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On the inapt attempt against the resolution of the Polish Supreme Court of 19 January 2017, I KZP 16/16

The resolution of the bench of seven judges of the Supreme Court[1] referred to in the title is no doubt, irrespective of the assessment of the appropriateness of individual opinions contained therein, an important voice in the discussion on the shape of the inapt attempt adopted in the criminal code of 6 June 1997[2] in force in Poland. Its adoption, let us recall, was a consequence of the initiative of the First President of the Supreme Court who appealed to the Supreme Court, in his motion presented on the basis of Article 60 para 1 of the law of 23 November 2016 on the Supreme Court[3] with a request to resolve with its decision the questions of the divergence in the interpretation of law with respect to the legal issue presented in the motion referred to in the following way: 'Does the absence of an object fit to be committed a prohibited act on, referred to in Article 13 para 2 of the criminal code, signifies absence of all and any referents of features of the object of the performed act on which the prohibited act committed could at least potentially be committed on in a given factual situation or solely absence of referents at which the intent of the perpetrator is oriented?'[4]. The Supreme Court decided to remove the objective divergence with a two-point, naturally justified resolution, which reads as follows:

'1. The expression contained in Article 13 para 2 of the criminal code: 'absence of an object fit to commit a prohibited act on' signified absence of an object which belongs to a set of referents of the feature of the object of the performed act of the type of the forbidden act which the perpetrator intends to commit.
2. A perpetrator of an inapt attempt can be made liable to criminal proceedings (Article 13 para 2 of the criminal code) *in concreto* dependent on

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1 The resolution is available on http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20kzp%2016–16.pdf.
2 Journal of Laws 1997, No. 88, Item 533 with amendments. Let us also add that the uniform text of the criminal code of 6 June 1997 is available in the Internet System of Legal Acts administered by the Secretariat of the Parliament of the Republic of Poland.
3 Journal of Laws 2002, No. 240, Item 2052 with amendments. The uniform text of the law referred to can be found in the Internet System of Legal Acts already referred to above.
4 Resolution..., p. 1.

> the establishment of facts as regards the intent of the perpetrator to commit the prohibited act on a specific object'[5].

Before we move to the analysis and evaluation of the resolution voted on, we will point out that its adoption was really necessary and thus fully justified because court decisions, of both the Supreme Court and common courts, lacked uniformity with respect to the interpretation of the component of Article 13 para 2 of the criminal code analyzed in the resolution.

To present the situation but briefly, on the one hand, courts assumed that the expression 'absence of an object fit to be committed a prohibited act on' signifies a situation characterized by absence of all and any referents of the feature describing the object of the performed act of a given type of a prohibited act and thus a situation characterized by complete absence of objects denoted by the indicated feature. Following the survey of court decisions made in the resolution voted on, we will point out that we have be able to find such an interpretation of the expression in question, among others, in the decision of the Supreme Court of 16 February 2010[6], in the judgment of the Supreme Court of 28 April 2011[7], in the judgment of the Court of Appeal in Katowice of 28 February 2002[8], in the judgment of the Court of Appeal in Łódź of 4 June 2013[9], in the judgment of the Court of Appeal in Lublin of 24 September 2013[10], or in the adjudication of the Court of Appeal in Białystok of 18 June 2015[11].

On the other hand, courts acknowledged that what is decisive for the assumption of an inapt attempt is whether a referent of the feature describing the object of the performed act existed in the actual situation examined. This point of view characterizes in particular the resolution of the Supreme Court of 20 November 2000[12]. It was also adopted in numerous adjudications of courts of appeal, in particular in the judgment of the Court of Appeal in Katowice of 24 May 2005[13], in the judgment of the Court of Appeal in Łódź of 28 March 2006[14], in the judgments of the Court of Appeal in Wrocław of 25 January 2013[15] and of 13 August 2015[16], or in the judgments of the Court of Appeal in Lublin of 4 April 2006[17] and of 26 February 2013[18].

The difference between the points of view referred to above which are, let us add, deeply confronted both in the resolution voted on and in the motion of the First President of the Supreme Court initiating its adoption comes down to the fact that according to the first of them an inapt attempt characterized by absence

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[5] Resolution..., p. 2.
[6] V Criminal Code 354/09, R-OSNKW 2010, Item 340.
[7] V K.K. 33/11, LEX No. 817558.
[8] II AKa 549/01, LEX No. 56778.
[9] II AKa 97/12, LEX No. 1409183.
[10] II AKa 131/13, LEX No. 1439168.
[11] II AKa 73/15, LEX No. 1439168.
[12] I KZP 36/00, OSNKW 2001, Notebooks 1–2, Item 1.
[13] II AKa 155/05, OSA/Kat. 2005, No. 3, Item 16.
[14] II AKa 45/06, KZS 2007, No. 7–8, Item 92.
[15] II AKa 400/12, LEX No. 1289607.
[16] II AKa 171/15, LEX No. 1798770.
[17] II AKa 66/06, LEX No. 183573.
[18] II AKa 18/13, LEX No. 1294721.

of an object fit to be committed a prohibited act on will take place only when in the factual situation being subject of assessment there is no referent of the object of the performed action of the prohibited act covered by the perpetrator's intent while according to the second of them absence in this factual situation of solely the referent of the object of the performed action which was covered by the perpetrator's intent was sufficient to assume the existence of an inapt attempt of the indicated type. Thus, where, for instance, we were to examine a situation in which a Smith intended to steal a specific bicycle for professional cyclists from a place in which there was no bicycle of this kind but there were other objects which could be willfully taken in the meaning of Article 278 para 1 of the criminal code which the perpetrator, having the opportunity to thus willfully take it did not steal, then according to the first of the characterized interpretation positions an apt attempt would have taken place while according to the second, an inapt attempt.

As it has already been pointed out, the Supreme Court adopted the stance that the expression 'absence of an object fit to be committed a prohibited act on' appearing in Article 13 para 2 of the criminal code signifies absence of all and any referents of the feature describing the object of the performed action (see: Item 1 of the resolution voted on). The stance is entirely accurate.

However, let us point out that it was subjected to criticism in another gloss to the resolution of the Supreme Court discussed here[19]. To avoid being accused of any deformation of the contents of the criticism, we will quote it *in extenso*. And thus, in the opinion of the author of the gloss, Andrzej Jezusek: '(...) the Supreme Court should be accused of failing to include in their considerations the structure of Article 13 of the criminal code and the link between its para 2 (giving a definition of an inapt attempt) and para 1 (constructing the institution of an attempt). Simultaneously, literature reveals a fairly common belief that Article 13 para 2 of the criminal code stipulating that «an attempt takes place also when the perpetrator is not aware of the fact that the act cannot be committed because of the absence of an object fit to be committed a prohibited act on or due to the use of an instrument not fit to commit a prohibited act» should be read together with Article 13 para 1 of the criminal code which points out that «responsible for an attempt is the person who with an intent to commit a prohibited act directly strives, with his behaviour, to commit the prohibited act, even when the act is not committed». Both doctrine and decisions express the opinion that Article 13 para 2 of the criminal code does not decree all the features of an inapt attempt: the content of this provision must be supplemented with features provided for in Article 13 para 2 of the criminal code. This means that a prohibited act referred to in Article 13 para 2 of the criminal code is a prohibited act the commission of which the perpetrator directly heads for, with the regulation contained in Article 13 para 1 of the criminal code stipulating that a behaviour constituting direct heading refers to a prohibited act which the perpetrator intends to commit. And, as a result, Article 13 para 2 of the criminal code does not refer to absence of an object fit to be

[19] See: A. Jezusek, *Glosa do uchwały Sądu Najwyższego z dnia 19 stycznia 2017,* sygn. I KZP 16/16, „Prokuratura i Prawo" 2017, No. 4, p. 154 et seq.

committed any prohibited act on by the perpetrator but absence of an object fit to be committed the prohibited act intended by the perpetrator'[20]. In other words, in the opinion of the author of the statement quoted above, the interpretation of the expression 'absence of an object fit to be committed a prohibited act on' given by the Supreme Court was made in a fragmentary, that is incorrect way, as it did not take into account the information contained in Article 13 para 1 of the criminal code and at the same time – in the opinion of Andrzej Jezusek – indicated that the term 'prohibited act' co-creating the expression interpreted by the Supreme Court is to refer solely to the prohibited act that the perpetrator deliberately and directly strives to commit which can consequently lead to a conclusion that, in the opinion of the author, it is the content of the perpetrator's intent that is to decide whether an object on which a prohibited act can be committed is absent in the factual situation because it is from this content that we learn on what object the perpetrator intended to commit the prohibited act. What we must immediately add is that, according to Andrzej Jezusek, the intent to commit a prohibited act is: '(...) relativized to the object of the act specified *in specie* and is, in consequence, related to a specific carrier of a legal interest'[21], because – as the author referred to argues – 'Though legal provisions give an abstract notion of legal interest, it is individualized interests that are subject to criminal law protection: what is subject to criminal law protection is not life as an abstract notion but the life of a specific person. Specific human behaviour is always a realization of a specific type of a prohibited act, also within the scope of the object of an act performed. Thus, it is not every object being a referent of the feature but a specific thing or person. In consequence, the perpetrator always individualizes the object which is to become the object of the attempt to a greater or lesser extent. In result, it is impossible to simultaneously claim that attacking a specific object the perpetrator wants to or agrees to cause an effect on other objects'[22].

The indicated attempt at questioning the analyzed stance of the Supreme Court on the interpretation of the expression 'absence of an object fit to be committed a prohibited act on' is hard to be considered fully accurate because for no good reason the aspect of the offence as to the doer of the attempt was mixed with the aspect of the offense as to the deed. Undertaking the attempt to answer the request for interpretation (in a non-pragmatic meaning) of the discussed expression, the Supreme Court assumed, and this is fully justified, that it describes an undoubtedly objective circumstance, in other words, that it refers – in the assessment of the Supreme Court – to the area of facts totally independent of the intellectual and volitional approach of the perpetrator, in consequence correctly concluding that absence of an object fit to be committed a prohibited act on is a set characterized by all and any objects denoted by the feature describing the object of the performed act of such an act. If then in the examined situation there was at least one of the objects denoted by the indicated feature, it should be concluded that from the objective side the situation would not present as a set with an absence of an object

[20] A. Jezusek, *Glosa...*, pp. 156–157.
[21] A. Jezusek, *Glosa...*, p. 162.
[22] A. Jezusek, *Glosa...*, p. 162.

fit to be committed a prohibited act on. That is, in such a situation, objectively speaking, the perpetrator could aptly attempt and commit the prohibited act covered by the intent to commit it which he had. To sum up, the considerations of the Supreme Court, resulting in the formulation of the thesis of Item 1 of the discussed resolution, were orientated solely at answering the question when, exclusively on the objective side, and thus the aspect not taking into account the content of the perpetrator's intent, absence of an object fit to be committed a prohibited act on will take place[23]. On the other hand, there is no doubt that from this side it will have place only when the perpetrator undertakes action in a situation characterized by absence of all and any objects being referents of the feature describing the object of the performed act.

It is quite another question whether a thus specified absence of an object fit to be committed a prohibited act on will decide about satisfying the features of an inapt attempt. It is so since everything depends on the content of the perpetrator's intent, indispensible for the existence of any criminal-law relevant attempt. Reverting to the theft example, the perpetrator may have the intent to willfully seize any particular mobile object being within the scope of his action but may also – as in the case of our Smith – have the intent to make such a seizure only with respect to a mobile object strictly specified by him being within the scope of his action[24]. What will ultimately decide whether an inapt attempt characterized by absence of an object fit to be committed a prohibited act on will have place in an examined situation will be the absence of solely and exclusively this object – being the referent of the feature describing the object of the performed act – on which the perpetrator intends to commit the prohibited act. The intellectual and volitional attitude of the perpetrator committing an inapt attempt characterized by absence of an object fit to be committed a prohibited act on is thus characterized by a belief he holds, inconsistent with the actual state of things and thus false, that a prohibited act on a specific referent describing the object of the act can be committed and thus a belief being the result of another belief of the perpetrator being false, namely, a belief in the existence of the object within the scope of his action[25].

[23] They were not aimed at studying the meaning of the expression 'absence of an object fit to be committed a prohibited act on' within the content of the sanctioned standard responsible for precise characteristics of the content elements of an inapt attempt. Briefly speaking, the Supreme Court, making an attempt at decoding the meaning of the indicated expression, did not do it within the framework of the procedure of recreating the sanctioned standard defining the scope of an inapt attempt. It is also for this reason, first of all for methodological reasons, that the accusation made by Andrzej Jezusek that the drawback of the discussed considerations of the Supreme Court was that they did not include the limiting effect of the scope of the discussed expression of the provision of Article 13 para 1 of the criminal code, had no grounds.

[24] In this point we should fully agree with Andrzej Jezusek that in the case of prohibited acts characterized by the object of the performed act, the intent is each time the intent to perform these acts on a referent of the feature describing the object of the act (specified by the perpetrator) which results from the fact that the behaviour of every individual perpetrator is always and exclusively a single example from the class of behaviours composing the notion specified – and presented by nature in an abstract way – type of a prohibited act. In short, the perpetrator, while satisfying with his behaviour the features of a specific type of a prohibited act, never commits a prohibited act of this kind because the latter, i.e. the type of the prohibited act, is nothing else but a collective description of a class – often widely diversified – of behaviours causing the same state of events, e.g. causing a man's death or producing an illocutionary effect in the form of its profanation.

[25] Basing on the information coming from Wojciech Patryas (see: W. Patryas, *Uznawanie zadań,* Warszawa–Poznań 1987, p. 18 et seq.) falling within the scope of epistemic logics. Let me recall that conviction is a strong belief of the subject that reality is such as the subject imagines it to be. Let us add

In other words, in the case of an inapt attempt characterized by absence of an object fit to be committed the prohibited act on, its doer-related aspect presents as an intent to satisfy the deed-related features of a specific type of a prohibited act on a particular referent of the feature describing the object of the performed act of this type of the performed act specified by the doer of this attempt. At the same time – which is of particular importance – the prediction of a possibility to satisfy the indicated features on a particular referent of a feature describing the object of the performed act of the examined type of a prohibited act is accompanied by the perpetrator's false conviction of a possibility of their fulfillment on this particular referent which is in turn a consequence of the perpetrator's failure to realize the non-existence of the referent within the scope of his action[26].

It is because of the above conclusions that the opinion expressed by the Supreme Court in pt. 2 of the resolution voted on deserves to be negatively assessed[27]. Let us recall that according to the Supreme Court: 'A perpetrator of an inapt attempt can be made liable to criminal proceedings (Article 13 para 2 of the criminal code) *in concreto* conditioned by the establishment of facts as regards the intention of the perpetrator to commit the prohibited act on a specific object'. The thus formulated opinion of the Supreme Court clearly seems to suggest that the establishments made as regards the object on which the perpetrator intended to commit a prohibited act solely can, and thus need not, determine the attribution of the commission of an inapt attempt of the discussed type. Meanwhile – as indicated above – the identification of the content of the perpetrator's intent is crucial in the context of attributing to him the commission of an inapt attempt characterized by absence of an object fit to be committed a prohibited act on. Without this identification, there can be no question of institutionally stating the commission of the indicated,

right away that apart from beliefs and thus sentences recognized by the subject and thus belonging to the knowledge determining his behaviour, we also distinguish, among others, objective suppositions which differ from beliefs, that their structure is devoid of a strong belief that reality presents as the representation presents it. Briefly speaking, in the case of object suppositions the subject is not strongly convinced of the correctness of the representation. On these questions see: W. Paryas, *Uznawanie*..., p. 18 et seq.

[26] Thus, the opinions which emphasize that a characterized inapt attempt is a mistake of its subject are in fact correct. Although Article 17 para 2 of the criminal code itself presents it in another way because it limits itself solely to the acceptance of the unawareness on the part of the doer of the inapt attempt of the impossibility of committing the prohibited act and thus a state which could hardly be described as an error (on this subject see in particular: J. Giezek, *Funkcja błędu co do ustawowych znamion w nowym kodeksie karnym* [in:] *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, A.J. Szwarc (ed.), Poznań 1999, p. 111 and also Ł. Pohl, *Błąd co do okoliczności stanowiącej znamię czynu zabronionego w polskim prawie karnym (zagadnienia ogólne)*, Poznań 2013, p. 15 et seq., as well as the literature quoted in these studies, then – as the above discussion shows – it is obvious that what pushes the perpetrator of an inapt attempt to act is his wrong conviction of a possibility to perform the prohibited act generated by the unawareness referred to above. It must be emphasized that the error of its doer characterizing an inapt attempt is not an error as to a circumstance constituting a feature of a prohibited act in the meaning of Article 28 para 1 of the criminal code. The latter of the mistakes causes that the perpetrator in error – precisely due to the error in question – implements the deed aspect related features of a specific type of a prohibited act in conditions of non-predicting their implementation. Meanwhile, in the case of an inapt attempt its doer fully predicts the possibility that the indicated features will be fulfilled but this prediction – as it has already been said – is accompanied by a wrong belief in an objective possibility of their fulfillment. For more on the function of the error as to the circumstance constituting a feature of a prohibited act and in particular a function limiting the doer aspect related side of a prohibited act committed in conditions of this error to solely and exclusively unaware inadvertence see: Ł. Pohl, *Mistake*..., p. 151 et seq.

[27] Comp. a different in this respect assessment by Andrzej Jezusek – see: A. Jezusek, *Glosa*..., p. 163, in which the Author expressed an opinion that the indicated opinion of the Supreme Court is in principle correct.

gradual form of the commission of a prohibited act. In other words, it is impossible to state the fact that the features of its commission were satisfied without first establishing the content of the perpetrator's intent because – let us repeat once again – it is the content of the intent, and in particular on what object the perpetrator intended to satisfy with his behaviour the deed aspect related features of a specific type of a prohibited act that determine whether his behaviour will be recognized as an inapt attempt characterized by absence of an object fit to be committed a prohibited act on[28]. Briefly speaking, the Supreme Court thesis contained in pt. 2 of the resolution voted on is utterly incorrect because it does not take into account the elementary information from the scope of substantive criminal law that the existence of an inapt attempt characterized by absence of an object fit to be committed a prohibited act on is in every case obligatorily co-decided[29] by the content of the perpetrator's intent, and to be exact the component of which that tells us on what referent of the feature describing the object of the performed act of a specific type of a prohibited act the perpetrator intended to satisfy with his behaviour the deed aspect related features of the indicated type of a prohibited act. In other words, and simultaneously using the language of the commented resolution, establishments as to the intent of the commission of a prohibited act on a specific object decide that the perpetrator is criminally liable for satisfying the features of an inapt attempt threatened with punishment characterized by absence of an object fit to be committed a prohibited act on.

The resolution voted on – ultimately – is thus difficult to be assessed as a whole. Although it is also characterized by other weaknesses[30], not strictly linked to the central issue, it can nevertheless be deemed an interesting attempt at resolving the principal problem from the field of the criminal law in force as well as from the field of the science of the crime attempt, an attempt the principal drawback of which is lack of an optional explanation – in the opinion of the Supreme Court – of the meaning of establishments concerning the intent to commit a prohibited act on a specific object in deciding a question of fundamental importance expressed in the question when in essence – in the opinion of the Supreme Court – an inapt attempt characterized by absence of an object fit to be committed a prohibited act on has place. Hence, the commented resolution can be described, without the risk of making a mistake, described as a voice which provides only a fragmentary solution to the legal problem analyzed in it.

[28] On this subject of this issue see more in Ł. Pohl, *Indywidualne właściwości desygnatu przedmiotu czynności wykonawczej jako problemu strony podmiotowej czynu zabronionego*, „Acta Iuris Stetinensis" 2018 (in print) a study in which the correctness of this opinion was attempted to be proved by reference to logics and the set theory (multiplicity).

[29] Recognition of a given behaviour as an example of an inapt attempt characterized by absence of an object fit to be committed a prohibited act on is after all – which is obvious – dependent also on absence of the referent of the feature describing an object of the performed act on which the perpetrator intended with his behaviour to satisfy the objective features of a prohibited act and also – what we also emphasize – dependent on the establishment of the wrong belief of the perpetrator that the commission of the prohibited act intended by him is possible on the referent of the feature describing the object of the performed act of this act which he assumes.

[30] One of them, pointedly and effectively, so to say, indicated already by Andrzej Jezusek (see: A. Jezusek, *Glosa...*, p. 155) – is the absolutely inadequate use by the legislator of the term 'imaginary crime'.

Abstract

Łukasz Pohl, *On the inapt attempt against the resolution of the Polish Supreme Court of 19 January 2017, I KZP 16/16*

The article is an assessment of the resolution of the bench of seven judges of the Supreme Court of 19 January 2017 (I KZP 16/16) with the wording: „1. Included in art. 13 § 2 k.k. the phrase: „no item suitable for committing a prohibited act on it" means the lack of such an object, which belongs to the set of designators of the mark of the subject of execution activity of the offense type committed by the perpetrator. 2. The penal liability of the perpetrator of an attempted inept attempt (Article 13 § 2 of the Code of Penal Procedure) may be in accordance with the decisions made as to the intention to commit an offense on a particular subject". The article expressed the opinion that the voted resolution of the Supreme Court is difficult to assess unequivocally. Its main drawback is that it does not explain the meaning of the arrangements for intent to commit a prohibited act on a particular item. Therefore, it was finally concluded that the position presented in the commented resolution does not fully resolve the legal problem analyzed in it.

Keywords: *attempt to commit an offence, inefficient attempt to commit an offence, intent to commit a prohibited act*

Streszczenie

Łukasz Pohl, *O usiłowaniu nieudolnym na tle uchwały polskiego Sądu Najwyższego z 19.01.2017 r., I KZP 16/16*

Przedmiotem artykułu jest ocena uchwały składu siedmiu Sędziów SN z 19.01.2017 r., I KZP 16/16 (OSNKW 2017/3, poz. 12) o brzmieniu: „1. Zawarte w art. 13 § 2 k.k. wyrażenie: „brak przedmiotu nadającego się do popełnienia na nim czynu zabronionego" oznacza brak takiego przedmiotu, który należy do zbioru desygnatów znamienia przedmiotu czynności wykonawczej typu czynu zabronionego, do którego popełnienia zmierza sprawca. 2. Pociągnięcie do odpowiedzialności karnej sprawcy usiłowania nieudolnego (art. 13 § 2 k.k.) może być in concreto uwarunkowane poczynionymi ustaleniami co do zamiaru popełnienia czynu zabronionego na określonym przedmiocie".
W artykule wyrażono opinię, że głosowaną uchwałę Sądu Najwyższego trudno ocenić jednoznacznie. Jej głównym mankamentem jest to, iż nie wyjaśniono w niej znaczenia (wagi) ustaleń dotyczących zamiaru popełnienia czynu zabronionego na określonym przedmiocie czynności wykonawczej przy rozstrzyganiu kwestii najzupełniej fundamentalnej, bowiem wyrażającej się w pytaniu o to, kiedy ma miejsce usiłowanie nieudolne znamienne brakiem przedmiotu nadającego się do popełnienia na nim czynu zabronionego. Stąd też ostatecznie uznano, że stanowisko przedstawione w komentowanej uchwale nie rozwiązuje w pełni analizowanego w niej problemu prawnego.

Słowa kluczowe: *usiłowanie, usiłowanie nieudolne, zamiar popełnienia czynu zabronionego*