



Participation in Crime in the Model Criminal Code

Malinin Vasily Borisovich

Professor, Doctor of Law, Academician of the Regional Academy of Medjement, Academician of the International United Academy of Sciences, Full Member (Academician) of the Petrovsky Academy Sciences and Arts, Professor, Department of Criminal Law of Crimean branch of the Russian State University of Justice 295006 Simferopol, st. Pavlenko, 5 T. + 7-978-019-08-09, Russia

ABSTRACT

This article is devoted to new issues of complicity in a crime in the criminal codes of Russia and foreign countries. It examines the very concept of complicity and its responsibility, the legal nature of complicity, the theory of complicity, including accessory theory, complicity with an inappropriate subject or subject acting inadvertently or innocently, types of accomplices: organizer, performer, accomplice, instigator and new species - initiator, concealer, provocateur, connivance, "thief in law" and their responsibility, forms of complicity: group of persons (co-execution), group of persons by prior agreement, organized group, crime nd organization, criminal organization "thieves in law", complicity in a crime with a special compound and special issues such as the participation excess of the perpetrator, the voluntary renunciation of accomplices

ARTICLE HISTORY

Received February 23 2020, Accepted March 17,2020 Published August 3, 2020

KEYWORDS

concept of complicity; types of partners, forms of co-participation, complicity with a special composition.

INTRODUCTION

Article 32. The concept of complicity and responsibility for it

1. Participation in a crime is an intentional joint participation two or more persons committing a crime.

2. Responsibility for complicity above responsibility for committing one crime.

3. Responsibility for complicity in a reckless crime shall notsame responsibility for the intentional crime.

4. Each accomplice is individually responsible for his deed.

The notions of complicity and even accomplices and forms of complicity are not found in all criminal codes. They are not in the Norwegian Criminal Law [1], the Criminal Code of the Republic of Serbia [2], the Swiss Criminal Code [3], and oddly enough, in the French Criminal Code [4].

In the Criminal Code of the Russian Federation, complicity is defined as the intentional joint participation of two or more persons in the commission of an intentional crime [5, Art. 32].

As noted by O.Yu. Bunin: "In this article there is excessive overload with the same terms as

"intentional" participation and "intentional crime" [6, p. 62]. But this is not the main thing.

The theory of criminal law is dominated by the view that complicity is possible only in intentional crimes, but not in careless.

We give an example. Three hunters, returning from hunting, noticed a peasant smoking a pipe. A. invited V. to show his skills in shooting and fall into the pipe of a peasant. V. Agreed, and B. put his shoulder under the gun of V., who shot and hit the head of the peasant.

How to qualify this act? According to the current wording of complicity, no one will be held responsible, since complicity is possible only in a deliberate crime, and here - reckless.

The only solution is to admit complicity in a reckless crime.

Some authors call such acts "careless contact" and suggest including it in the Criminal Code.

By the way, the Polish Criminal Code recognizes reckless complicity [7, § 2, art. 19].

Consider now the legal nature of complicity. On this issue in the theory of criminal law there are two established concepts. According to one of them, complicity is of an accessory nature (from the Latin

Contact Malinin Vasily Borisovich Department of Criminal Law of Crimean branch of the Russian State University of Justice

2020 The Authors. This is an open access article under the terms of the Creative Commons Attribution Non Commercial Share Alike 4.0 (<https://creativecommons.org/licenses/by-nc-sa/4.0/>)

word accessories - "additional", "non-independent". The main provisions of this theory are as follows: 1) the basis of the criminal liability of accomplices is the commission of a socially dangerous act by the executor; 2) the criminal liability of an accomplice is allowed only if the performer is held accountable; 3) as a form and measure of punishment, the accomplices shall include the punishment assigned to the perpetrator of the crime [8, p. 271].

The accessory theory of complicity is recognized, for example, by the legislation of most US states [9, p. 195].

Proponents of another theory consider complicity as an independent form of criminal activity [10, p. 326], in which each accomplice has an independent responsibility.

For complicity, it is not required that the intentions of each co-participant include the activities of all accomplices.

To this effect, the Thai Criminal Code contains article 86 "Any person who takes part in a crime or assists him before or during the commission of a crime by another person, even if the criminal does not know about his participation or assistance, is considered an accomplice and receives two-thirds of the punishment provided for this crime" [11, Art. 86].

Article 33. Types of partners and their responsibility

1. The perpetrator is liable for the crime provided enforced by the Criminal Code.

2. "Thief in law" is double punished for leading crime activity.

3. The organizer bears the main penalty plus half of it for leadership of an organized criminal group.

4. The initiator bears the main penalty plus one third of it for proposal to commit a crime.

5. The instigator and the provocateur carry half of the main ass knowledge for incitement to commit a crime and provocation of it.

6. The accomplice bears one third of the basic punishment for helping to committing a crime.

7. Concealer, who agreed to shelter the offender, funds, the instruments for committing the crime, its traces, items obtained in a stupid way, as well as the acquisition or sale of these items, the acquiescent who agreed not to impede the commission of the crime, the informant who agreed not to inform the law enforcement authorities of the forthcoming crime, bear one quarter from the main punishment.

8. Punishment of accomplices in a criminal group (any battle of its kind) is appointed from the punishment assigned for participation in this group.

The original position is taken by the Criminal Code of Austria: "Consideration of all accomplices of the crime as perpetrators" [12, § 12].

Executor. The Criminal Code of the Russian Federation and almost all textbooks and scientific works indicate that the perpetrator is the person who committed the crime directly, as if other accomplices did not commit the crime of "their own crime" themselves. The Contractor differs from other participants in that it performs the objective side or part of the objective side of the specific corpus delict provided for by the Special Part of the Criminal Code.

When the performer uses as an instrument of crime persons who are not subject to criminal liability, his actions are not included in the objective side of the crime provided for by the Special Part of the Criminal Code of the Russian Federation [14, p. 438]. That is why this provision must be included in the concept of the performer in the Criminal Code.

When a person uses other persons not subject to criminal liability, this is called "mediocre infliction". It consists in the use of: 1) a person who has not reached the age of criminal responsibility; 2) the insane, incomprehensible nature of the committed act; 3) a person acting under physical or mental coercion; 4) a person who does not understand the nature of the committed act.

"Thieves in law" - the leaders of the entire criminal world. They lead the criminal life of cities, districts and regions, prisons and colonies. They collect "gatherings" on which they solve strategic issues of the criminal world, perform "arbitration" functions to resolve conflicts between criminal groups, collect money in the "common fund" for criminal activities, etc. They themselves do not commit crimes. Therefore, bringing them to justice is very difficult.

Organizer - a person who created a criminal organization or organized group or led them.

The organization of the commission of a crime as a form of organizational action may consist of developing a plan for the commission of a specific crime (or several crimes at once), selecting and recruiting the performer and other participants, distributing roles between them, training the performer in special skills or rights, providing him with the necessary tools and instruments for committing a crime, developing ways to hide traces, crimes, preparing channels for the sale of objects obtained by criminal means.

Initiator - a person who initiated the commission of a crime.

E.A. Galaktionov even recognizes him as the main culprit of the crime. He defines it this way: "The initiator of a crime is the one who initiates, directs, directs and manages the commission of a crime by virtue of internal motivation" [13, p.130] (the last, of course, superfluous - V.M.).

Among the co-executors, he is the first among equals, it is he who proposes to commit a crime. It differs from the instigator in that it does not intimidate them or otherwise affect other collaborators. Internally, they themselves are ready to commit a crime. But the initiator is the inspirer of the crime.

An instigator is a person who persuades another to commit a crime, that is, aroused his intention to commit him.

Incitement is possible in relation to a specific person and to commit a specific crime. General appeals to commit crimes not addressed to a specific person [14, p. 92].

Provocateur - a person who persuaded another to commit a crime in order to expose him as a criminal. The legal assessment of the provocation was reflected in the Criminal Code of the Republic of Poland. In accordance with Art. 24 responsibility as incitement is subject to those who persuade another person to commit a prohibited act with the aim of initiating criminal prosecution against him [7, p.24]. Provocation should be applied to any crime, but now in the current Criminal Code of the Russian Federation there is only one article - article 304 of the Criminal Code of the Russian Federation "Provocation of a bribe or commercial bribery". In practice, for example, the provocation of the necessary defense is often used.

Many scientists admit provocation of a crime during an operational experiment: V.S. Komissarov, [15, p.412], E.V. Loshenkova, A.I. Chu-chai [8, p.218], E.A. Galactions [14, p. 116]. In addition, the justification of an operational experiment contradicts the law, which is clear from Art. 204 of the Criminal Code.

Detention of a criminal should be distinguished from provocation during an investigative experiment, for example, when a victim claims to extort a bribe.

Assistant - a person who contributed to the commission of a crime, that is, by his actions contributing to the execution of a jointly committed crime.

The essence of aiding is to facilitate the commission of a crime.

To contribute means to actively participate in someone's affairs with the goal of facilitating, helping, supporting in some activity.

Aiding is divided into physical and intellectual.

Physical aiding is the provision of tools or tools or the removal of obstacles to the commission of a crime.

A physical accomplice should also be liable if the contractor did not use the funds provided to him. Intellectual aiding consists in providing information, giving advice and guidance on the commission of a crime.

Information, advice and guidance help other accomplices to obtain the information necessary for

the commission of a crime, overcome obstacles and, ultimately, contribute to the commission of a crime.

A person is considered an accomplice until the crime is committed, even in cases where: there was a significant time lag between the provision of assistance and the commission of a crime or the crime was committed after a specified time; the provided or technical assistance was accepted, but the contractor did not use it, and the amount of such assistance does not matter [15, p.192].

Concealer - a person who has agreed to shelter a criminal, means, instruments for committing a crime, its traces, items obtained in a criminal way, as well as to acquire or sell these items.

Pre-promised concealment is not necessarily characterized by the fact of providing the promised concealment (for this a special article is proposed in the Special Part of the Criminal Code), and most importantly, the promise to provide it.

Assassin - a person who has agreed not to impede the commission of a crime.

If the acquaintance prevented the commission of a crime, this will serve as his voluntary refusal.

Non-Carrier - a person who has agreed not to inform the law enforcement authorities of an impending crime.

The implication of a crime - acts committed after the commission of a crime: concealment, acquiescence and underreporting not promised in advance - special formulations provided for by the Special Part of the Criminal Code. Will be discussed in the relevant chapters.

Article 34. Forms of complicity and responsibility of their participants

1. With the participation of a person in a group of persons, the punishment increases one quarter of the main.

2. With the participation of a person in a group with the distribution of roles, the punishment shall be increased by one third of the main.

3. With the participation of a person in an organized group, the punishment is increased by half of the main one.

4. With the participation of a person in a criminal organization, punishment shall be impaired to him by two-thirds of the principal.

5. With the participation of a person in the criminal community of "thieves in law" punishment is doubled from the main punishment.

Group of persons (co-execution) - a group of two or more co-executors.

Co-fulfillment means that two or more persons directly fulfill the objective side or part thereof.

In practice, there are several options for co-execution.

Firstly, one of the accomplices together with another committed the same crime. For example, each of the collaborators inflicts beatings on the victim.

Secondly, one of the accomplices carries out the crime in full, and the other (others) only partially. For example, during rape, one subject commits forced sexual intercourse, and the second fetters the victim's resistance.

Thirdly, each of the entities actually performs actions that are partially covered by objective signs of corpus delict. The crime, on its objective side, consists of the sum of the actions of the accomplices. For example, when making counterfeit bank notes for the purpose of marketing, one entity makes cliches, the other specializes in printing, the third specializes in the printing of watermarks and other security signs, etc. [13, p. 268-269].

A group of persons by preliminary conspiracy is a group of two or more persons who have previously agreed to commit a crime.

This group differs from a simple group in the presence of collusion and the time to reach such a conspiracy - in advance.

And co-execution and a group of people with the distribution of roles can be committed both by prior agreement and without it.

By prior conspiracy - means that two or more persons, prior to the commission of the crime, agreed on its joint commission.

Organized group - a group of three or more persons, pre-organized for the commission of one or more crimes.

Signs of an organized group are the stability and preliminary unity of the group members to commit one or more crimes.

As a rule, such a person thoroughly prepares and plans crimes, distributes roles between accomplices, and is technically equipped.

A criminal organization is a structured, organized, stable group of five or more persons operating under a single leadership.

In the Criminal Code of the Russian Federation, in the definition of a criminal organization, it is said that it was created to commit only grave and especially grave and especially grave crimes.

Correctly writes A.P. Kozlov, that it is necessary to critically comprehend the very restriction of the existence of a criminal organization only in relation to grave and especially grave crimes [16, p. 287]. He is supported by E.A. Galaktionov, which indicates that there are 21 medium-weight personnel, the commission of which is possible by a criminal organization. This may include crimes committed in the economic sphere, for example, art. 159, 165 of the Criminal Code of the Russian Federation (remember, at least the various "pyramids" — MMM, "Lords" and others - V.M., which operated in the 90s). The same E.A. Galaktionov supports us in the

fact that a criminal organization should consist of at least 5 people [14, p.104].

The criminal community of thieves in law is a mafia organization consisting of several hundred leaders of the criminal world of Russia. Such a community exists only in Russia and nowhere else. There is no such criminal area, and not only criminal, which this community would not supervise.

Article 35. Kcession of an accomplice and responsibility for him

1. For the excess of an accomplice, only he is responsible.

2. Other accomplices are responsible for the attempt (after-encroachment) on a planned crime.

3. In case of an excess of an accomplice, he is also responsible for the excess, and for attempt (encroachment) on a planned crime.

In the CIS Model Criminal Code, a corresponding short story was proposed - Article 37 - an excess of an accomplice [17, p. 99].

It seems to us that an excess is possible only with the performer and the organizer. It is impossible to imagine an excess in the instigator and accomplice.

Going beyond what was previously agreed upon, the accomplice thereby changes the content of intent and, consequently, the subjective connection between the accomplices is lost. The absence of objective and subjective grounds for the reproach (concurrence of the commission) of other partners makes it possible to free them from criminal liability for a crime committed during an excess [9, p. 369-370].

Article 36. Voluntary refusal of partners

1. The performer is not subject to criminal liability if he voluntarily and permanently terminates the commission of a crime.

2. A thief in law is not subject to criminal liability if he voluntarily and permanently ceases his criminal activity ("retires").

3. The organizer is not subject to criminal liability if he voluntarily by his active actions did not allow the perpetrator to commit a crime.

4. The initiator and instigator (provocateur) are not subject to criminal liable liability if they voluntarily dissuaded the performer from committing a crime.

5. An accomplice is not subject to criminal liability if he voluntarily by his active actions did not allow the perpetrator to commit a crime.

6. If the accomplices, despite all their efforts, failed to prevent the commission of a crime by the performer, they are still not subject to criminal liability.

7. In case of the voluntary refusal of the performer, the actions of the other co-

participants are regarded as preparation for a crime, and since the latter is not punishable, they do not bear criminal liability (failed complicity).

The voluntary refusal of the partners means that one or several partners stop the execution of the actions that they are required to perform due to the role they play, when they recognize the possibility of bringing them to the end. As in the cases of individual commission of a crime, the voluntary refusal of the accomplices should be characterized by signs of voluntariness and finality. It is also a condition for the release of partners from criminal liability, if the deed does not contain signs of a different crime before the decision on refusal is taken. Voluntary refusal of accomplices is possible in any form of complicity at any stage of the crime, but always before the criminal result [18, p. 374].

Article 37. Participation with a special subject

1. In complicity with a special subject, the performer may only be him.

2. Non-special subject to be the perpetrator of such crimes can not.

In the special corpus delicti, the reason for its commission can only be an act committed by a special subject, possessing additional features or expressing in violation of the special functional duties assigned to him [19, p. 364].

It is especially difficult to qualify complicity in crimes with a special subject when socially dangerous acts are committed by a group of people. At the same time, the public danger of a criminal group most often depends not only on what public harm is caused at the time the crime was committed, but also how it is committed by a special subject in the group [20, p. 181].

Section 38. Collaboration with an improper subject or subject, acting by negligence or innocently

1. When committing a crime with an improper subject, the lying subject is responsible as for complicity.

2. When committing a crime with a person acting on negligence or innocence, an intentionally acting entity is also liable for complicity.

In judicial practice, for a long time, for a long time, a different point of view was expressed by the Supreme Court of the RSFSR (now it is canceled - V.M.), according to which complicity is recognized even when the second person is not a proper subject [21, p.540]

This view is incorrect. And another point of view is also incorrect, but for legal reasons. There can be no complicity with one subject.

Therefore, we propose a different solution to this problem.

We found one ruling of the Supreme Court of the Russian Federation confirming our position: "A

crime is recognized as a group committed by a person in a preliminary conspiracy if it was attended by persons who agreed in advance to commit it jointly, regardless of the fact that some of the participants were not brought to criminal responsibility by virtue of not reaching the age of criminal responsibility or because of insanity" [22, p.17].

Some terms used in this article

Thieves in Law are the leaders of the underworld. They lead the criminal life of cities, districts and regions, prisons and colonies.

Initiator - a person who initiated the commission of a crime.

Contractor - a person who has directly committed a crime, that is, who has performed the objective side or part of the objective side of a specific corpus delicti, provided for by the Special Part of the Criminal Code, as well as the person who committed a crime through the use of persons not subject to criminal liability.

Organizer - a person who created a criminal organization or an organized group or led them.

Assistant - a person who assisted in the commission of a crime, that is, through his actions contributed to the execution of a jointly committed crime. **An instigator** is a person who persuades another to commit a criminal offense.

Assistant - a person who contributed to the commission of a crime.

Thieves in Law are the leaders of the underworld. They lead the criminal life of cities, districts and regions, prisons and colonies.

Group of persons (co-execution) - a group of two or more co-executors.

A group of persons by prior conspiracy is a group of two or more persons who have previously agreed to commit a crime.

A group of persons with a distribution of roles is a group in which, in addition to the performer is present and other accomplices.

Initiator - a person who initiated the commission of a crime.

An instigator is a person who persuades another to commit a criminal offense.

A criminal organization is a structured, organized, stable group of five or more persons acting under a single leadership.

The criminal community of thieves in law is a mafia organization consisting of several hundred leaders of the criminal world of Russia, the so-called thieves in law.

Concealer - a person who has agreed to shelter the offender, the means, instruments of the crime, his tracks, items obtained by criminal means, as well as to acquire or sell these items.

A provocateur is a person who persuades another to commit a crime in order to expose him as a criminal.

The excess of an accomplice is the accomplishment of an accomplice in a crime not covered by the intent of other accomplices.

REFERENCES

1. The criminal law of Norway. Oslo: Ed. The legal center. 2019 - 375 p.
2. The Criminal Code of the Republic of Serbia. Belgrade: Publ. Codex - 2019 - 325 p.
3. The Swiss Penal Code. Geneva: Ed. Legislation. 2018 – 268 p.
4. The French Penal Code. Paris: Ed. Right. 2017 - 650 p.
5. The Criminal Code of the Russian Federation. M: Publ. Eksmo. 2019 – 270 p.
6. Bunin O.Yu. Scientific and critical commentary on the General Part of the Criminal Code of the Russian Federation. M: Filin, 2017 - 210 p.
7. The Criminal Code of the Republic of Poland. Warsaw: Ed. Polish legal legislation. 2017 - 232 p.
8. The concept and terms in the criminal law of Russia / Otv. ed. A.Yu. Chuchaev, E.V. Loshenkova. M: CONTRACT. 2017 - 320 p.
9. Criminal law of foreign countries. / Ans. ed. NOT. Krylova. In 3 vols. V.1. A common part. England. USA. M: Yurayt. 2017 - 240 p.
10. The criminal law of Russia. General Part / Ed. N.F. Blacksmith-howl and I.M. Heavy. M: Publ. MIRROR-M. 2nd ed. 2017 - 752 p.
11. The Criminal Code of Thailand. Bangkok. 2018 - 200 p.
12. The Criminal Code of Austria. Vein. Legal ed. 2019 - 352 p.
13. Encyclopedia of criminal law. T.6. Participation in crime / Otv. ed. V.B. Raspberry SPb: Publication of Professor Malinin. 2017 - 592 p.
14. Galaktionov E.A. Complicity in a crime. SPb: Publ. St. Petersburg University of the Ministry of Internal Affairs of Russia. 2nd ed. 2017 - 227 p.
15. Criminal law. A common part. Textbook for universities // Otv. ed. AND I. Kozachenko, Z.A. Neznamova. M: Publ. NORM_INFRA. 2018.2 ed. - 576 p.
16. Kozlov A.P. Complicity. SPb.: Legal Center Press. 2001 - 362 p.
17. Model Penal Code. The Recommendation Act for the CIS // Newsletter of the Interparliamentary Assembly of the CIS Member States. 1996. No. 10. Appendix – P. 3-252.
18. Shargorodsky M.D. Some questions of the general doctrine of co-participation // Jurisprudence. 1960. No. 1 - P. 84-97.
19. Pavlov V.G. Qualification of crimes with a special composition. SPb.: Legal Center Press. 2018.2 ed. - 374 p.
20. The course of Soviet criminal law / Ed. ON. Belyaev and M.D. Shargorod-sky. In 5 t.t. T.1. L: Ed. LSU. 2018. (rotary print) - 648 p.
21. Resolution of the Plenum of the Supreme Court of the Russian Federation of April 22, 1992 "On judicial practice in cases of rape" // Collection of rulings of the Plenum of the Supreme Courts of the USSR and the RSFSR (Russian Federation) in criminal matters. M: Spark. 1995 – 599 p.
22. Resolution of the Plenum of the Supreme Court of the Russian Federation dated June 15, 2004 No. 11. "On judicial practice in cases of crimes provided for in Articles 131 and 132 of the Criminal Code of the Russian Federation" // Russian newspaper. 2004. June 29.