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**The problems of application of the note to the article 134 of the Criminal Code of the Russian Federation: theory and practice**

*The article is devoted to the detailed analysis of the notes to the article 134 of the Criminal Code of the Russian Federation. The author carried out both the theoretical analysis of a criminal and legal definition, and the analysis of a court practice. Examples from the judicial and investigative practice with the author’s comments are given. According to the author, literal interpretation of the note 1 to the article 134 of the Criminal Code of the Russian Federation allows draw a categorical conclusion that concerning the persons who committed crimes according to p.1 of the article 134 of the Criminal Code of the Russian Federation it is impossible to stop criminal cases in connection with a release from criminal liability. The courts are obliged to exempt such persons from punishment and only in cases if the perpetrators complied the conditions stated by the legislator in the note 1 of the article 134 of the Criminal Code of the Russian Federation.*

**Проблемы применения примечания к ст. 134 УК РФ: теория и практика**

*Статья посвящена детальному анализу примечаний к ст. 134 УК РФ. Автором проведен как теоретический анализ уголовно-правовой дефиниции, так и анализ судебной практики. Приведены примеры из судебно-следственной практики с комментариями автора. По мнению автора, буквальное толкование примечания 1 к ст. 134 УК РФ позволяет сделать категоричный вывод о том, что в отношении лиц, совершивших преступления по ч. 1 ст. 134 УК РФ, нельзя прекращать уголовные дела в связи с освобождением от уголовной ответственности. Суды обязаны освободить таких лиц от наказания и только в случаях, если виновными лицами соблюдены условия, изложенные законодателем в примечании 1 к ст. 134 УК РФ.*

***Keywords:*** *criminal liability, release from punishment, court practice, conciliation with the victim, active repentance, interpretation of the criminal precept of law, legislator's definition, legal nature.*

***Ключевые слова:*** *уголовная ответственность, освобождение от наказания, судебная практика, примирение с потерпевшим, деятельное раскаяние, толкование уголовно-правовой нормы, дефиниция законодателя, юридическая природа.*

The legislator established criminal liability for making of sexual connection, a sodomy, lesbianism, the other actions of sexual nature or the dissolute actions with the person who didn't reach 16-year age made without a use of violence or threat of its application and without a use of helpless condition of the victim by the person who reached the eighteen-year age.

E.Yu. Moshchitskaya writes that "… at minors and juveniles as a result of accustoming to the systematic making with them of the crimes provided by the articles 134 and 135 of the Criminal Code (furhter – CC) negative moral mental sets, views on the nature and essence of sexual relations often are developed. These relations are represented to them in cynical light that leads further to permissiveness, dissoluteness in the sexual sphere, to occupation prostitution. Quite often sexual abuse of minors by sexual criminals determines making by the teenagers of sexual crimes" [1, p. 562].

The analysis of judicial and investigative practice shows that by the law enforcement official not always the sense of the notes to CC of the Russian Federation unambiguously is understood and, therefore, there is no uniform interpretation of the considered definition of the legislator and, respectively, the law enforcement.

The article134 of CC contains two notes:

1. The person who for the first time committed the crime provided by p.1 of the first this article is exempted by the court from punishment if it is established that this person and the crime committed by him stopped being socially dangerous in connection with marriage with the victim.

The following conditions are necessary for the release from punishment:

a) making by the perpetrator of sexual connection (p.1 of the article 134 of CC) with the person who didn't reach the 16-year age. When making the crimes provided by the other parts of the article 134 of CC, the perpetrator doesn't fall under the action of the considered note;

b) making by the crime perpetrator (p.1 of the article 134 of CC) for the first time.

Here it is about a so-called legal criminal record, but not actual. The person wasn't brought to a trial under the considered article earlier and, therefore, has no criminal record or the perpetrator was an offender (judged) earlier, but at the time of consideration of criminal case by the court the criminal record in the order established by the law is removed or extinguished;

c) the perpetrator married the victim.

Analyzing the problems of application of the considered note to the article 134 of CC of the Russian Federation, V.V. Romanova writes: "… In this case discrepancy of the note to the article 134 of the CC of the Russian Federation is obvious to regulations of the family legislation. So, according to provisions of the articles 12, 13 of the Family code of the Russian Federation a mutual voluntary consent of the man and woman, marrying, and achievement of the marryage by them are necessary for marriage. The age of consent is established from 18 years. Local government bodies have the right to permit to marry at the corresponding request to the persons which reached the age of 16 years. The order and conditions in the presence of which marriage by the way of exception taking into account special circumstances can be authorized before achievement of the age of 16 years are established by the laws of the subjects of the Russian Federation. The body or the official which can grant permission for marriage of this age category of persons aren't determined also. Besides, the form of so-called de facto marriage is widespread now. It is obvious that this circumstance shall be considered in a case of decision making about initiation of legal proceedings, and also be accepted in attention during the pretrial investigation and consideration of criminal case by the court" [2, p. 28 – 29].

In our opinion, there are no special problems in application of the note to the article 134 of CC of the Russian Federation, but, at the same time, considering publications of this sort, nevertheless some explanations are necessary:

* first, the fact that in different territorial subjects of the Russian Federation different persons, bodies make decisions on "decrease" in the marryage for application of the note of doesn't play a role;

- secondly, the so-called de facto marriages aren't considered and shan't be considered by the courts in case of decision making about a release from punishment. Only the legal marriage specified in the Family code of the Russian Federation is considered.

Besides, in determination of the Constitutional court of the Russian Federation of 21.10.2008 No. 568-O-O is said that "… provisions of the article 13 of the Family code of the Russian Federation in interrelation with provisions of the article 134 of CC of the Russian Federation exclude illegality of sexual connection of the person who reached the eighteen-year age with the person who didn't reach the sixteen-year age only after registration of their marriage and consequently, and official recognition of their family relations, and don't give the grounds for any other interpretation and, therefore, any application of this regulation of CC of the Russian Federation. The other would contradict the articles 23 (p.1) and 38 (p.1) of the Constitution of the Russian Federation, protecting the family relations, personal privacy and family secret, to the tasks of CC of the Russian Federation, a concept of crime and the basis of criminal liability" [3].

Further V.V. Romanova writes: "… Thus, there is a set of questions of a possibility of application of provisions of the note to the article 134 of CC of the Russian Federation, including at a stage of pretrial investigation. For the problem resolution of application of provisions of the article 134 of CC of the Russian Federation it is offered to consider that the crime provided by p.1 of the article 134 of CC of the Russian Federation belongs to the category of crimes of average weight. Thus, it can be stopped in connection with conciliation of the sides. If the sides (the suspect, the defendant and the victim) got married, so they conciliated, and criminal case can be dismissed, according to the article 25 of the Code of Criminal Procedure of the Russian Federation. The termination of criminal case is possible also based on the article 75 of the Criminal Code of the Russian Federation in connection with the active repentance. Besides, the fact of marriage can be regarded as a special case of change of a situation" [2, p. 29].

In our opinion, V.V. Romanova proposes the controversial solution.

On the one hand, we agree, considering that p.1 of the article 134 of CC of the Russian Federation on nature and degree of public danger belongs to the category of crimes of average weight therefore the staff of investigating bodies has theoretically the right (we pay attention that this right, but not an obligation) to dismiss criminal case at a stage of preliminary inquiry according to the article 75 of CC of the Russian Federation (release from criminal liability in connection with the active repentance) or according to the article 76 of CC of the Russian Federation (release from criminal liability in connection with conciliation with the victim). For example, in cases when the perpetrator conciliated with the injured person, smoothed down the harm done to the victim, and they for inquiry period of criminal case gave the application to the Registry Office for marriage registration, previously having resolved the problem with the local government bodies on "decrease" in the marryage.

On the other hand, considering strengthening of criminal liability in the sphere of crimes against sexual integrity and sexual freedom, we expect that the supervising body on behalf of the prosecutor's office won't agree to the termination of criminal cases of the specified category, giving this right to the court (perhaps, such situation is not in all territorial subjects of the Russian Federation and is the isolated cases of termination of such cases).

And it is quite fair as a priori there is a prohibition on sexual connection and other actions of sexual nature with the person who didn't reach sixteen-year age, even in a case of voluntary consent of the last.

First, only the court has the right to exempt the perpetrator from punishment as it is accurately specified in the note, but not the law enforcement officers at the stage of preliminary inquiry.

It is necessary to pay attention that the speech in the note goes not about a release from criminal liability as the notes to the other articles of the Special part of CC of the Russian Federation are formulated, and from punishment that is a prerogative only of the court.

Though in the court practice there are cases when the judges stop the criminal cases brought according to p.1 of the article 134 of CC of the Russian Federation in connection with the active repentance [4] and in connection with conciliation with the victim [5].

Unfortunately, there are cases when the guilty person commits several crimes, and criminal case is dismissed in connection with conciliation with the victims. So, for example, A. in 2008 made sexual connection with the person who obviously didn't reach 16-year age – R.D.V., from his voluntary consent, in a natural form. She, in 2009 made sexual connection with the person who obviously didn't reach 16-year age – R.P.F., from his voluntary consent, in a natural form [6].

Secondly, the court was granted a power of decision about involvement of the guilty person to criminal liability and assignment of punishment or about release from it.

About it is directly told in determination of the Constitutional court of the Russian Federation of 21.10.2008 No. 568-O-O: "… doesn't exclude the right of the court in each case, proceeding from the tasks established in the penal statute and punishments are more comprehensively and without prejudice estimating all facts of a case, including the data characterizing the identity of defendant and the victim, being guided by the tasks and principles of CC of the Russian Federation, to make the decision on involvement of the guilty person to criminal liability and the purpose of punishment or on release from them in the order and on the bases established by chapters 11 and 12 of CC of the Russian Federation" [3].

In our opinion, considering literal interpretation of the note 1 to the article 134 of CC of the Russian Federation, concerning the persons who committed crimes according to p.1 of the article 134 of CC of the Russian Federation it is impossible to stop criminal cases in connection with the release from criminal liability.

Besides, in the note 1 of the word of the legislator "… it is exempted by the court from punishment if it is established …", say that by the legal nature the specified note is a peremptory norm, but not discretionary, that is it is an obligation of the court, but not the right to exempt the perpetrator from punishment.

Thus, the courts are given even not the right, but an obligation to exempt such persons from punishment and only in cases if the conditions stated by the legislator in the note 1 of the article 134 of CC of the Russian Federation are complied by perpetrators;

g) the perpetrator and the crime committed by him stopped being socially dangerous in connection with marriage with the victim.

The court estimates in each case whether lost the perpetrator and the crime committed by him public danger in connection with marriage with the victim. Judges by consideration of specific criminal case shan't show formalistic approach in case of assessment of all conditions specified by the legislator in the note 1 of the article of CC and exclude dummy got married for the purpose of leaving from criminal liability or punishment.

2. In the note 2 of the article 134 of CC it is that if the age difference between the victim and the defendant makes less than four years, custodial sanction for the made act prescribed by p.1 of the article 134 of CC or p.1 of the article 135 of CC of the Russian Federation isn't applied to the last.

In our opinion, the legislator in the considered note specified a special case of assignment of punishment in the form of imprisonment, considering by p. 3 of the article 60 of CC of the Russian Federation.

Thus, the analysis of the note 1 which is carried out by us to the article 134 of CC of the Russian Federation allows draw an unambiguous conclusion that the courts are obliged to exempt from punishment of persons if it is established that the person has for the first time committed the crime provided by p.1 of the article 134 of CC of the Russian Federation, and the crime committed by him has stopped being socially dangerous in connection with marriage with the victim.

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