ASPECTS CONCERNING THE PRESUMPTION OF INNOCENCE IN THE LIGHT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Rodica Aida POPA*

Abstract

The presumption of innocence represents a constant principle of law, becoming in our modern era a basic principle of all law systems.

In Romania, the presumption of innocence is regulated by the Romanian Constitution, as revised, but at the same time by the Criminal Procedure Code that came into effect on 1st February 2014. The application of this principle is closely connected with other procedural guarantees of the suspect and/or defendant during the penal trial, this presumption being expressly given efficiency by judicial bodies under the scope of majority of court orders.

The European Convention for the Protection of Human Rights and Fundamental Freedoms addresses effectively the presumption of innocence in the dispositions of Art. 6 § 2, and the jurisprudence of the European Court has also established some specific criteria in its application.

Our study aims to make a brief analysis of the jurisprudence of the European Human Rights Court on the presumption of innocence, with respect to a number of causes, regarding Romania but also other member states of the Council of Europe and towards national standards involved by its regulation.

The applicability of the standards established by the European Court of Human Rights concerning this presumption confers to national courts from Romania the possibility to insure effectiveness to the national norm, by completing it, which ensures full compliance of all the guarantees a defendant may benefit from during criminal trials.

We consider that the national norm on presumption of innocence stipulated by art 4 of Criminal Procedure code may be modified as well in the light of the agreement given by the European Court in the application of the provisions of art 6 § 2 from the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Keywords: *presumption of innocence, European Court case law, enforcement criteria, meaning of words, national standard.*

Introduction

The concept of human rights has a broad scope in national Romanian case law relative to each specialisation matter and institutions thereof. Within the meaning of criminal procedure law, the concept of human rights becomes effective, both from the viewpoint of substantive law, and the viewpoint of procedure law. For the purpose of this study, the notion of the presumption of innocence shall be tackled as a criminal proceedings principle, on the whole, both during criminal investigations, and first instance and appeal proceedings, as well as from the point of view of human rights, as regulated by the provisions of Article 6 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The importance of a national and European two-dimensional approach of the presumption of innocence allows us to understand the common aspects of regulation and enforcement, along with the distinct aspects, as the two approaches do not overlap — the conventional regulation perspective is considerably broader than the national scope. In the matter of the presumption of innocence within our study, we intend to examine the regulatory framework, and its implications, in the scope of criminal procedure law, the factual criteria, and the manner in which the approach of this presumption under the Convention for the Protection of Human Rights and Fundamental Freedoms completes the scope of national rule interpretation, with the hard instruments of the arguments of the European Court of Human Rights concerning this presumption, in relation to the national rules that regulate the said presumption. We believe that this study, including solid practical aspects, shall help clarify certain matters regarding the enforcement of the provisions of Article 6 § 2 of the Convention in case investigation and proceedings, as well as provide the opportunity to postulate within the doctrine the manner in which the presumption of innocence is interpreted and enforced as a principle of a criminal trial.

Paper Content

Within the current Criminal Procedure Code, which entered into force on 1 February 2014, the presumption of innocence is regulated in Article 4[1]. As

* Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest, Judge, The High Court of Cassation and Justice, Criminal Chamber (e-mail: aidap@scj.ro).

[1] Article 4 The presumption of innocence. (1) Everyone shall be presumed innocent until being found guilty by a final criminal judgement. (2) Following the submission of all the evidence, any doubt in the formulation of the opinion of judicial bodies shall be interpreted to the favour of the suspect, or the defendant.

can be observed from the perspective of the regulatory technique used, the legislator expressly stated the time point until an individual can enjoy presuming themselves and being presumed innocent, that is, their guilt is established by a final judgement. Whereas, in the Romanian law system, the appeal — the ordinary legal remedy — is the only court to sanction as final, in criminal matters, the resolution ordered in the court of first instance, i.e., concerning the existence or non-existence of the criminal facts that the persons allegedly committed, based on the evidence submitted during the criminal investigation, found as legal during the pre-trial chamber procedure, the evidence filed during the criminal investigation, in the court of first instance, as well as the evidence submitted during the appeal, upon a new judgement, pending a decision whether to hold the defendant on trial liable or not.

In the second paragraph of the aforementioned rule, as novelty, the principle of *in dubio pro reo* is stated, to the extent that any doubt in formulating the opinion of the judicial bodies shall be interpreted to the favour of the suspect or the defendant[2].

The presumption of innocence is a relative presumption that can be overturned by solid evidence by judicial bodies.

It has been stated in the doctrine[3] that the presumption of innocence is more than a tenet, rather regarded as a fundamental human right that, in one opinion, falls within the category of substantial rights, concerning anyone, as enforceable *erga omnes*, not only to judicial bodies[4], and, in another opinion, relates to a procedural right as, both under constitutional rule and criminal procedure rule, the notion of criminal judgement is utilised, leading to the conclusion that the presumption of innocence operates solely when a person is charged with committing a criminal offence[5].

The Convention for the Protection of Human Rights and Fundamental Freedoms enshrines within Article 6 § 2 that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. Based on the manner of regulation, the presumption of innocence refers to a defendant in relation to the domestic regulation concerning everyone, the scope being broader in domestic criminal procedure law, which enabled an extension over witnesses to not self-incriminate, as provided for in Article 118 of the Code of Criminal Procedure[6].

Within the meaning of the European Court of Human Rights, 'accusation on criminal matters' has an autonomous character, and the 'accused' is any person against whom the competent bodies have ordered an action expressing the attribution of the offence to the said person, and which entails important consequences concerning their status, relative to search, arrest, bank account freezing and ordering mandatory domicile on an island[7].

The literature has mentioned that there is a scope for the presumption of innocence where it is enforceable according to the case law of the European Court of Human Rights, but it is not a safeguard of national law, respectively the matter 'assimilated' by the Court to the 'accusation on criminal matters', namely the field of contravention, fiscal crimes and liability to disciplinary action in certain situations[8].

We shall hereinafter present several significant cases in the case law of the European Court of Human Rights wherein infringement or non-infringement of Article 6 § 2 of the Convention was found.

Thus, in the case of Peltereau-Villeneuve v. Switzerland (case No. 60101/09 of 28 October 2014, found final on 28 January 2015) infringement of Article 6 § 2 of the Convention (ss. 30-39 of the decision) was found, highlighting that 'The Court notes that the presumption of innocence enshrined by paragraph 2 of Article 6 is among the elements of a fair criminal trial expressly provided for under paragraph 1 (see Deweer v. Belgium, 27 February 1980, § 56, series A No. 35 and Minelli v. Switzerland, 25 March 1983, § 27, series A No. 62). It is found as not assessed for its fair value when an official statement concerning a suspect reflects the feeling that they are guilty while their guilt has not been previously legally established (see, in particular, Allenet de Ribemont, 10 February 1995, § m 35-36; Daktaras v. Lithuania, No. 42095/98, §§ 41-42; ECHR 2000-X; Moullet v. France (Dec.), No. 27521/04, 13 September 2007). The reasons provided by the judge alone are sufficient, even in the absence of a formal finding, even the judge's sole opinion that the interested party is guilty (see Daktaras v. Lithuania, pre-cited § 41). On the other hand, prejudice to the presumption of innocence can emerge not only from a judge or a court, but also from public authorities, or even prosecutors (see Allenet de Ribemont v. France (interpretation), 7 August 1996 § 36, Judgement and

[2] Ion Neagu, Mircea Damaschin, Treaty by procedure criminal, The general part, In the light the new Procedure Criminal Code, Universul Juridic, Bucharest, 2014, p. 67.

[3] Nicolae Volonciu & Andreea Simona Uzlău team coordinators, The New Procedure Criminal Code, comments, The Second Edition, revised and completed, Hamangiu Publishing House, 2015, p. 15.

[4] *Ibidem*, p.15, citing S.M. Teodoroiu, I. Teodoroiu, The presumption of innocence and unconstitutionality procedural rules, in Dreptul nr. 5/1995, p. 4, apud. V. Puşcaşu, The presumption of innocence, Universul Juridic Publishing House, Bucharest, 2010, p. 35.

[5] *Ibidem*, p. 15.

[6] Article 118. The right of the witness to not self-incriminate. The witness statement provided by a person who, in the same case, prior to the statement, or thereafter, became a suspect or defendant, cannot be used against them. The judicial bodies are under the obligation to mention, upon recording the statement, the previous capacity.

[7] Nicolae Volonciu and Andreea Simona Uzlău team coordinators, The New Procedure Criminal Code, comments, The Second Edition, revised and completed,, Hamangia Publishing House, 2015, p.16, citing cases Tejedor Garcia v. Spain; Abas v. The Netherlands; Padin Gestoso v. Spain; Slezevicius v. Lithuania.

[8] *Ibidem*, p.17.

decision Vol. 1996-III, and Daktaras v. Lithuania, previously cited § 42). What is equally at stake once criminal proceedings are initiated, is the reputation of the interested party, as well as the manner in which it is perceived by the audience (see Allen v. the United Kingdom (GC) No. 25424/09, § 94, ECHR 2013). In addition, the Court holds that a distinction should be made between the judgements reflecting the feeling that the person in question is guilty, and the ones limited to presenting a state of suspicion. The former type infringes the presumption of innocence, while the latter category has been deemed as in accordance with the spirit of Article 6 of the Convention several times (see Marziano v. Italy, No. 45313/99, § 31, 28 November 2002). Last but not least, there is a fundamental difference between saying that someone is merely suspected of having committed a criminal offence, and an unequivocal judicial statement putting forward, in the absence of a final conviction, that the interested party has committed the offence in question (see Matijasevic v. Serbia, case No. 23037/04, § 48, ECHR 2006-X). As such, the Court should determine whether, in this specific case, the resolution of the criminal proceeding questions the innocence of the applicant while the latter has not been found guilty (see Virabyan v. Armenia, No. 40094/05, § 187, 2 October 2012). In this specific case, the investigation against the applicant was dismissed by the general prosecutor in relation to the prescription of the criminal action. It is true, as the Government emphasises, that, the classification of the offences in question needs to be conducted prior to establishing if they are punishable and prior to the intervention of prescription. The Court also notes that enforcement of Article 116 of 1 CPP/GE neither presumes, nor claims with certainty that the offence was committed (see, *a contrario*, Virabyan v. Armenia, previously cited, § 191). Thus, the examination of the terms in the Ordinance dated 25 September 2008, as it was drawn up, leaves no doubt concerning the general prosecutor in the matter of the applicant's culpability. In particular, having found that the offences had been established and having examined the conditions of finding the offence, the general prosecutor concluded that 'the criminal proceeding (...) could not have been carried out in relation to the prescription, even if the facts lead to finding that an offence has indeed been committed against the victims'. On the other hand, the use of superfluous phrases aided these findings. Such as using 'impossible manner' when the applicant committed the offence 'at least' against the two alleged victims. There is, therefore, no doubt that the Ordinance dated 25 September 2008, conveys the sense that the general prosecutor, as concerns the guilt of the applicant, failed to merely describe a state of suspicion. Whereas, if classification of the offences in question was required, nothing within the enforceable provisions compelled the general prosecutor to establish the facts. It was only up to the general prosecutor to choose the terms that did not exceed describing a state of suspicion rather than that of guilt of the applicant. The Prosecution and the Federal Court dismissed the applicant's appeals, without disapproving of the body of the Ordinance. Even while reconfirming the statements of the general prosecutor, the Federal Court found that the Ordinance included 'nothing that is not necessary to substantiate the reason for dismissal'. On the other hand, the content of the Ordinance dated 25 September 2008, was carried over by the media and it counted as an important landmark within the canon of the law procedure. If it can be taken into account that the public has an interest in being informed, such interest does not require concluding upon the applicant's guilt status. Whereas, it only led to largely affecting the applicant's reputation, as the order for dismissal was made public (see Allen v. the United Kingdom (GC), previously cited, § 94). These elements were enough for the Court to conclude upon the Reasons of the Order for dismissal dated 25 September 2008, and, primarily, confirm that, both the Prosecution and the Federal Court, breached the principle of the presumption of innocence. Thus, we have found infringement of Article 6 § 2 of the Convention'.

In another case, Neagoe v. Romania (case No. 23319/08 dated 21 July 2015, confirmed as final on 21 October 2015), the European Court of Human Rights found infringement of Article 6 § 2 of the Convention, the presumption of innocence respectively, and, mainly, held that, reporting the settled case law on the matter and that 'what matters is the real meaning of the statements in the case, and not their literal form. Finally, the fact that the statements in question were uttered as an interrogation or doubt is not enough to elude the provisions of Article 6 § 2 of the Convention; otherwise, the presumption of innocence would be void of all effectiveness (Lavents, previously cited, § 126). By applying these principles to the case, the Court holds that, mainly, on 29 February 2008, when the spokesperson of the Galati Court of Appeal made the litigious statement to the media, the guilt of the applicant had not yet been legally established. Finally, the Court of Appeal only issued the final judgement three days later, on 3 March 2008 (paragraphs 14 and 15 above). The Court then holds that judge G.I. intervened, in their official capacity of spokesperson of the Galati Court of Appeal in order to inform the media of the proceedings of the case... The Court also finds that the spokesperson did not resort to a simple communication of information concerning the procedure stages of the case, as they conveyed opinions regarding the guilt of the applicant, suggesting that a conviction would probably be delivered (paragraph 14 above). Finally, the Court holds that the litigious statement prompted the public to believe in the guilt of the applicant, while the Court of Appeal had not yet delivered the judgement in the case. The Court held that the spokesperson used certain terms expressing doubt, such as 'it is likely' and 'I suppose' (paragraph 14 above); on the other hand, the Court believed that this behaviour did not alter the real meaning of the

statement (Lavents, previously cited, § 126). The Court holds that, under their official duties, the spokesperson is under the obligation to observe the presumption of innocence, judicial independence, impartiality and objectivity of the justice administration (paragraphs 18 and 19 above). Moreover, the Court emphasises that the spokesperson publicly intervened for the purpose of informing the media as well, (see *a contrario*, A.L. V. Germany, case No. 72758/01, § 38, 28 April 2005), and that they did not hesitate to spontaneously express a personal opinion (see, *a contrario*, Gutsanovi, previously cited, §§ 195-196). The Court finds that, in accordance with the duties and particular circumstances of the case, the spokesperson should have shown more caution and reservation as regards the choice of words in order to avoid the overall confusion (Allenet de Ribemont, previously cited, § 41, Gutsanovi, previously cited, § 199, and Khoujine *and others* v Russia, case No. 13470/02, § 96, 23 October 2008). Finally, the Court emphasises that the offence for which the applicant was ultimately found guilty and sentenced to imprisonment could not erase their initial right to be presumed innocent until legally proven guilty. The Court holds, several times, that Article 6 § 2 of the Convention envisages the entire criminal proceedings 'independently of investigation initiation' (Minelli v. Switzerland, 25 March 1983, § 30, series A, No. 62, and Matijasevic v. Serbia, case No. 23037/04, § 49, ECHR 2006-X). These elements are sufficient for the Court to find that there was an infringement of Article 6 § 2 of the Convention'.

In another case, Bivolaru versus Romania (Application No. 28796/04, judgement of 28 February 2017, confirmed as final on 28 May 2017), the European Court did not find an infringement of Article 6 § 2 of the Convention, mainly noting that 'the Court holds that the applicant reported an interference with their right to be presumed innocent, in relation to the statements of the minister of Administration and Interior, I.R., who stated to the press that they 'found unusual the release of the applicant, on matters of procedure'. In the case, the Court notes that on 5 April 2004, when the minister of Administration and Interior made the litigious statement before the press, the guilt of the applicant was not yet legally established: a criminal investigation was still pending. The Court further holds that the statement in question was not a formal finding of guilt concerning the applicant, and that it referred to the initiation of the proceedings, rather expressing certain doubts concerning the procedure in terms of releasing the interested party from pre-trial arrest. The Court also notes that the applicant was acquitted in the court of first instance and appeal. It was only through the judgement of 14 June 2013, nine years after the statement of I.R., that the High Court of Cassation and Justice sentenced the applicant on matters of criminal law. Thus, it cannot be established that the litigious statement influenced the judge's ruling on the case (see *mutatis mutandi*, Pullicino v. Malta (dec.), case No. 45441/99, 15 June 2000). Finally, nothing on file leads to considering that the arguments professed by the applicant and the elements in question had influenced the judge's ruling on the first instance, following the statements of I.R. reprinted by the press (Mircea v. Romania, case No. 41250/02, § 75, 29 March 2007). In light of the foregoing, the Court finds that, in this specific case, there was no infringement of Article 6 § 2 of the Convention in relation to the statement made by the minister of Administration and Interior, I.R.'.

Conclusions

The presumption of innocence, as currently regulated by the Code of Criminal Procedure, enables its coherent enforcement within criminal procedures, which can also be complemented by the criteria highlighted in the case law of The European Court of Human Rights, making its effectiveness lead to holding judicial bodies accountable for its warranty throughout the proceedings.

Our study outlines the need to use cautious wording as concerns the content of the presumption of innocence, both in substantiating the orders, when a resolution of not going to trial is issued, within the evidence body, within the sentence delivered in the court of first instance, and upon making the public aware of the resolutions through conferences, statements, or press releases.

As noted, the use of words and phrases should be managed carefully as long as the judicial bodies are carrying out proceedings, not enabling the use of terms that would lead to the finding of an offence for which the defendant is being investigated, but merely a suspicion that can be estimated based on the criteria highlighted in European case law.

We believe that through our study both the main laws, the Code of Criminal Procedure and Article 4 in relation to the case law of The European Court of Human Rights, can be adjusted and improved, and secondary laws, namely, the Superior Council of Magistracy Guidelines on the relationship between the judicial system of Romania and the media, as well as the manner in which procedural actions are substantiated in criminal cases, ordinances, evidence reports, court resolutions delivered by Judges for Rights and Liberties concerning pre-trial measures, precautionary measures, court resolutions delivered by the Pre-Trial Chamber on the applications and exceptions lodged on the matter of the legality of the referral, of the evidence, of the criminal investigation actions and sentences delivered in the court of first instance.

References

- Ion Neagu, Mircea Damaschin, Treaty by procedure criminal, The general part, In the light the new Procedure Criminal Code , Universul Juridic, Bucharest, 2014
- Nicolae Volonciu & Andreea Simona Uzlău team coordinators, The New Procedure Criminal Code, comments, The Second Edition, revised and completed, Hamangiu Publishing House, 2015
- Case Peltereau-Villeneuve v. Switzerland on the HUDOC database of the European Court of Human Rights
- Case Neagoe v. Romania on the HUDOC database of the European Court of Human Rights
- Case Bivolaru v. Romania on the HUDOC database of the European Court of Human Rights