

CASE LAW NO. 48/2021/AL

On the mitigating circumstance of criminal liability "returning illicit profits"

Approved by the Judicial Council of the Supreme People's Court on November 25th, 2021, and published under Decision No. 594/QĐ-CA dated December 31st, 2021, by the Chief Justice of the Supreme People's Court.

Source of the Case Law:

The Cassation Decision No. 03/2020/HS-GĐT dated April 22nd, 2020, by the Judicial Council of the Supreme People's Court regarding the case of "Gambling" and "Organizing Gambling" against the defendants Hồ Công Nhật Q, Hồ Việt H, and Nguyễn Mộng V.

Location of the Case Law's Content:

Paragraph 3 of the "Court's Opinion" section.

Summary of the Case Law:

- Case Background:

The defendants returned illicit profits obtained from criminal activities.

- Legal Resolution:

In this case, the Court must determine that the defendants are entitled to a mitigating circumstance of criminal liability according to Clause 2, Article 46 of the 1999 Penal Code (corresponding to Clause 2, Article 51 of the 2015 Penal Code, amended and supplemented in 2017).

Relevant Legal Provisions:

- Clause 2, Article 46 of the 1999 Penal Code (corresponding to Clause 2, Article 51 of the 2015 Penal Code, amended and supplemented in 2017);

- Point c, Section 5 of Resolution 01/2000/NQ-HĐTP dated August 4th, 2000, guiding the application of several provisions in the “General” part of the 1999 Penal Code.

Keywords:

"Returning illicit profits"; "Mitigating circumstance of criminal liability"; "Gambling"; "Organizing gambling".

CASE DETAILS

On September 20th, 2016, the Criminal Investigation Agency of the Police of T Province apprehended multiple individuals implicated in orchestrating large-scale illegal online gambling operations involving numerous participants. The modus operandi employed by the group entailed acquiring betting accounts on the IBET platform, subdividing them into multiple sub-accounts, and distributing these among accomplices to facilitate unlawful online gambling activities. Specifically, these activities pertained to illicit football betting conducted on a foreign website featuring an English interface and utilizing a virtual currency denominated as "dollars," with an agreed exchange rate to Vietnamese dong between the house and account holders.

The defendants utilized internet-enabled computers, laptops, and Wi-Fi-enabled mobile devices as instrumentalities for organizing and participating in the illegal online gambling ventures. Payments for wins and losses incurred from football wagers were settled in Vietnamese dong, either directly or through trusted intermediaries. The house compensated players via a commission structure termed the Gross Commission. In pursuit of financial gain, the organizers augmented the exchange rate of one dollar above the rate they themselves obtained, thereby pooling funds with the house for gambling purposes. Moreover, in an effort to incentivize players, the organizers elevated the commission rate for account holders to two or three times the standard amount.

Specific Actions of the Defendants Hồ Công Nhật Q, Hồ Viết H, and Nguyễn Mộng V are detailed as follows:

1. Regarding Hồ Công Nhật Q:

In February 2016, Q acknowledged receiving the football betting account TVK2 from an individual identified as P (full name and address unknown) on the IBET network, with a betting amount of 3,000,000 dollars. P and Q agreed on an exchange rate of one dollar equating to VND 5,000, with P compensating Q through the Gross Comm section. Subsequently, Q subdivided the TVK2 account into 19 sub-accounts, each valued at 5,000 dollars, which were distributed to various individuals for the purposes of gambling or facilitating gambling. Notably, Q allocated 03 accounts to Nguyễn Mộng V, 03 accounts to Hồ Viết H, and several others to different individuals, retaining 02 accounts for personal use and issuing additional sub-accounts as needed.

During the investigation, authorities obtained detailed information regarding 07 specific accounts: TVK204, TVK20B, TVK20K, TVK20N, TVK20P, TVK219, and TVK20S.

1.1. Organizing Gambling Activities:

Q provided Hồ Viết H with the accounts TVK20B, TVK204, and TVK20K, each assigned respective exchange rates of VND 10,000 per dollar for TVK204, and VND 7,000 per dollar for TVK20B and TVK20K. From June to September 2016, the betting amounts on these accounts were as follows:

- TVK204: 116,877 dollars.
- TVK20B: 261,819 dollars.
- TVK20K: 131,060 dollars.

Q also provided Nguyễn Mộng V with the accounts TVK20N, TVK20P, and TVK20S, set at exchange rates of VND 7,000 per dollar for TVK20N and

TVK20P, and VND 6,500 per dollar for TVK20S. During the same period, the betting amounts were:

- TVK20N: 28,583 dollars.

- TVK20P: 152,542 dollars.

- TVK20S: 247,592 dollars.

Q additionally provided an individual identified as Q1 (residing in the United States) with the account TVK219 at an exchange rate of VND 6,000 per dollar. From June to September 2016, this account accumulated a betting amount of 96,404 dollars.

In total, Q is criminally accountable for the offense of "Organizing gambling" across the seven accounts as follows:

$(116,877 \text{ dollars} + 261,819 \text{ dollars} + 131,060 \text{ dollars} + 28,583 \text{ dollars} + 152,542 \text{ dollars} + 247,592 \text{ dollars} + 96,404 \text{ dollars}) \times \text{VND } 5,000 \text{ per dollar} = \text{VND } 5,174,385,000.$

Q received a commission totaling VND 8,759,400 through Gross Comm. Q disbursed commissions of VND 22,713,030 to H, VND 10,533,887 to V, and VND 2,656,080 to Q1, amounting to a total disbursement of VND 35,902,997 to subordinates and players.

1.2. Gambling Activities:

Based on comprehensive documentation, summary reports, and confessions from the defendants, Q augmented the exchange rate above the received rate for gambling purposes, detailed as follows:

Portion allocated to H (including bets placed and losses to be covered):

- Account TVK204 $[(116,877 \text{ dollars} + 43,451.05 \text{ dollars}) \times (\text{VND } 10,000 - \text{VND } 5,000)] = \text{VND } 801,640,250.$

- Account TVK20B [(261,819 dollars + 98,676.27 dollars) x (VND 7,000 – VND 5,000)] = VND 720,990,540.

- Account TVK20K [(131,060 dollars + 41,797.44 dollars) x (VND 7,000 – VND 5,000)] = VND 345,714,880.

Portion allocated to V:

- Account TVK20N [(28,583 dollars + 6,617.7 dollars) x (VND 7,000 – VND 5,000)] = VND 70,401,400.

- Account TVK20P [(152,542 dollars + 61,009.59 dollars) x (VND 7,000 – VND 5,000)] = VND 427,103,180.

- Account TVK20S [(247,592 dollars + 99,584.13 dollars) x (VND 6,500 – VND 5,000)] = VND 520,764,195.

Portion allocated to Q1:

- Account TVK219 [(96,404 dollars + 42,802.9 dollars) x (VND 6,000 – VND 5,000)] = VND 139,206,900.

In total, Q utilized VND 3,025,821,385 for gambling activities on the TVK2 account. This encompasses 74 instances of bets and losses exceeding VND 5,000,000 per instance, totaling VND 692,170,780. An additional 13,480 instances involved bets and losses below VND 5,000,000 per instance, totaling VND 2,333,650,605, and thus do not incur criminal liability. Through these gambling activities, Q achieved winnings amounting to VND 884,599,190 across the seven accounts, with losses totaling VND 825,636,385, resulting in a net profit of VND 58,962,805.

2. Regarding Hồ Viết H:

Hồ Viết H received the accounts TVK204 (1 dollar = VND 10,000), TVK20B (1 dollar = VND 7,000), and TVK20K (1 dollar = VND 7,000) from Hồ Công Nhật Q. Subsequently, H provided the TVK20B account to Châu Anh

T at an exchange rate of 1 dollar = VND 12,000, tasking T with creating multiple sub-accounts for players. H compensated T at a rate of Gross Comm x 4. For the TVK204 account, H established 5 sub-accounts and an additional 13 sub-accounts for direct gambling. Similarly, for the TVK20K account, H set up 3 sub-accounts and an additional 12 sub-accounts for direct gambling.

2.1. Organizing Gambling Activities:

Based on detailed documentation, summary reports, and statements from the defendants, H's organization of gambling activities unfolded as follows: Upon receiving the TVK20B account at an exchange rate of VND 7,000 per dollar, H transferred it to Châu Anh T. From March 1st, 2016, to September 20th, 2016, the total betting amount on the TVK20B account amounted to 261,819 dollars x VND 7,000 = VND 1,832,733,000. H received a commission of VND 11,279,310 from Q, and disbursed VND 25,781,280 to T as commission, resulting in no net profit from organizing gambling.

2.2. Gambling Activities:

- Gambling Activities via Châu Anh T:

Having provided the TVK20B account to T at an exchange rate of VND 12,000 per dollar, H pooled funds with the house to engage in gambling with subordinates at VND 5,000 per dollar. Therefore, the amount H used for gambling on this account was [(261,819 dollars + 98,676.27 dollars (H's losses)] x VND 5,000 = VND 1,802,476,350. This included 61 instances of bets and losses exceeding VND 5,000,000 per instance, totaling VND 643,134,000. An additional 7,381 instances involved bets and losses below VND 5,000,000 per instance, totaling VND 1,159,342,350. H won VND 507,499,700 on this account and lost VND 493,381,350, resulting in a profit of VND 14,118,350.

- Gambling Activities with the House:

Upon receiving the TVK204 and TVK20K accounts, H created multiple sub-accounts for direct gambling with the house. From March 1, 2016, to September 20, 2016, the total betting amount on these two accounts was 247,937 dollars (TVK204: 116,877 dollars, TVK20K: 131,060 dollars). H's winnings on these accounts totaled 85,248.49 dollars (TVK204: 43,451.05 dollars, TVK20K: 41,797.44 dollars). Thus, H engaged in gambling on the TVK204 account as follows: $(116,877 \text{ dollars} + 43,451.05 \text{ dollars}) \times \text{VND } 10,000 = \text{VND } 1,603,280,500$, and on the TVK20K account as follows: $(131,060 \text{ dollars} + 41,797.44 \text{ dollars}) \times \text{VND } 7,000 = \text{VND } 1,210,002,080$.

Across these accounts, there were 115 instances of bets and winnings exceeding VND 5,000,000 per instance, totaling VND 1,282,290,840. An additional 3,187 instances involved bets and winnings below VND 5,000,000 per instance, totaling VND 1,530,991,740. H's total winnings from gambling on these two accounts amounted to VND 727,092,580, while losses totaled VND 772,741,000, resulting in no net profit from gambling.

In total, H bears criminal responsibility for gambling activities on these three accounts totaling VND 1,925,424,840. The remaining 10,568 instances, involving betting amounts totaling VND 2,690,334,090, were not subject to criminal liability as each instance involved amounts below VND 5,000,000. H received a commission of VND 11,433,720 from gambling activities.

3. Regarding Nguyễn Mộng V:

Nguyễn Mộng V received three accounts from Hồ Công Nhật Q: TVK20N (1 dollar = 7,000 VND), TVK20P (1 dollar = 7,000 VND), and TVK20S (1 dollar = 6,500 VND). V subsequently reassigned the TVK20P account to Nguyễn Văn B, compensating B with a 1% commission based on the total amount wagered on the account. For the remaining accounts, V created sub-accounts which were further subdivided into 10 individual segments for direct gambling activities with the house.

3.1. Gambling Organization Activities:

V received the TVK20P account from Q at an exchange rate of 1 dollar = 7,000 VND. From September 1, 2016, to September 20, 2016, the total amount wagered on the TVK20P account under V's management was 152,542 dollars. Consequently, V is criminally liable for organizing gambling activities amounting to VND 1,067,794,000. V received a commission of VND 5,947,200, while disbursing VND 12,203,360 as commission to B, resulting in no profit from this activity for V.

3.2. Gambling Activities:

- Gambling Activities via Nguyễn Văn B:

Upon providing B with the TVK20P account at an exchange rate of 1 dollar = 8,000 VND, V engaged in gambling with the house at 1,000 VND per dollar. The total amount wagered by V on this account was VND 213,551,590, with no individual bets exceeding VND 5,000,000. V's total winnings amounted to VND 1,374,920.

- Gambling Activities with the House:

After receiving the TVK20N and TVK20S accounts, V established 10 individual segments for direct gambling activities with the upper tier. From August 1st, 2016, to September 20th, 2016, the total amount wagered on the TVK20N account was 28,583 dollars, with V winning 6,617.7 dollars and losing 9,617 dollars. Consequently, the total amount wagered on this account was VND 246,404,900. On the TVK20S account, the total amount wagered was 247,592 dollars, with V winning 99,584.13 dollars and losing 112,753 dollars, resulting in a total amount wagered of VND 2,256,644,845.

Thus, the cumulative amount V wagered on these two accounts was VND 2,503,049,745. This included 173 instances where bets and winnings exceeded VND 5,000,000 per bet, totaling VND 1,938,520,070, and 286 instances where

bets and winnings were below VND 5,000,000, totaling VND 564,529,675. V's total winnings on these two accounts amounted to VND 693,620,745, while total losses reached VND 800,213,500, resulting in no net profit for V. V received a commission of VND 4,586,688 from Q for these two accounts.

In total, V is criminally liable for gambling activities on these three accounts amounting to VND 1,938,520,070. The remaining 1,246 instances, totaling VND 778,801,265, do not incur criminal liability as each instance involved amounts below VND 5,000,000.

In the First-instance Criminal Judgment No. 04/2018/HSST dated January 16th, 2018, the People's Court of Thừa Thiên Huế decided:

Applying Clause 1, Article 249; Points b, p Clause 1, Article 46 of the 1999 Penal Code, Hồ Công Nhật Q was sentenced to 01 year and 03 months imprisonment for "Organizing Gambling." Applying Point b, Clause 2, Article 248; Points b, o, p Clause 1, Article 46; Article 47 of the 1999 Penal Code, Hồ Công Nhật Q was sentenced to 10 months imprisonment for "Gambling."

Applying Clause 1, Article 249; Points b, p Clause 1, Clause 2, Article 46; Article 47 of the 1999 Penal Code, Hồ Việt H was sentenced to 09 months imprisonment for "Organizing Gambling." Applying Point b, Clause 2, Article 248; Points b, o, p Clause 1, Clause 2, Article 46, Article 47 of the 1999 Penal Code, Hồ Việt H was sentenced to 06 months imprisonment for "Gambling."

Applying Clause 1, Article 249; Points b, p Clause 1, Clause 2, Article 46; Article 47 of the 1999 Penal Code, Nguyễn Mộng V was sentenced to 06 months imprisonment for "Organizing Gambling." Applying Point b, Clause 2, Article 248; Points b, o, p Clause 1, Clause 2, Article 46; Article 47 of the 1999 Penal Code, Nguyễn Mộng V was sentenced to 06 months imprisonment for "Gambling."

Applying Article 50 of the Penal Code, the total penalties for the above defendants are: Q was sentenced to a total of 02 years and 01 month

imprisonment, H to a total of 01 year and 03 months imprisonment, and V to a total of 01 year imprisonment.

On January 30th, 2018, Hồ Công Nhật Q, Hồ Viết H, and Nguyễn Mộng V appealed for suspended sentences.

In the Appellate Criminal Judgment No. 158/2018/HS-PT dated June 27th, 2018, the High People's Court in Đà Nẵng decided to:

Apply Clause 1, Article 249; Point b, Clause 2, Article 248; Points b, o, p Clause 1, Clause 2, Article 46; Article 47; Article 50 of the 1999 Penal Code, and sentenced:

Hồ Công Nhật Q to 09 months imprisonment for “Organizing Gambling” and 06 months imprisonment for “Gambling.” The total sentence is 15 months imprisonment.

Hồ Viết H to 05 months imprisonment for “Organizing Gambling” and 04 months imprisonment for “Gambling.” The total sentence is 09 months imprisonment.

Nguyễn Mộng V to 04 months and 19 days imprisonment for “Organizing Gambling” and 04 months imprisonment for “Gambling.” The total sentence is 08 months and 19 days imprisonment.

In the Decision No. 03/2019/KN-HS dated June 19th, 2019, the Chief Justice of the Supreme People’s Court lodged a protest against the Appellate Criminal Judgment No. 158/2018/HS-PT dated June 27th, 2018, of the High People’s Court in Đà Nẵng; requesting the Judicial Council of the Supreme People’s Court to conduct a cassation trial, vacate the above Appellate Criminal Judgment and the First-instance Criminal Judgment No. 04/2018/HSST dated January 16th, 2018, of the People’s Court of Thừa Thiên Huế Province regarding the main penalties and the total penalties for Hồ Công Nhật Q, Hồ Viết H, and Nguyễn Mộng V; and remand the case to the People’s Court of

Thừa Thiên Huế Province for a new first-instance trial according to the law.

At the cassation hearing, the representative of the Supreme People's Procuracy concurred with the Appeal Decision of the Chief Justice of the Supreme People's Court.

COURT'S OPINION:

[1] In the First-instance Criminal Judgment No. 04/2018/HSST dated January 16th, 2018, the People's Court of Thừa Thiên Huế adjudicated that Hồ Công Nhật Q received a football betting account from the IBET website and subsequently divided it into 19 accounts. Q retained 02 accounts and distributed the remaining accounts to Hồ Việt H, Nguyễn Mộng V, and other individuals for the purpose of organizing and engaging in gambling activities. Hồ Việt H and Nguyễn Mộng V each received 03 accounts, retaining 02 accounts each and reassigning 01 account respectively to Châu Anh T and Nguyễn Văn B for similar activities. Q was held criminally responsible for organizing gambling amounting to VND 5,174,385,000; H for VND 1,832,733,000; and V for VND 1,067,794,000. These actions were classified under the "large scale" category as per Clause 1, Article 249 of the 1999 Penal Code, carrying a sentencing range of 01 to 05 years of imprisonment.

[2] From the retained accounts, H and V established multiple sub-accounts and directly engaged in gambling with the house. Additionally, Q, H, and V inflated the conversion rate by 01 dollar above the initial rate during distribution, leading to gambling activities with participants. Based on the investigation agency's records, Q was found criminally responsible for 74 instances where bet amounts and losses exceeded VND 5,000,000 per instance, totaling VND 692,170,780; H for 176 instances totaling VND 1,925,424,840; and V for 173 instances totaling VND 1,938,520,070. The defendants Q, H, and V faced charges of "Gambling" under Clause 2, Article 248 of the Penal Code, categorized as a serious crime with a sentencing range of 02 to 07 years of imprisonment.

[3] During the trial, the first-instance court incorrectly applied Point b of Clause 1, Article 46 of the Penal Code, as returning illicit profits does not qualify as a mitigating circumstance under this provision but rather under Clause 2, Article 46. Furthermore, the court erroneously considered the defendants' confessions as voluntary under Point o of Clause 1, Article 46, despite Q and V being arrested under emergency warrants for illegal internet gambling, with Q confessing after his arrest. H was prosecuted for similar charges on October 4, 2016, and was also detained. The confessions made during the investigation were merely honest declarations, not voluntary confessions. Additionally, the court failed to apply the aggravating circumstance of "committing the crime multiple times" under Point g of Clause 1, Article 48 of the Penal Code to Q, H, and V. Therefore, the application of Article 47 of the Penal Code by the first-instance court, sentencing Q to 01 year and 03 months of imprisonment, H to 09 months, and V to 06 months for "Organizing Gambling," and sentencing Q to 10 months, H to 06 months, and V to 06 months for "Gambling" (below the minimum penalty range), was unduly lenient and did not uphold the strictness of the law.

[4] The appellate court failed to identify the errors of the first-instance court and placed excessive emphasis on certain mitigating circumstances already considered, such as the defendants' restitution of illicit profits, their roles as primary breadwinners, and their responsibilities towards young children. Moreover, the appellate court introduced additional mitigating factors, such as Q's full restitution of illicit profits and his father's community contributions, which were not substantial mitigating factors justifying reduced sentences for the defendants. This constituted a serious error in the application of the law, failing to align with the gravity of the offense and the defendants' roles, thereby falling short of the requirements for combating and preventing such criminal activities. In light of the foregoing, pursuant to Articles 382, 388, and 391 of the 2015 Criminal Procedure Code;

IT IS DECIDED:

1. To accept the Appeal Decision No. 03/2019/KN-HS dated June 19th, 2019, of the Chief Justice of the Supreme People's Court.

2. To vacate the Appellate Criminal Judgment No. 158/2018/HS-PT dated June 27th, 2018, of the High People's Court in Đà Nẵng and the First-instance Criminal Judgment No. 04/2018/HSST dated January 16th, 2018, of the People's Court of Thừa Thiên Huế Province regarding the main penalties and the total penalties for Hồ Công Nhật Q, Hồ Việt H, and Nguyễn Mộng V; and to remand the case to the People's Court of Thừa Thiên Huế Province for a new first-instance trial in accordance with the law.

CONTENT OF THE CASE LAW:

“[3] During the trial, the first-instance court incorrectly applied Point b of Clause 1, Article 46 of the Penal Code, as returning illicit profits does not qualify as a mitigating circumstance under this provision but rather under Clause 2, Article 46...”