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PRACTICE OF IMPOSING CRIMINAL SENTENCES OUTSIDE THE PUBLIC PROSECUTOR'S INDICTMENT IN NARCOTICS CASES

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Abstract

The establishment of the Criminal Procedure Code as a replacement for the HIR, raises hopes for a more humane criminal law enforcement, and can truly lead to the material truth of a criminal event. The Criminal Procedure Code has been running for more than 40 years, on the other hand the dynamics of human life continue to run so that it seems that the Criminal Procedure Code no longer answers the problems that arise today. In narcotics cases, situations are often found where the defendant is not charged with Article 127 of the Narcotics Law, but in the trial facts it is revealed that the defendant is purely a drug abuser. Meanwhile, Article 182 paragraph (4) of the Criminal Procedure Code requires the judge to impose a sentence according to the public prosecutor's indictment. To overcome this, a Circular Letter has been issued which allows judges to impose a sentence below the special minimum, and still decide according to the public prosecutor's indictment. However, in practice, namely the cassation decision Number 1832 K / Pid.Sus / 2023, it does not heed the provisions of Article 182 paragraph (4) of the Criminal Procedure Code, and the provisions of the Circular Letter, by imposing the defendant with Article 127 of the Narcotics Law, even though the article was not charged. This study aims to determine how the judge's considerations in imposing a sentence outside the indictment in the cassation decision Number 1832 K / Pid.Sus / 2023. This research is a normative legal research, the legal materials used in this study consist of primary, secondary, and tertiary. Based on the results of the study, it is known that the basis for the judge's considerations is the existence of jurisprudence that allows the judge to decide outside the indictment as long as the article applied is similar to the article charged, and the threat of punishment is lighter. The act of deciding outside the indictment is part of the judge's efforts to explore legal values, truth, and the benefits of law in order to realize justice.

Keywords: ***Criminal Procedure Law, Indictment, Narcotics***

1. Introduction

The birth of the Criminal Procedure Code (KUHAP), there is hope that law enforcement in Indonesia will take place in a humane manner and respect human values more. All law enforcement officers from the Police, Prosecutors, Courts, to Correctional Institutions both at the central and regional levels are expected to be able to internalize and implement human rights in upholding justice, in accordance with the methods that have been regulated in the KUHAP itself. Protection of human rights is a direct mandate of the 1945 Constitution of the Republic of Indonesia. The state is obliged to uphold human rights and guarantee citizens who have equal standing in the eyes of the law and government. In addition, the state is also obliged to uphold the law and government without exception. On that basis, in the context of criminal law enforcement, the state has made a special law regulating criminal procedure law to replace HIR (Herziene Indonesisch Reglement) because it lacks enthusiasm in upholding human rights in criminal law enforcement.

However, the enactment of the Criminal Procedure Code does not automatically resolve the problems of criminal procedure law in Indonesia. Moreover, the Criminal Procedure Code has been in effect in Indonesia for 43 years, and during that time the dynamics of Indonesian society have continued to run, even very quickly, so that the Criminal Procedure Code is no longer able to answer the problems that arise in practice. One of them is related to the provisions of Article 182 paragraph (4) of the Criminal Procedure Code, which in essence regulates that judges in determining their decisions must be based on the indictment and everything that is proven in the examination at trial. Related to the validity of this article, in practice there are problems that are quite often faced by judges, namely in narcotics cases, where the Public Prosecutor charges the defendant with Article 111 or Article 112 or Article 114 paragraph (1) of Law Number 35 of 2009 concerning Narcotics, but based on the legal facts revealed at trial, the

defendant was proven to have committed an act prohibited in Article 127 of Law Number 35 of 2009 concerning Narcotics. Based on these conditions, a deadlock occurred because based on Article 182 paragraph (4) of Law Number 8 of 1981 concerning the Criminal Procedure Code, in determining the verdict, it must be based on the Public Prosecutor's indictment.To overcome this problem, the Supreme Court of the Republic of Indonesia has issued SEMA Number 3 of 2015, SEMA Number 1 of 2017, and SEMA Number 3 of 2023, which are the results of the formulation of the chamber's plenary meeting. Based on the provisions of the SEMA, it basically explains that in the case of a defendant who is not charged with the provisions of Article 127 of the Narcotics Law, but based on the legal facts revealed in court the defendant is proven to be a user and the amount or evidence as in SEMA Number 4 of 2010, then the judge examining the case will still decide in accordance with the indictment, but can deviate from the provisions of the special minimum sentence by making sufficient considerations.

However, in practice, it turns out that there are Judge's decisions that in dealing with narcotics cases where the Public Prosecutor does not charge the defendant with Article 127 of the Narcotics Law, but in fact the defendant is a drug abuser, the Judge does not decide as regulated in the SEMA. As in the Cassation Decision Number 1832 K/Pid.Sus/2023 which was decided on June 13, 2023, where in the decision the defendant was charged with alternative charges, namely Article 114 paragraph (1) of Law Number 35 of 2009 concerning Narcotics and Article 112 Paragraph (1) of Law Number 35 of 2009 concerning Narcotics. However, in its decision, the Panel of Judges at the cassation level stated that the defendant was legally and demonstrably proven guilty of committing a crime as stipulated in Article 127 of Law Number 35 of 2009 concerning Narcotics. Based on the decision, it can be seen that the Panel of Judges at the cassation level has imposed a criminal sentence that was not charged by the Public Prosecutor.

Meanwhile, as stipulated in Article 182 paragraph (4) of the Criminal Procedure Code, the Judge in determining his decision must be based on the indictment and everything proven in the examination at trial. Thus, in the decision, the Panel of Judges has set aside the provisions of Article 182 paragraph (4) of the Criminal Procedure Code. Meanwhile, if referring to the provisions of Article 3 of the Criminal Procedure Code, it contains the principle of nullum iudicium sine lege, where the trial or law enforcement is carried out in a manner that has been regulated in the Criminal Procedure Code.[1]As also emphasized by Prof. GJM Corstens (Hoge Raad der Nederlands) where the principle of legality in substantive criminal law is different from the principle of legality in criminal procedural law and in criminal procedural law it cannot be enacted in statutory regulations below the law.[2]Based on this principle, it can be understood that the implementation or actions that may be carried out by law enforcement officers in carrying out law enforcement activities, only if these actions have been regulated in the Criminal Procedure Code.

However, in reality in the field there are provisions that have been regulated in the Criminal Procedure Code, such as the provisions of Article 182 paragraph (4) of the Criminal Procedure Code which were deviated from by the Panel of Judges in Decision Number 1832 K/Pid.Sus/2023, so the author is interested in studying this further through this article in the form of a journal. Thus, based on the above matters, the problem that will be discussed in this article is regarding how the judge's considerations in imposing a sentence outside the Public Prosecutor's indictment in the Cassation Decision Number 1832 K/Pid.Sus/2023?

2. Research methods

The research method used in this paper is normative juridical, namely by analyzing regulations related to criminal procedure law regarding indictments and criminal penalties. Related to the research method used in this study, namely normative juridical, the approach used in this study is to use the statute approach and the case approach. Then related to the legal materials used in this paper, they consist of primary, secondary, and tertiary legal materials. The technical search for legal materials itself uses document study techniques and analysis of studies using qualitative analysis.

3. Literature review

3.1. Indictment and Sentencing

As previously mentioned, the panel of judges in carrying out the panel's deliberation to determine its decision must be based on the indictment submitted by the public prosecutor. The indictment itself is submitted when the public prosecutor refers the case to the district court. The Criminal Procedure Code itself does not regulate the

[1]Tristam P. Moeliono, and Widati Wulandari. (2015). The Principle of Legality in Criminal Procedure Law: Critique of the Constitutional Court Decision on Pretrial, Ius Quia Iustum Law Journal 4(22), 594 – 616. doi: 10.20885/iustum.vol22.iss4.art4. p. 599.

[2]Komariah Emong Sapardjaja. (2015). Legal Study and Notes on Pre-Trial Decision Number 04/Pid.Prap/2015/PN. Jkt. Sel Dated February 16, 2015 in the Budi Gunawan Case: A Critical Analysis. Padjadjaran Journal of Legal Studies. 2(1). 14-26. doi: *10.22304/pjih.v2n1.a2*.h.17.

understanding or definition of an indictment, but the Criminal Procedure Code has regulated both formal and material requirements in the indictment. If referring to expert opinion, such as Mr. I. A Negerbugh who is of the opinion that what is meant by an indictment is a basis and limit for a judge in an ongoing trial examination.[3]Furthermore, according to Andi Hamzah, the indictment is the basis for the judge in carrying out examination activities in court, where only based on the indictment does the judge make a decision.[4]

Referring back to the provisions of Article 182 paragraph (4) of the Criminal Procedure Code, where the article explains that in principle the judge in determining his decision must base it on the Public Prosecutor's indictment. The provisions of Article 182 paragraph (4) of the Criminal Procedure Code itself are located in Chapter XVI concerning Examination in Court Hearings, Part Three concerning Ordinary Examination Procedures. Article 182 of the Criminal Procedure Code itself is the final part of the trial examination process before the Panel of Judges issues its decision. Explicitly based on the wording of the provisions of Article 182 paragraph (4) of the Criminal Procedure Code, it can be seen that this authority belongs to the Judge which is mandatory, because there is the phrase "must" in the provisions of the article. Although it is mandatory, the Criminal Procedure Code does not provide regulations regarding what the legal consequences are if Article 182 paragraph (4) of the Criminal Procedure Code is not heeded by the Panel of Judges handling the case.

3.2. Discovery of Law by Judges

According to Sudikno Mertokusumo, legal discovery is the process of forming laws carried out by judges or other legal officers who have the authority to implement laws or apply legal rules of a legal nature to a concrete legal event or incident.[5]Meanwhile, according to Paul Scholten, legal discovery is something different from simply applying legal rules to concrete events.[6]JA Pontier defines legal discovery as a reaction to the existence of problematic conditions that people describe in legal terms.[7] In legal discovery, there are at least 2 (two) important elements, namely the first is the law, and the second is the fact. Regarding the law, in its development not all laws are found in statutes, but also include other sources of law such as doctrine, jurisprudence, agreements, and customs.[8]Meanwhile, regarding facts, before the first element (law) is applied to a concrete event, it is first determined what constitutes a legal fact, namely a factual situation that is legally relevant.[9]Legal discovery is usually used by judges in carrying out adjudication activities, namely examining and deciding a case they are facing. There are several schools of thought regarding legal discovery by judges, namely as follows:[10]

a. Legal jurisprudence stream
   According to this school, legal deficiencies in the law can be completed by judges by using legal logic, as well as by expanding the definition of the law based on ratio. In this school, the aspect of legal certainty is a priority.
b. The flow of legal interest
   Based on this school, the law is not the only source of law. Judges or other officials have the authority in the form of the broadest possible freedom to be able to find the law to be able to deviate from the law for the benefit of society and the highest justice.
c. Soziologische Rechtsschule school
   Based on this school of thought, judges are not merely mouthpieces of the law who only implement the law, but judges must see what is in the realities in society, including the feelings and legal needs of their citizens. So in this school of thought, judges have freedom, but the freedom that judges have is bound, where here judges can align the law with the conditions of the times.

[3]Jihan Sukmawati Dartu, and Abdul Ficar Hadjar. (2024) Decisions on Narcotics Crimes Issued Outside of the Public Prosecutor's Indictment, Trisaksti Journal of Legal Reform, 6(1), p. 143.
[4]Andi Hamzah, (2019) Indonesian Criminal Procedure Law, Jakarta: Sinar Grafika, p. 167.
[5]Achmad Rifai. (2011). Discovery of Law by Judges in the Perspective of Progressive Law, Jakarta: Sinar Grafika. p.21.
[6]Ibid
[7]Zainal Arifin Mochtar, and Eddy OS Hiarej, op. cit., p. 412.
[8]Ibid, p. 413.
[9]Ibid, p. 414.
[10]Achmad Rifai. (2011). op. cit., p. 32.

3.3. Narcotics Crimes

Etymologically, the word narcotics comes from the Greek word Narke, which means being drugged so that you don't feel anything.[11]According to Black's Law Dictionary, a narcotic is an addictive drug, such as opium, that dulls the senses and induces sleep. It is a controlled or prohibited drug by law.[12]

Meanwhile, if we refer to Law Number 35 of 2009 concerning Narcotics, it defines narcotics as:

> "substances or drugs, whether derived from plants or not, whether synthetic or semi-synthetic, which can cause a decrease or change in consciousness, loss of sensation, reduce or eliminate pain, and can cause dependency, which are divided into groups as attached to this Law."

Thus, narcotics crimes are acts that are prohibited by law and are subject to criminal penalties because they are related to narcotics. Narcotics crimes as stipulated in Law Number 35 of 2009 are regulated from Article 111 to Article 148. If we look at the elements, in general, the use of narcotics may only be used if there is a medical need and for research purposes. Outside of that, the use of narcotics is a crime.

In the Narcotics Law, there are several subjects involved in narcotics crimes, namely Narcotics Addicts, namely people who use/abuse narcotics, Abusers, namely people who use narcotics without rights or against the law, Distributors, namely those as regulated in Article 115 of the Narcotics Law, namely anyone who carries, sends, transports, or transits narcotics without rights or against the law, and Corporations, namely organized groups of people and/or assets, whether they are legal entities or legal entities, who commit narcotics crimes.

Based on the provisions of the Narcotics Law, it is also possible to identify categories of prohibited acts and those punishable by criminal penalties related to narcotics themselves, namely:

- Cluster 1, namely that which is regulated in Articles 111 to 126, is intended to criminalize producers, dealers, couriers and distributors;
- Cluster 2, namely that regulated in Article 127 and Article 128, is intended for abusers, victims of abuse and addicts.

4. Research result

4.1 Analysis of Case Consideration Number 1832 K/PID.SUS/2023

Decision Number 1832 K/Pid.Sus/2023 which was decided on June 13, 2023 is a cassation decision from the previous decisions, namely the Makassar District Court decision Number 1219/Pid.Sus/2022/PN Mks dated November 16, 2022, and the Makassar High Court decision Number 850/PID.SUS/2022/PT MKS dated December 22, 2022. Previously in the case, the defendant was charged with alternative charges, namely First, Article 114 paragraph (1) of Law of the Republic of Indonesia No. 35 of 2009 concerning Narcotics in conjunction with Article 55 paragraph (1) 1 of the Criminal Code, or Second, Article 112 paragraph (1) of Law of the Republic of Indonesia No. 35 of 2009 concerning Narcotics in conjunction with Article 55 paragraph (1) 1 of the Criminal Code. To prove the charges, the public prosecutor has brought 2 (two) witnesses, namely a witness who is an investigator who arrested the defendant, and a witness who is a co-defendant who was also charged for the same incident but in a different case (splitting).

Then, against the charges of the public prosecutor, the panel of judges at the Makassar District Court found the defendant guilty as in the first charge. In its considerations, in essence the defendant had committed an act, namely receiving narcotics in the form of crystal methamphetamine from his friend, as per the second element in Article 114 paragraph (1) of the Narcotics Law, namely "Without rights and against the law Offering for sale, selling, buying, receiving, acting as an intermediary in buying and selling, exchanging, or handing over Class I non-plant narcotics". Although in the trial, it was revealed that the defendant's intention in "receiving narcotics in the form of crystal methamphetamine from his friend" was to be consumed together, unfortunately here the panel of judges at the Makassar District Court did not consider this matter enough, and paid more attention to fulfilling the elements only. Meanwhile, if we look back at the intent of the element "Without rights and against the law Offering for sale, selling, buying, receiving, acting as an intermediary in buying and selling, exchanging, or handing over Class I non-plant narcotics", it is not to blame the person who buys it for use, but this element blames the person who buys it to then resell it. Basically, the criminal provisions in the Narcotics Law itself are divided into 2 (two) clusters, and Article

[11]Nys. Arfa. (2019). Socialization of the Dangers of Narcotics Among Elementary Schools in Danau Teluk District, Jambi City. Journal of Community Service. 3(2). 211-223. doi:10.22437/jkam.v3i2.8486. p. 213.
[12]Bryan A. Garnerm. Black's Law Dictionary. Toronto: Thomson Reuters. h. 3246.

114 itself is included in the first cluster, namely that which is intended to punish narcotics producers, dealers, couriers and distributors.[13]So according to the author, the description of the second element is not quite right because there is a mismatch between the elements of the article to be proven and the facts in the trial. Then the panel of judges at the Makassar District Court in the case sentenced the defendant to 5 (five) years in prison and a fine of Rp1,000,000,000, - (one billion rupiah) with the provision that if the fine is not paid it will be replaced with 2 (two) months in prison. Then, regarding the verdict of the Makassar District Court, both the defendant and the public prosecutor have stated an appeal, but until the case was examined by the Makassar High Court, both of them have not filed an appeal memorandum. Regarding this case, the panel of judges examining the case at the Makassar High Court has a different view from the verdict of the Makassar District Court, because based on the considerations of the Makassar High Court, the defendant is more appropriately found guilty of the second charge, namely the provisions of Article 112 paragraph (1) of Law of the Republic of Indonesia No. 35 of 2009 concerning Narcotics in conjunction with Article 55 paragraph (1) 1 of the Criminal Code. In its considerations, the panel of judges at the Makassar High Court, based on the facts revealed in the trial, that the act of "possessing" related to the evidence, had been carried out without rights or against the law, so that the element of "without rights or against the law possessing, storing, controlling, or providing Class I Narcotics, not plants" has been fulfilled.

In addition, in its considerations, the panel of judges also gave its opinion on the clarity of the provisions of Article 112 paragraph (1) of the Narcotics Law, where in addition to considering the element of "storing, controlling, or providing Class I Narcotics other than plants" it is also necessary to consider the intent and purpose or context of control or possession of narcotics. This is an effort to ensure that law enforcement is more targeted. According to the panel of judges, in this case it has been found that the act of "possessing" related to the evidence carried out by the defendant was intended for shared consumption. This fact is supported by evidence in the form of 1 (one) plastic sachet containing Class I shabu-shabu narcotics with an initial weight of 0.0439 and a final weight of 0.0136 grams, where the amount of evidence is relatively small as per SEMA Number 4 of 2010, as well as the statements of the witnesses presented which show that the intent and purpose of the defendant in controlling the narcotics was for shared use.

Regarding the existence of these facts, the panel of judges at the Makassar High Court is of the opinion that the actions committed by the defendant can be categorized as Narcotics Abuse so that Article 127 of the Narcotics Law should apply to the defendant, so that it is reasonable to impose a sentence that deviates from the provisions of the special minimum sentence as in Article 112 paragraph (1) of the Narcotics Law. According to the panel of judges, imposing a sentence below the special minimum is appropriate, fair and commensurate with the defendant's mistake. Then, therefore, the panel of judges at the Makassar High Court overturned the decision of the Makassar District Court Number 1219/Pid.Sus/2022/PN Mks, and tried it themselves by declaring the defendant guilty of committing a crime as in the second indictment, and sentenced the defendant to 2 (two) years and a fine of IDR 800,000.00 (eight hundred million rupiah) with the provision that if the fine is not paid it will be replaced with imprisonment for 2 (two) months.

Based on the considerations of the panel of judges at the Makassar High Court, it can be seen that the panel of judges is of the opinion that the defendant is subject to Article 127 of the Narcotics Law, but in its verdict the panel of judges still stated that the defendant was guilty of Article 112 paragraph (1) of the Narcotics Law as in the second indictment of the public prosecutor. Based on this, according to the author, the panel of judges has been guided by the provisions of Article 182 paragraph (4) of the Criminal Procedure Code, where in determining its verdict it is based on the indictment. Because in the indictment, the public prosecutor did not charge the defendant with Article 127 of the Narcotics Law, here the panel of judges did not apply this article to the defendant, even though the panel of judges is of the opinion that it is more appropriate for the defendant to be subject to the provisions of Article 127 of the Narcotics Law. Based on this decision, we can also conclude that the panel of judges still upholds the principle of nullu m iudicium sine lege, by choosing not to deviate from the provisions of Article 182 paragraph (4), and instead deviating from its material provisions, namely regarding the criminal threat of Article 112 paragraph (1) of the Narcotics Law, where the panel of judges imposes a sentence of 2 (two) years, while based on Article 112 paragraph (1) of the Narcotics Law, the criminal threat imposed if the article is violated is a minimum of 4 (years) and a maximum of 12 (twelve) years. Based on these considerations, it can also be seen that the panel of judges at the Makassar High Court is implementing the provisions of SEMA Number 3 of 2015 and SEMA Number 1 of 2017. In both SEMAs, guidelines have been provided if the defendant is not charged with the provisions of Article 127 of the Narcotics Law but based on the legal facts revealed in court, the defendant is proven to be a user and the amount or

[13]National Legal Development Agency. (2018). Report on the Results of the Harmonization of the Academic Manuscript of the Draft Law on Amendments to Law Number 35 of 2009 on Narcotics, Ministry of Law and Human Rights of the Republic of Indonesia, available fromhttps://bphn.go.id/data/documents/na_narkotika.pdf, (Accessed November 17, 2024).

evidence as in SEMA Number 4 of 2010, then the examining judge can deviate from the provisions of the special minimum sentence by making sufficient considerations. The validity of the SEMA in the Supreme Court environment is important as an effort to maintain the unity of the application of law and consistency of decisions. Regarding the meaning of "by making sufficient considerations" as in the SEMA, in this case the panel of judges has provided sufficient considerations that show that the intent and purpose of the defendant's possession of narcotics is not for resale or distribution, but for consumption. Then the panel of judges has also provided considerations regarding the inappropriateness of the defendant being subjected to Article 114 paragraph (1) of the Narcotics Law, but it is more appropriate to apply Article 127 of the Narcotics Law. Thus, with these considerations and also based on this SEMA, it is sufficient for the panel of judges for this case to impose a criminal verdict by still declaring the defendant guilty as in Article 114 paragraph (1) of the Narcotics Law, but the sentence imposed, deviates from the minimum in particular.

Then, based on the decision of the Makassar High Court, the public prosecutor filed a cassation appeal to the Supreme Court. In essence, the reason the public prosecutor filed a cassation appeal was because he did not agree with the judex facti of the Makassar High Court which stated that the defendant was proven guilty of Article 112 paragraph (1) of the Narcotics Law, where the defendant should have been proven guilty of Article 114 paragraph (1) of the Narcotics Law. However, in the cassation decision, he did not agree with either the decision of the Makassar High Court or the reasons for the public prosecutor's cassation appeal, so he revised the Makassar High Court decision by sentencing the defendant to Article 127 of the Narcotics Law. Although the provisions of Article 127 of the Narcotics Law were not charged by the public prosecutor, in the cassation decision the panel of judges declared the defendant guilty of his actions which were prohibited as stipulated in Article 127 of the Narcotics Law. That here it can be concluded from the beginning, the panel of judges has deviated from the principle of nullum iudicium sine lege. However, before giving that conclusion, it is necessary for us to examine the considerations of the cassation decision.

In the beginning, the panel of judges at the cassation level has considered the facts revealed in the trial which focused more on the facts showing that the defendant's possession of narcotics was not intended to distribute, sell, trade or act as an intermediary for buying and selling by gaining financial gain of a certain amount of money, but for consumption. Regarding this, the panel of judges is of the opinion that the investigator should have conducted a urine test, blood test, hair test, dioxygen bonuclear acid (DNA) test and other body part tests, but this was not done. In addition, the panel of judges also questioned the duties and authorities of the public prosecutor, who should have made an indictment based on the actual circumstances according to the evidence and evidence. That the defendant should also have been assessed by an integrated team but this was not done. The existence of a rehabilitation assessment has legal consequences for the condition of drug addicts, namely as a substitute for punishment that can improve addicts to be better, although in practice some of them still repeat their crimes (recidivists).[14]

Regarding the consideration, according to the author, the panel of judges is currently searching for material truth. Material truth is the truth that really happened or in other words without any additional fabricated facts.[15]However, the problem faced by the panel of judges here is that no urine test or other tests were conducted, so the facts that indicate the defendant is a drug abuser are somewhat vague. Although no tests were conducted on the defendant, based on the facts revealed in court, according to the author, it is sufficient to prove that the intention of possession of narcotics was for consumption. Then, after stating that the defendant is a drug abuser, in its considerations it is stated that in essence, the defendant should have been charged with Article 127 paragraph (1) of the Narcotics Law, but the article was not charged by the public prosecutor so that according to the principles of criminal procedure law it is obligatory for the judge to acquit the defendant of all charges. Furthermore, in its considerations it is stated that regarding the legal principle, the panel of judges is of the opinion that the legal principle is used as a guideline for judges in examining, trying cases that base their decisions on the legal facts of the trial and are no longer solely based on the public prosecutor's indictment, but rather the provisions of Article 182 paragraph (4) of the Criminal Procedure Code and the permanent jurisprudence of the Supreme Court.

Regarding jurisprudence, in its considerations the panel of judges also briefly mentioned Decision Number 1892 K/Pid/2011 which in essence "If the article that is not charged can be declared proven if the article is of the same type and the threat of punishment is lighter than the article charged." Then it is stated that in judicial practice and jurisprudence, it is permissible for a judge to decide a case outside the indictment with several considerations. Regarding the consideration, the panel of judges has an interpretation of the principle of procedural law where in

[14]Wilson Bugner F. Pasaribu, Syafruddin Kalo, Madiasa Ablisar, et al., (2024) Legal Implications In The Implementation of Rehabilitation Assessment For Narcotics Abuse Addicts, RGSA –Revista de Gestão Social e Ambiental 18(4), 1-15, doi:10.24857/rgsa.v18n4-068, p. 6.
[15]Amir Junaidi, loc. cit.

examining and trying a case, it is mandatory to base its decision on the legal facts of the trial. From this principle, the panel of judges is of the opinion that the decision-making process is not only based on the indictment, but also on jurisprudence. Based on the contents of the jurisprudence mentioned in the consideration, the requirements for being able to impose a sentence outside of the public prosecutor's indictment can be outlined, namely that the article imposed by the panel of judges must be an article that is similar to that charged by the Public Prosecutor, the criminal threat is lighter than the article charged by the public prosecutor, and the article used as the basis for imposing a sentence must be in accordance with the facts revealed in the trial.

Then in his considerations it was also stated that the attitude and actions of the judge who decided outside the indictment, could not be said to violate the provisions of criminal procedure law, because the judge as a judge in carrying out his duties, has an obligation to explore legal values, truth, and legal benefits in order to realize justice by finding, creating, making laws or renewing laws. The imposition of Article 127 paragraph (1) of the Narcotics Law is the right and correct legal choice compared to applying the provisions of Article 112 or 114 of the Narcotics Law. Regarding these considerations, according to the author, here the panel of judges is implementing legal discovery based on the Interessenjurisprudens school, where in this school judges have freies ermessen or the broadest possible freedom to make legal discoveries.[16]Even to achieve the highest possible justice, judges are allowed to deviate from the law, for the benefit of society.[17]The discovery of law according to this school, views law according to its purpose, and one of the purposes of law itself is to protect real life needs. If correlated with this case, namely deciding outside the indictment with Article 127 paragraph (1) of the Narcotics Law, then it is necessary to look at the purpose of criminal procedure law itself, namely to seek and find or at least approach the material truth and protect human rights.

Thus, what the panel of judges did was in line with the purpose of criminal procedure law itself, namely deciding according to the facts revealed in court (material truth), with the aim of punishing the defendant according to his actions (protection of human rights). However, on the other hand, the consideration of the judge who has decided outside the indictment can also potentially cause legal uncertainty. Because here the judge has taken action outside the provisions of the law, especially what is being disputed is criminal procedure law, which has the principle of nullum iudicium sine lege. In other words, normatively, one of the elements of Article 182 paragraph (4) of the Criminal Procedure Code, namely basing the decision on the indictment, has been ignored. Thus, the actions taken by the panel of judges who decide on a verdict outside the indictment cannot be done carelessly, must be done carefully, and adhere to the values of justice. That this is also in line with the provisions of Article 53 paragraph (2) of Law Number 1 of 2023, where if there is a conflict between justice and legal certainty, the judge must prioritize justice over legal certainty as much as possible.

Apart from considering legal matters, the panel of judges alsohas considered non-juridical matters, such as discussing the mission, goals and intentions of the Narcotics Law makers who should provide medical services, treatment, therapy in the form of rehabilitation to addicted and dependent narcotics abusers. In addition, in its considerations it is also explained regarding the capacity of the Correctional Institution which has exceeded its capacity, and the statement of the Minister of Law and Human Rights regarding narcotics abusers should not apply the provisions of Article 111 Paragraph (1), Article 112 Paragraph (1), and Article 114 Paragraph (1) because it will have a bad impact on the Correctional Institution. Based on these considerations, the author sees that here the judge has viewed that the law is not what is in the written rules alone, butwhat is in the social interest as well as legal realism thinking. In this theory, what is referred to as law is what is in practice (Law in Action), not what is in the statute book.[18]The law is not something that is rigid and formal, but the law itself is that which exists in social society.[19]

Thus, based on these considerations, the panel of judges at the cassation level assessed that the Makassar High Court decision Number 850/PID.SUS/2022/PT MKS was not unlawful, but the decision was still revised, namely regarding the qualifications of the proven criminal acts and the punishment imposed on the defendant, so that he was proven guilty of committing a crime as referred to in Article 127 paragraph (1) of the Narcotics Law, and sentenced him to 1 (one) year and 6 (six) months in prison.

Conclusion

Normatively, one of the elements of Article 182 paragraph (4) of the Criminal Procedure Code, namely basing the decision on the indictment, has been ignored by the panel of judges in the Cassation Decision Number 1832

[16]Achmad Rifai. (2011). loc. cit.
[17]Ibid, p. 33.
[18]Indra Rahmatullah, (2021), "Philosophy of Legal Realism: Concept and Actualization in Business Law in Indonesia", Jurnal Adalah: Bulletin of Law and Justice Vol 5, No 5 pp. 1-14.
[19]Nichole McCarthy, 2023, Legal Realism,https://www.law.cornell.edu/wex/legal_realism, (July 15, 2024).

K/Pid.Sus/2023. However, the panel of judges in the case is of the opinion that in examining and trying a case, it bases its decision on the legal facts of the trial and is no longer solely based on the public prosecutor's indictment, but rather the provisions of Article 182 paragraph (4) of the Criminal Procedure Code and the permanent jurisprudence of the Supreme Court. Furthermore, deciding a case outside the indictment can be justified with several considerations, namely that the article that is not charged can be declared proven if the article is of the same type and the criminal threat is lighter than the article charged. In addition, the panel of judges is of the opinion that the attitude and action of deciding outside the indictment cannot be said to violate the provisions of criminal procedure law, because the judge as a judge in carrying out his duties has an obligation to explore legal values, truth, and legal benefits in order to realize justice by finding, creating, making laws or renewing laws.

According to the author, the considerations of the panel of judges in this case have the potential to create legal uncertainty. Because here the judge has taken actions outside the provisions of the law, especially what is being disputed is the criminal procedure law, which has the principle of nullum iudicium sine lege. However, because in this decision, the panel of judges has also considered matters outside the law, which shows that the panel of judges has considered all perspectives in order to achieve justice, then according to the author, justice can be prioritized over legal uncertainty as stipulated in Article 53 paragraph (2) of Law Number 1 of 2023. Thus, according to the author, the cassation decision, the Cassation Decision Number 1832 K/Pid.Sus/2023 has provided sufficient consideration to impose a criminal sentence outside the public prosecutor's indictment.

Suggestion

According to the author, the imposition of a criminal sentence outside the indictment has the potential to cause legal uncertainty, because it is an action outside the provisions of criminal procedure law which should be carried out rigidly. Therefore, the author suggests that the imposition of a criminal sentence outside the indictment be avoided as much as possible, by making efforts to provide guidance to law enforcement officers, especially in narcotics crimes, so that the investigation, prosecution, and trial processes are truly carried out in accordance with laws and regulations. If the judge is forced to carry out legal activities in the form of imposing a sentence outside the indictment, then it must be done very carefully, and done in order to realize the value of justice. Likewise, the legal considerations given must be described sufficiently, emphasizing the value of justice and benefit.

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