of the offender. These provisions correspond to the rules of Article 55 (Section 3) of the Constitution of the Russian Federation which provides that the rights and freedoms of man and citizen may be restricted by federal law only to the extent necessary for the protection of the fundamentals of the constitutional order, morals, health, the rights and lawful interests of others, and for ensuring the defense of the country and the security of the State.

Pursuant to the above-stated provisions of the Constitution of the Russian Federation and international instruments, it is prohibited to arbitrarily alter the legal regime for the participants in the criminal procedure relations, including the person in respect of whom a final judgment has been rendered. As a general rule this means that within the review of a final judgment *reformatio in pejus* in respect of a convicted or acquitted person is prohibited. The legal opinion of the Constitutional Court of the Russian Federation expressed in the decisions of 3 July 1997 upon a request of Judge N. V. Grigoryeva of the Moscow Regional Court and the decision of 8 February 2001 upon a complaint of A. P. Petrov about violation of his constitutional rights by Articles 371 and 380 of the Criminal Procedure Code of the RSFSR and Article 36 of the Federal Law “On the Prosecutor’s Office of the Russian Federation” is based on the same ground.

At the same time, Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), provides that the right not to be tried or punished twice does not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned if there is evidence of new or newly discovered facts or if there was been a fundamental defect in the previous proceedings (“*un vice fondamental*” in French) which could affect the outcome of the case.

It follows from the mentioned provision of the Convention and the corresponding provisions of Article 55 (Section 3) of the Constitution of the Russian Federation that the national legislation may provide, subject to the requirements and conditions of the abovementioned provisions, for procedural mechanisms and procedures of reopening and

annulment of final judgments, and, giving due regard to their specificity, determine on which occasions a case may be reopened under new or newly discovered circumstances or review on supervision.

At the same time any exceptions from the general prohibition to resume proceedings to the detriment of the acquitted or convicted person may only be permissible only as a measure of last resort when a failure to rectify a judicial mistake would distort the very essence of justice, the meaning of the judgment as an act of administration of justice, and destroy the necessary balance of constitutionally protected values, *inter alia* the rights and lawful interests of convicted persons and the victims of the crime. The absence of any possibility to reverse a final judgment resulting from proceedings tainted by a fundamental defect crucial for the outcome of the case would mean that, in spite of the general principle of fairness and constitutional guarantees of protection of human dignity and the principle of judicial protection of fundamental rights and freedoms (Section 1, Article 17; Article 19, 21 and 46 of the Constitution of the Russian Federation), such erroneous judgment cannot be rectified.

3.2. Following the requirements of Articles 15 (Section 4), 17 (Sections 1 and 3), 46, 50 (Section 1) and 55 (Section 3) of the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms, the federal legislator establishing the possibility to annul a final judgment and to review a criminal case should formulate clear and precise grounds and criteria for such annulment. It should give due regard to the fact that the judgment concerned has already become binding and determinative of the individual's guilt and degree of punishment.

However, the grounds for review of final judgments provided for in the Criminal Procedure Code of the RSFSR go beyond these limits. At the time of establishing a procedure for review of final judgments, particularly judgments of acquittal, the federal legislator guided by the requirements of the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms was under an obligation to formulate definitive grounds for its application with sufficient determinacy, clarity and precision in order to preclude arbitrary application of this procedure by courts. Having failed to do so, the legislator distorted the criteria of permissible annulment of final judgments in criminal cases, while these criteria are present in Articles 15 (Section 4), 46, 50 (Section 1) and 55 (Section 3) of the Constitution of the Russian Federation and Article 4 of Protocol No. 7 to the Convention.

As a result the principles of adversarial proceedings and equality of parties (Section 3, Article 123 of the Constitution of the Russian Federation) are violated since these principles presume that institution of criminal prosecution, filing and maintaining charges before a court are performed by the authorities and officials listed in the law, and the person brought to criminal

liability shall be entitled to exhaust all domestic remedies to defend himself against the charges brought. Moreover, the presumption of innocence guaranteed by Article 49 of the Constitution of the Russian Federation is distorted because everyone accused of committing a crime shall be considered innocent until his guilt is proven according to the rules prescribed by federal law and established by a court sentence that has come into legal force. The accused person shall not be obliged to prove his innocence; irremediable doubts on the person's guilt shall be interpreted in his favor.

Relying on the above principles, in its Judgment of 20 April 1999 in the case concerning the review of the constitutionality of Subsections 1 and 3, Section 1 of Article 232, Section 4 of Article 248 and Section 1 of Article 258 of the Criminal Procedure Code of the RSFSR, the Constitutional Court of the Russian Federation expressed a legal opinion that if criminal prosecution authorities failed to prove the defendant's guilt of the whole charge, the defendant shall be acquitted or found guilty of a less grave crime according to valid criminal procedure norms in their constitutional interpretation.

The supervisory review court power to remit a case for further investigation when it concludes through its own assessment of evidence that the previous investigation was prejudicial or incomplete (Subsection 2, Section 1, Article 378 of the Criminal Procedure Code of the RSFSR), is incompatible with the constitutional principles of criminal procedure and does not conform to the legal opinion of the Constitutional Court of the Russian Federation since it gives the prosecution an unlawful advantage by enhancing its chances to prove guilt even after the respective judgment has entered into force. Consequently, a court of supervisory instance cannot annul a final judgment of acquittal only on the ground of being unfounded, if the previous proceedings did not give rise to a violation, which meets the criteria of Article 4 § 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Hence, the prosecutor is not entitled to request a supervisory review of such judgment on the ground of being unfounded if it does not fall under this criterion.

Thus, the normatively united provisions of Subsections 1 and 2 of Article 342, Section 1 and Subsection 1, Section 2 of Article 371, Subsection 2, Section 1 of Article 378, Section 1 of Article 379 and Section 3 of Article 380 of the Criminal Procedure Code of the RSFSR, and Subsections 1 and 2 of Article 36 of the Federal Law "On the Prosecutor's Office of the Russian Federation", do not conform to the Constitution of the Russian Federation and its Articles 15 (Section 4), 46, 49, 50 (Section 1), 55 (Section 3) and 123 (Section 3) to the extent that they allow, upon the prosecutor's request, to review and annul the judgment of acquittal which has entered into force, due to prejudice and incompleteness of preliminary investigation or judicial proceedings, or inconsistency between the facts of the case and the conclusions reached by the

court, if the previous proceeding did not give rise to a violation which meets the criteria of Article 4 § 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

4. According to Article 41 of the Criminal Code of the RSFSR, if a convicted person has committed a new crime after his conviction and before serving his sentence in full, a court shall include, fully or partially, the unserved term of the previous conviction in the new sentence. The analogous rule is to be found in Article 70 of the Criminal Code of the RSFSR, which is in force at the present time. In normative content unity with Article 373, Section 3 of Article 380 and Section 2 of Article 382 of the Criminal Procedure Code of the RSFSR, this rule serves as a ground for empowering the supervisory review court to annul the conviction within one year after it entered into force, on the ground that the new sentence did not include the unserved term imposed by the previous conviction, and remand the case to the first instance court for a new trial in order to remedy the violation.

A court is obliged to apply this imperative norm each time a new judgment in respect of the mentioned category of convicts is rendered. That is why a court may not fail to include the unserved term of the previous conviction in the new sentence. A court's discretion is manifested only in deciding on whether the unserved term of the previous conviction should be included in full or in part (and in what part).

A judgment which has entered into force, since it has not been reviewed in a procedure prescribed by law, is an act of a judicial authority and thus is compulsory for everyone including the court which examines new charges brought against the person serving the sentence imposed by this judgment. Therefore, if, in violation of the mentioned criminal procedure imperative, a court does not include the unserved term for the previously committed crime in the new sentence such grave judicial mistake shall be unconditionally rectified, even after the judgment has entered into force. Any other interpretation would mean that the judgment rendered in the previous criminal case is (in essence) unlawfully annulled. Within the meaning of Articles 1 (Section 1), 17 (Sections 1 and 2), 19 (Sections 1 and 2), 55 (Section 3) and 118 (Sections 1 and 2) of the Constitution of the Russian Federation taken in conjunction with Article 4 § 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, such outcome is incompatible with the principles of criminal law, contradicts the very idea of justice and therefore is impermissible in a rule of law State.

At the same time, the review and annulment of a final judgment in supervisory proceedings, if it involves aggravation of the convicted person's situation (even when the judgment is annulled because the court failed to include the unserved term as imposed by the previous judgment), by virtue of the principles of legal stability and legal security provided for in

Articles 19 (Section 2) and 55 (Section 3) of the Constitution of the Russian Federation, must be conditioned by a sufficiently short term. The provisions of Article 373 of the Criminal Procedure Code of the RSFSR providing for a possibility to review a conviction in supervisory proceedings, within one year from its entering into force, on the grounds which might aggravate the convicted person's situation is aimed to preclude a long-term risk of a judgment review. As such it does not upset the balance of constitutionally protected values (Section 3, Article 17; Section 1, Article 50; Section 3, Article 55 of the Constitution of the Russian Federation).

Consequently, the normatively united provisions of Article 41 of the Criminal Code of the RSFSR, Article 373, Section 3 of Article 380 and Section 2 of Article 382 of the Criminal Procedure Code of the RSFSR, to the extent that they empower a supervisory review court to annul the conviction within one year after it entered into force, on the ground that the new sentence did not include the unserved term imposed by the previous conviction, and to remand the case to the first instance court for a new trial in order to remedy the violation, as these provisions are aimed to remedy an evident fundamental mistake related to sentencing, comply with the admissibility criteria for the annulment of final judgments provided for in the Constitution of the Russian Federation and the Convention for the Protection of Human Rights and Fundamental Freedoms.

Concluding from the above and pursuant to Sections 1 and 2 of Article 71, Articles 72, 74, 75, 79, 100 and 104 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the normatively united provisions of Subsections 1 and 2 of Article 342, Section 1 and Subsection 1, Section 2 of Article 371, Subsection 2, Section 1 of Article 378, Section 1 of Article 379 and Section 3 of Article 380 of the Criminal Procedure Code of the RSFSR, and Subsections 1 and 2 of Article 36 of the Federal Law "On the Prosecutor's Office of the Russian Federation", as non-conforming to the Constitution of the Russian Federation and its Articles 15 (Section 4), 46, 49, 50 (Section 1), 55 (Section 3) and 123 (Section 3) to the extent that they allow, upon the prosecutor's request, to review and annul a judgment of acquittal that entered into force, due to prejudice and incompleteness of preliminary investigation or judicial proceedings and on the basis of inconsistency between the facts of the case and the conclusions reached by the court in the judgment if the previous proceeding did not involve violations which meet the requirements stipulated in Article 4 § 2 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

2. To recognize the normatively united provisions of Article 41 of the Criminal Code of the RSFSR, Article 373, Section 3 of Article 380 and Section 2 of Article 382 of the Criminal Procedure Code of the RSFSR as conforming to the Constitution of the Russian Federation to the extent that they empower the supervisory review court to annul the conviction within one year after it entered into force, on the ground that the new sentence did not include the unserved term imposed by the previous conviction and to remand the case to the first instance court for a new trial in order to remedy the violation.

3. To recognize the complaint of A. Yu. Zhevchenko to the extent that it concerns a review of the constitutionality of Section 2 of Article 1, Article 2 and Section 5 of Article 47 of the Criminal Procedure Code of the RSFSR, and the complaint of the applicant A. V. Myagkov as inadmissible within the meaning of Article 97 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” and in this connection to discontinue the proceedings to this extent pursuant to Article 68 of the Law.

4. The judicial decisions of the supervisory review courts rendered in the criminal cases against S. I. Zaruba, A. K. Nikitin, V. A. Sardo, D. Yu. Luzgin and S. A. Lukyanov, in connection with which the Podolsk City Court of the Moscow Region lodged a request with the Constitutional Court of the Russian Federation, and based on the provisions of the Criminal Procedure Code of the RSFSR which, according to Subsection 1 of the holding of the present Judgment, are recognized as unconstitutional, are to be reconsidered by courts according to the established procedure.

5. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon its pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

6. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published immediately in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court
of the Russian Federation