

RULING

December 28, 2015

The Appellate Judicial Division for Criminal Cases of the Court of the City of Astana, chaired by Presiding Judge G.Zh. Mergenava, in the presence of Secretary D.B. Atimova, with the participation of the prosecutors of the Prosecutor's Office of the City of Astana, K.D. Kamalbek, T.K. Ryhmanova, the convicted offender, Y.K. Kabduakasov, his counsel for the defense, A.Y. Kaduakasov, the attorney from the Esilskiy Legal Consultant of the City of Astana, G.T. Shaldykava, considered in open court the criminal case submitted in accordance with a protest appeal of the public prosecutor A. Gabdykaparov, and an appeal from the attorney G. Shaldykava against the verdict of District Court No. 2 Saryarka District of Astana of November 9, 2015, in which

Yklas Kayrullinovich Kabduakasov, born on February 19, 1961, a native of Vostochno-Kazakhstanskaya Region, an ethnic Kazakh, citizen of the Republic of Kazakhstan, having a higher education, married, with eight children, residing at the address: 50 Prospekt N.Tlendieva, Apt. 116, Astana, who until his detention worked as the head of security at AstanaStroyInvest, LLP, and had no previous convictions,

was convicted under Article 174 Part 1 of the Criminal Code of the Republic of Kazakhstan (the Criminal Code) to 7 years of imprisonment. In accordance with the requirements of Art. 44 of the Criminal Code in respect of the convicted offender, probationary supervision was set for a period of 7 years. The preventive measure in the form of detention was changed to his own recognizance and good behavior, and he was released from custody from the courtroom. In accordance with Part 3, Article 62 of the Criminal Code, the sentence of supervised release was set off against the sentence imposed on the convicted offender of custodial restraint for the time he was held in detention from August 14 to November 9, 2015 at the rate of one day's detention for one day of supervised release.

The convicted offender was charged with procedural costs in the amount of KZT 149,742.52 for the production of forensic assessments.

The fate of the material evidence was decided in accordance with the requirements of Article 118 of the Code of Criminal Procedure,

ESTABLISHES:

by a verdict of the court that Y.K. Kabduakasov is guilty of deliberate actions aimed at inciting religious discord, insulting the religious feelings of citizens, promoting exclusivity and the superiority of citizens on the basis of their religious affiliation, with the use of literature and other media advocating religious hatred, committed under the following circumstances:

In 2011, Y.K. Kabsuakasov converted to the Protestant denomination of the Christian religion, and with the aim of exploring Protestant ideology participated in preaching, worship, religious rites, as well as other religious ceremonies held in houses of worship of the local religious associations Astana Charitable Mission of Grace, the Local Church of the Seventh-Day Adventists, and the Church of Evangelical Christian Baptists.

In 2013, without obtaining authorization to carry out activities aimed at disseminating religious teachings in the territory of the Republic of Kazakhstan on behalf of religious communities registered in the Republic of Kazakhstan, deliberately distorting the ideology of Protestantism, with the aim of widely disseminating his conceptions among the indigenous population and establishing the superiority of Protestant Christianity, which is not widely practiced in the Kazakh nation, Y.K. Kabsuakasov set out with criminal intent to incite religious hatred and enmity among the population of the indigenous nationality, with the aim of promoting the superiority of the Christian religion and the inferiority of the Islamic religion, organizing sermons, worship, religious ceremonies and meetings in rented apartments and houses of worship of the religious associations The Local Church of Seventh-Day Adventists and Evangelical Christian Baptists.

Since October 4, 2014, to implement his criminal intent, Y.K. Kabsuakasov, while at the places of worship of the local religious organization Church of Evangelical Christian-Baptists located at 16 Brusilovsky St. in Astana, in flagrant violation of the charter of the aforementioned association in carrying out worship, publicly stated: . "біз сатқын Ислам бола алмаймыз" (we cannot be a traitor to Islam), thus promoting the inferiority of the Islamic religion.

Then, realizing his criminal intent, in the period from November 21, 2014 to November 24, 2014, in a rented apartment, with no authorization to hold religious services, located at 3a Kumisbekova Street, Apt. 8 in Astana, during a service, willfully, performed public acts aimed at inciting religious hatred, denigrating religious feelings of citizens and promoting exclusively based on religious beliefs, and the superiority of the Christian religion and inferiority of the Islamic religion.

On February 5, 2015, Y.K. Kabsuakasov continued his criminal activities during religious ceremonies in places of worship of the religious associations The Local Church of Seventh-Day Adventists located at 21 Bogenbay Batyr, Apt. 8 in Astana. During the service, with direct intent aimed at inciting religious hatred, willfully and publicly

he compared with each other the Prophets Muhammad and Jesus Christ, the holy books of the Koran and the Bible, and incorrectly interpreting these books, expressed his negative thoughts in regard to the Islamic religion, and also used religious literature and other media to repeatedly advocate the superiority of the Christian religion and the inferiority of the Islamic religion.

Then, on June 22, 2015, at 38 Esenberlin Street, Apt. 3 and on June 27, 2015 at 4 Y. Duken Uly Street, Apt. 63 in Astana, during services, with direct intent, publicly voiced negative comments directed at denigrating the religious feelings of citizens, promoting exclusivity on the basis of religious beliefs, and the superiority of the Christian religion and inferiority of Islam.

Next, on August 4, 2015, Y.K. Kabsuakasov, continuing his criminal offenses aimed at inciting religious hatred and enmity, and insulting the religious feelings of citizens, while in the midst of a gathering at a rented apartment located at 8 Tashenova St., Apt. 65 in Astana, publicly expressed his negative thoughts against the Islamic faith and the Prophet Muhammad, thereby repeatedly inciting religious hatred and enmity:

According to forensic assessment No. 2308 of July 29, 2015, the statements of Y.K. Kabduakasov contain evidence of inciting religious hatred, discord, statements about the superiority of the Christian religion and the inferiority of the Islamic religion.

On November 24, 2014, Y.K. Kabsuakasov, while in an apartment at 3 Kumisbekova St., Apt. 8 in Astana, during services and religious ceremonies, distributed the religious text Лайықты жауаптар.

According to the conclusions of comprehensive forensic assessment No. 2471 of September 1, 2015 the ideas presented in the book Лайықты жауаптар relate to the Protestant tradition – current of Christianity. In this book there is evidence of inciting national, religious hatred and enmity, statements of exclusivity, the superiority of Isa Masih (Jesus) and the inferiority of the Prophet Mohammed on the basis of their attitude to religion.

According to forensic assessment No. 2629 of September 4, 2015, the statements of Y.K. Kabduakasov contain evidence of religious hatred, enmity, the promotion of the exclusivity of the Christian religion, the inferiority of the Islamic religion, the promotion of the exclusivity, superiority of the Prophet Jesus and inferiority of the Prophet Muhammad.

Not agreeing with the verdict of the court in terms of the classification of the actions of the convicted offender on whom a sentence was imposed, and the resolution of the fate of material evidence, in

a protest appeal, the public prosecutor asks that the sentence be amended in view of the significant violations of criminal procedure law, the incorrect application of criminal statutes, and the inconsistency of the severity of the punishment in light of the criminal offense.

In support of his arguments, the prosecutor pointed out that the court allowed a contradiction between the descriptive and motivation parts of the verdict in classifying the actions of Y.K. Kabduakasov.

Thus, in the descriptive part of the verdict, the court specified that the nature of the criminal offense committed by Kabduakasov was based on duplicity, which corresponded to the charges in full under Part 2, Article 174 of the Criminal Code.

However, in the motivation part of the verdict, the court concluded that there was no indication in the actions of the convicted offender of duplicity, indicating that the defendant's actions were covered by a single intent and united by one purpose, and therefore, found him guilty under Part 1 Article 174 of the Criminal Code.

The court's findings on the absence of duplicity in the actions of Kabduakasov, according to the public prosecutor, are unfounded and contrary to the case file.

In this regard, the prosecutor asks that the action of Y.K. Kabsuakasov be reclassified from Part 1, Article 174 of the Criminal Code to Part 2 of Article 174 of the Criminal Code, for which a sentence be imposed of 6 years imprisonment with deprivation of the right to engage in specified activities for up to 3 years, having imposed a sentence in a general penal colony.

As a circumstance aggravating criminal responsibility and punishment, in accordance with Paragraph 6, Part 1 of Article 54 of the Criminal Code, he requests the recognition of the commission of a criminal offense motivated by religious hatred.

In addition, the prosecutor asks the court to amend the sentence with regard to the resolution of the fate of material evidence, listed in the operative part of the verdict as follows:

"located in the evidence room of the Department of the National Security Agency (DNSA) an HP notebook with charger, in a sealed bag, an Asus notebook with charger, a Panasonic camcorder seized on August 14, 2015, be returned to proper ownership, as these items do not contain any information required as evidence in the case, they are subject to exclusion from the inventory of material evidence and are to be returned to their owners.

In the appeal of the attorney G.T. Shaldykona, she points out that the prosecution has not presented sufficient and reliable evidence that her client is guilty of committing incriminating acts.

On the basis of the decision of the court, the forensic assessments No. 2629 of September 4, 2015, No. 2308 of September 7, 2015, the testimony of the witness M.V. Petrov were put in the verbatim transcripts on the results compiled by the Law Enforcement Support System (LESS).

However, according to the lawyer, this evidence should be declared inadmissible because it was obtained in violation of criminal procedural law.

Forensic assessment No. 2308 of July 7, 2015 raises doubts, because it was prepared over three business days by the forensic experts D.T. Rabilov, who is a specialist in Kazakh philology, and Sh.S. Sisimbaeva, a legal specialist.

The lawyer believes that the expert Sh. Sisimbaeva could not conduct a psychological and philological assessment, since she has no higher philological education while the expert D. Rabilov graduated with a degree in the Kazakh language; moreover, the language of proceedings in this case is Russian, and the forensic assessments are in Russian.

In addition, the complainant drew attention to the fact that the forensic experts went beyond their competence in responding to the legal question indicated in the provision on the appointment of expertise: whether or not the text of the publication contains evidence of inciting national, religious, tribal, social hatred, and whether the statements in the text are insulting towards persons of a particular nation, religion, race, whether the text contains statements about the exclusivity, superiority or inferiority of one religion over another?

In assessments Nos. 2308, 2369 carried out in the Forensic Center of the City of Astana, there is no evidence in the statements made on October 4, 2014, November 21, 2014, June 22, 2014, and August 4, 2015 that Kabduakasov was inciting hatred, but in spite of this, the court did not exclude from the verdict incriminating data.

In assessment No. 2308, the experts cite the example from the transcripts of February 2, 2015, but the statements belong to K.K. Bulathanav, and the recording of November 24, 2014 is of poor quality, and choppy.

In this regard, counsel requests to exclude from the verdict incriminating evidence from October 4, 2014, November 21, 2014, August 4, 2015, February 5, 2014, and November 24, 2014.

In statements of June 22, 2015 and June 27, 2015, Kabduakasov was relaying historical facts, and his words and his statements cannot be seen as a manifestation of conflict between persons of different religions, the superiority of one religion over another, which is confirmed by verbatim transcripts, which suggests that Kabduakasov provided advice, well-wishes to the youth who affiliated themselves with the Christian religion.

The witnesses Koshanov, Ivanov, Musinov, Petrov, Mustafin, Musilov, coming to meetings at Kabduakasov's, asked him loaded questions on religious matters, contrary to the requirements of Article 15 of the Law of the Republic of Kazakhstan on Operative Investigative Activities.

In this connection, counsel G.T. Shaldykava requests that the testimony of these witnesses be examined critically.

The defense believes the assessment No. 2629 of September 4, 2015 should also be recognized as inadmissible because the investigator, in violation of Article 274 of the RK Criminal Code familiarized the counsel for the defense and Kabduakasov with the decree on the appointment of the forensic psychological and philological assessment on September 7, 2015, after the DNSC received the forensic assessment on September 4, 2015.

The expert who conducted this assessment, Manahaev, graduated from the Kazakh-Kuwait University, which is an Islamic University, and therefore, his opinion cannot be objective.

In addition, the complainant draws attention to the violation of procedural law committed by the court of first instance.

Thus, the court, in violation of Article 118 of the RK Criminal Code did not properly resolve the fate of the material evidence through the destruction the HP and Asus, and Aser notebooks with chargers, the Adata Superior hard drive, and the Panasonic camcorder seized on August 14, 2015 by DNSA personnel.

In the introductory part of the verdict, the court did not specify the evidence of the interpreter and court clerk, N. Rayhmanov.

In violation of Article 91 of the RK Criminal Code the court did not clarify to the participants in the process the right to challenge through the court clerk, T.A. Temirkulava.

In violation of the requirements of the Normative Regulations No. 19 of the Armed Forces of the Republic of Kazakhstan of August 15, 2002, the Court incorrectly indicated in the descriptive part of the verdict evidence of duplicity.

In the descriptive and motivation part of the verdict, the Court did not evaluate the testimony of the witnesses Bulatova, Nurlanuly, Kanafina, Amangeldinova, Batyrova, Adilova, Azhgulova, Dzhakisheva, Kanafina T., Tazhibaeva, which indicated that Kabduakasov did not proselytize any religion among them, rejecting the testimony they provided at the pre-trial investigation stage.

The defense believes that the charges against Kabduakasov of inciting religious hatred and enmity are not confirmed by the evidence, are contradicted by the actual facts of the case, and his actions do not constitute a criminal offense under Part 1, Article 174 of the Criminal Code.

The defense believes that Kabduakasov has been convicted for his religious beliefs, that his legitimate rights and interests have been infringed upon, he has been subjected to discrimination based on religion and beliefs in violation of Article 14 of the Constitution of the Republic of Kazakhstan.

In this connection, counsel for the defense G.T. Shaldykava asks that we take into account the assessments of the specialists Ya.F. Trofimov, R.D. Karymsakova, and that her client be acquitted for lack of the elements of a criminal offense under Part 1, Article 174 of the Criminal Code.

As regards the fate of material evidence not related to the criminal case, return to proper ownership the HP, Asus, Aser with chargers.

In addition to the appeal, defense counsel asks the court to amend the sentence in terms of deciding the fate of material evidence located in the evidence room of DNSA of Astana, 2 Transend USB memory cards with capacities of 8 GB and 16 GB, 1 red USB memory card with a capacity of 32 GB, and return to the proper owner, D.K. Pavlenko

Having heard G.T. Shaldykeva, the defense counsel for Y.K. Kabsuakasov, the attorney A.K. Kabduakasova, who supported the arguments of the appeal and opposed the arguments of the protest appeal of the prosecutor, G.K. Rymhanov, who proposed the verdict of the court should be amended in response to the arguments set out in the protest appeal, having opposed the case of the defense, having examined the materials of the case, the contents of the complaint and protest, the Appellate Judicial Division has arrived at the following:

The findings of the court on the culpability of Y.K. Kabsuakasov under Part 1, Article 174 of the Criminal Code are based on a full and objective detailed examination of the evidence that is mutually consistent in its aspects.

The arguments of the defense on the absence in the acts of Kabduakasov of the indicated crime are refuted by the actual circumstances of the case established by the court of first instance.

Thus, the guilt of Kabduakasov in the criminal acts ascribe to him are objectively confirmed by:

- the unswerving and consistent testimony of the witness M.V. Petrov about how in his services Kabduakasov emphasized the exclusiveness of the Christian religion alone, and the inferiority of the Islamic religion, and how he distributed religious books;

- the testimony of the witnesses A.K. Tazhibayev, Zh. Zh. Kurmangalnev, G.A. Amangeldinov, B.T. Kanafin, and B.A. Nurpeisov, who worked as guards for StroyInvest LLP of Astana that the head of security, Kabduakasov, adhered to the Christian religion, and disseminated among the workers religious literature, oppressed those who adhered to the religion of Islam, forced them to accept the Christian religion, and fired from work those who refused without explanation;

- the unswerving testimony of the witnesses B.M. Koshanov, K.Zh. Musinov, M.K. Beisembayev, A.G. Musilov, and T.A. Iskaliev, who explained to the court that they had met with Kabduakasov through their fellow students, and that in religious associations of Astana he conducted a religious ministry. Subsequently, they met with Kabduakasov in rented apartments where Kabduakasov conducted worship, saying that salvation is only in Jesus, and the religion of Islam was invented by Muhammad for

mercenary purposes, and verses from the Koran were completely incomprehensible; he would compare the prayer mat with yoga, saying that the Prophet Muhammad is not a prophet, but is an ordinary person, and distributed religious books during worship;

- the forensic psychological and philological assessments No. 2308 of July 29, 2015 and No. 2629 of September 4, 2015, which found that in the statements of the speaker "Y" there is evidence of incitement to religious hatred, hostility, the promotion of the exclusivity of the Christian religion, statements about the superiority of the Christian religion and inferiority of the Islamic religion.

- the verbatim transcripts of results produced by LESS, heard in the court of first instance and the appellate court, from which it follows that Kabduakasov actively proselytized the Christian religion to listeners, imposing Protestant views, developing a negative image of the sacred writings of Islam, the Koran, expressing the superiority of Christianity and the inferiority of Islam;

- the search record, from which it follows that during the inspection of the residence of Kabduakasov at the address in Astana 50 Tlendiev Street, Apt. 116, the book *Calling for a Great Commission* was also discovered and confiscated, at Y. Kabduakasov's place of employment at the address 5 Kerey Janibek Handar Street, Office 5, Astana, in the office of the deputy director of StroyInvest, LLP Astana, Zh.T. Dzhakisheva, the book *Kindred Live in Abundance!* was discovered and seized, in the office of the head of security, Kabduakasov, the books *Calling for a Great Commission*, *Орталық Азия мен Қазақстанның мәсіхшілік тарихы* were discovered and confiscated, at the place where Y. Kabduakasov conducted religious events at the address 4 Berel, Astana the book *Лайқыты жауаптар* was discovered and seized.

- the record of seizures of August 4, 2015, from which it follows that M.A. Zhunusova, the mother of the witness M. Petrov voluntarily handed over the book called *Лайқыты жауаптар*, which her son M. Petrov had brought from a certain Yklas;

- the conclusions of the forensic comprehensive psychological and philological assessment No. 2471 of September 1, 2015, which, based on the conclusions of the literature that was examined, found evidence of national and religious enmity and hatred, statements of exclusivity, the superiority of Isa Masih (Jesus) and the inferiority of the Prophet Muhammad on the basis of their attitude to religion;

- the testimony of the witness T. Kanafin given in the pre-trial investigation on how he called the dispatch center of the Astana office of the National Security Agency of Kazakhstan and reported the actions of Kabduakasov aimed at inciting hatred among people, between Muslims and Christians to promote the Christian religion among the workers of AstanaStroyInvest, LLP.

An analysis of the evidence examined by the court has allowed the court to come to a proper conclusion about the culpability of Y.K. Kadbuakasov in the commission of a crime under Part 1, Article 174 of the Criminal Code.

The arguments of the defense on the recognition as inadmissible the evidence of the forensic psychological philological assessments Nos. 2308, 2629, the testimony of the witnesses Koshanov, Ivanov, Musinov, Petrov, Mustafin, and Musilov were a matter of discussion by the court of first instance, and they were assessed properly on their merits.

Thus, the Court rightly recognized the conclusions of these forensic assessments as credible and admissible evidence, because the examination conducted in accordance with the requirements of Criminal Procedure Law, the Law of RK No. 240-IV "On Forensic Expert Activities in the Republic of Kazakhstan" by competent experts with specific experience in the field of philological activity.

The forensic expert S.S. Sisimbaeva is a leading specialist of the Central Institute of Forensic Science of Astana, has a higher education, is a qualified forensic expert with a degree in Forensic Psychological and Philological Research and a proven record of forensic work dating to 2010.

The forensic expert D.T. Rabil is a leading expert of the Central Institute of Forensics in Astana, has a higher philological education, and forensic expert qualification in the specialty forensic psychological and philological research, with a proven record of forensic work of more than 8 years.

The arguments of the defense about the exclusion of the evidence of the forensic assessment No. 2629 of September 4, 2015, on the grounds that the proceedings in the criminal case were carried out in Russian and the assessment was carried out in the state language, the expert Manahan graduated from the Kazakh-Kuwait University, which is an Islamic University, and therefore, his opinion cannot be objective shall be left without satisfaction.

The court of first instance gave a proper legal evaluation of the judicial assessment provided by Manahaev, since in the case file there is a translation into Russian of the judicial assessment, the expert B.B. Manahan is a leading expert of the Central Institute of Forensic Science of Astana, has a higher education in religion and philology, is a forensic expert qualified in the field of forensic psychological and philological research, a forensic specialist in religious research, with a proven record of forensic work of more than 8 years.

Thus, the Appellate Judicial Division, in agreement with the findings of the court, considers that all of the forensic assessments executed in the framework of the pre-trial investigations are objective, motivated and reliable. There are no grounds for not trusting the conclusions of the forensic specialists, as they were

warned about criminal liability for knowingly giving false conclusions.

In addition, when questioned at the hearing, the expert D.T. Rabil explained that assessment No. 2308 of July 29, 2015 was held over three [*Sic! days*], since according to the norms of the Criminal Procedure Code, the time span of the assessment shall not exceed 30 days. The assessment was carried out according to the Procedure for Psychological and Philological Assessments of 2008, which is listed in the state register of forensic expertise, following this Procedure, the linguistic specialist is qualified to decide the legal question of whether the text of the publication contains evidence of inciting national, religious, racial and social hatred and whether or not there are statements in the text of a denigrating nature in relation to persons of a particular nation, religion, race, statements of exclusivity, superiority or inferiority of one religion over another.

In this regard, the defense's arguments that the experts have gone beyond their competence in their responses to the legal question are invalid.

Also not subject to satisfaction are the arguments of counsel for the exclusion of the evidence of the witnesses Koshanov, Ivanov, Musinov, Petrov, Mustafin, Musilov, as it was obtained in violation of Article 15 of the Law of the Republic of Kazakhstan "On Operative-Search Activity," prohibiting incitement, and the provocation of the commission of crimes, since the fact of the provocation on the part of these witnesses on inciting Kabduakasov to commit a crime is not evident.

The court has reliably determined that the convicted defendant, before meeting with the witnesses, was actively engaged in propagandistic activities in a community of indigenous people aimed at disseminating the teachings of the Christian religion, and the establishment of its superiority and the inferiority of the Islamic religion.

In this regard, the court rightly took as the basis for the verdict the above testimony of witnesses who unswervingly and consistently over the pre-trial investigation and the court hearing insisted that Kabduakasov publicly distributed religious ideology aimed at inciting religious hatred.

Their statements are consistent with the case file, examined in the trial.

Thus, from the videos viewed in the courts of first and appellate instances, it follows that in Kabduakasov's statements, we can trace elements of a negative attitude towards Islam, and the superiority of the Christian religion.

For example, in an episode dating to October 4, 2014, despite the fact that Kabduakasov is in the audience while Deacon K. Dyakonov was conducting divine service among the parishioners, Kabduakasov expresses his opinion about Islam in the following phrase: "Біз саткын Ислам бела алмаймыз. Никак", which testifies to his

negative attitude towards Islam and his imposition of his beliefs on the indigenous.

Despite the fact that the transcript of the crime scene has not been the subject of inquiry in the conclusions of assessment No. 2308 of July 29, 2015, the Appellate Judicial Division considers that it is one of the proofs of the crimes committed by Kabduakasov, and therefore the Appellate Judicial Division does not find reason for its exclusion from the verdict.

However, the criminal episode of February 5, 2015 is subject to exclusion, since in the investigated statement, the speech is that of K.K. Bulathanav, not Y. Kabduakasov.

The criminal episodes of June 22, 2015, June 27, 2015, November 24, 2014, and August 4, 2015, testify to the public dissemination by Kabduakasov of his ideas aimed at inciting religious hatred, denigrating and insulting Muslim believers, promoting the exclusivity of the Christian religion and the inferiority of Islam.

This is evidenced by the results of verbatim transcripts from LESS that contain such statements by Kabduakasov as "Исаны ғана тындау керек, Исаға ғана сену керек Мухаммед қалай келді әмірге и Иса қалай келді әмірге и Иса қалай келді. Иса через святого духа келді Мариям пәк кыздан никакой күнә жасаған жок. Ал ана Мухаммед как хорошая память болды, біз сиякты грешник болды, уйленді свои какие — то расчет были, откуда мы знаем этот грешник А этот чистый Иса, күдайдын рухынан тұған, без отца родился ... " And so on.

Arguments of the defense for the exclusion of the above criminal episodes from the charges against, Kabduakasov are not subject to satisfaction because, according to the materials of LESS received on June 22, 2015, June 27, 2015, November 24, 2014, August 4, 2015, October 14, 2014, Kabduaksov's culpability in the charges has been completely proved. There were no violations of criminal procedure law in the production of LESS by the prosecuting agency.

The Appellate Judicial Division finds without merit the claim of the defense that criminal episodes of August 4, 2015 and October 4, 2014 were not the subject of forensic studies, and therefore cannot serve as a basis for the verdict,

In accordance with Para. 11 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 16 of November 26, 2014, "On Forensics in Criminal Cases", forensic evidence must be examined and assessed. In the examination of forensic assessment, it should be borne in mind that it does not have any advantages over other evidence and is a previously established force subject to analysis,

comparison and assessment in conjunction with other evidence in the case.

In this connection, the Appellate Judicial Division does not find grounds for the exclusion of these criminal episodes from the court verdict.

The court, reliably ascertaining the facts of the case, gave a proper legal assessment of the actions of the convicted person, qualifying them under Part 1, Article 174 of the Criminal Code of the Republic of Kazakhstan as an ongoing crime, since the actions of Kabduakasov in all of the criminal episodes are covered by a single intent, aimed at inciting religious hatred, insulting the religious feelings citizens, promoting the exclusivity and superiority of citizens on the basis of their attitude to religious affiliations with the use of literature and other media promoting religious hostility.

The intent of the convicted person, aimed at actions intended to incite religious hatred, is evidenced by the fact that, without the authority to distribute religious teachings, without being involved in a religious association, with no spiritual education, he actively promoted among indigenous persons the superiority of the Christian religion and inferiority of the Islamic religion, he spread among the young religious books containing evidence of inciting ethnic or religious enmity and hatred (the book Лайқыты жауаптар).

The arguments of the prosecutor and the defense about the presence in the verdict of a contradiction between the descriptive and motivation part in the legal assessment of the actions of the convicted offender are reasonable.

However, the Appellate Judicial Division believes that on the whole, the actions of Kabduakasov are classified correctly as falling under Part 1, Article 174 the Criminal Code on the above grounds.

The reference to duplicity in the commission of a crime by Kabduakoasov in the descriptive part of the verdict and the classification of his actions under Part 2, Article 174 of the Criminal Code is subject to exclusion as erroneous.

In this regard, the protest appeal of the public prosecutor in regards to the improper application of criminal law is not subject to satisfaction, since the arguments indicated in the protest are not grounds for amending the verdict provided for in Article 442 of the Criminal Procedure Code of Kazakhstan.

However, the arguments of the public prosecutor regarding the punishment designated for the convicted offender Kabduakasov not conforming to the gravity of his crimes are subject to satisfaction.

The Court without regard to the requirements of Article 52 of the Criminal Code of the Republic sentenced Kabduakasov to punishment in the form of a restriction of liberty, not in correspondence to the gravity of the crime committed against the peace and security of humankind, aimed at the incitement of religious enmity and hatred among the population of Kazakhstan of indigenous nationality.

The Appellate Judicial Division finds as fair and sufficient, taking into account mitigating circumstances and the absence of aggravating circumstances, the personality of the convicted offender, his marital status, his eight children, a sentence of imprisonment for a minimum period of 2 years.

In this case, there are no grounds for recognition as circumstances warranting responsibility and punishment provided for in Paragraph 6, Part 1, Article 54 of the Criminal Code – the commission of a criminal offense motivated by religious hatred, since this element is covered by the disposition of Article 174 of the Criminal Code.

The arguments of the defense and prosecution regarding the resolution of the fate of the material evidence are subject to satisfaction.

According to Part 1, Article 118 of the Criminal Code, property is recognized as material evidence if there is reason to believe that it was the instrument of a criminal offense or if it was an object used in a socially-dangerous infringement or if it retains the traces of a criminal offense.

In this regard, according to Part 3 of this provision of the law, an instrument of a criminal offense is subject to confiscation by the courts or transferred to a relevant institution or destroyed.

From the record of the inspection of objects and documents of August 20, 2015 seized during the searches on August 14, 2015, it follows that the inspected HP and Asus notebooks, the Panasonic video camera, as well as the 2 Transend USB flash cards with capacities of 8 GB and 16 GB, 1 red USB flash card with a capacity of 32 GB did not contain files of a destructive nature.

Thus, these items should be excluded from the inventory of material evidence and returned to their proper owners: Asus laptop with chargers, Panasonic camcorder, return to Timir Batyrovich Baybatyrav, HP laptop return to Gulyaym Khamitovna Vsenovoy, 2 Transend USB flash cards with capacities of 8 GB and 16 GB, 1 red USB flash card with a capacity of 32 GB return to the proper ownership of Daryagul Kurmashevna Pavlenko

Under such circumstances, the Appellate Judicial Division believes that the verdict against Y.K. Kabsuakasov is subject to change.

As regards the sentence, the verdict should be set aside, with the imposition of a new sentence for Kabduakasov under Part 1, Article 174 of the Criminal Code of 2 years imprisonment in a general penal colony; the rest of the sentence is upheld, the protest appeal of the public prosecutor A. Gabdykaparov and the appeal of the lawyer G.T. Shaldykavova are subject to satisfaction in part.

Based on the foregoing, guided by Article, 431 Part 1, Paragraph 2, 443, 444 of the Code of Criminal Procedure, the Appellate Judicial Division

HEREBY RULES

To amend the verdict of District Court No. 2 of Saryarka District of Astana on November 9, 2015 in relation to Yklas Kayrullinovich Kabduakasov:

To set aside the sentence imposed by the court of 7 years of a restriction of freedom, having imposed on Y.K. Kabduakov under Part 1, Article 174 of the Criminal Code a sentence of two (2) years of imprisonment in a general penal colony.

To amend the preventive measure against Y.K. Kabduakasov in the form of recognizance not to leave and good behavior to change, and take him into custody in the courtroom.

To calculate the term of punishment from December 28, 2015, set off against the sentence the time spent in custody from August 14 to November 9, 2015.

To exclude from the descriptive part of the verdict the specification of the court on duplicity in the commission of a crime by Y.K. Kabduakasov and the classification of his actions under Part 2 Article 174 of the Criminal Code as erroneous.

To exclude from the verdict the criminal episode of February 5, 2015 as unverified by the court session.

To exclude from the inventory of material evidence the following items: HP and Asus notebooks, Panasonic video camera, 2 Transend USB flash cards with capacities of 8 GB and 16 GB, 1 red USB flash card with a capacity of 32 GB; return the Asus laptop with chargers, Panasonic camcorder, return to Timir Batyrovich Baybatyrav, HP laptop return to Gulyaym Khamitovna Vsenovoy, 2 Transend USB flash cards with capacities of 8 GB and 16 GB, 1 red USB flash card with a capacity of 32 GB return to the proper ownership of Daryagul Kurmashevna Pavlenko .

The rest of the verdict upheld.

To partially satisfy the protest appeal of the public prosecutor A. Gabdykaparova and the appeal of the lawyer G. Shaldykava.

The decision enters into force upon its disclosure, and may be challenged or appealed in the cassation division of the judicial board of the court of Astana given a decline in the convicted offender within 6 months on the accession of the sentence into legal force, and for reasons entailing improving the situation of the convicted offender, the term is not limited.

Presiding
Judge
True copy

G. Dz. Mergenava
G. Dz. Mergenava

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Numbered and bound

On _____ sheets

Judge G.Dz. Mergenava

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