THE SIZE AND THE IMPORTANCE OF THE EVIDENCE GOVERNED DURING THE PROSECUTION IN REM

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Abstract

The jurisdiction developed on the edge of the implementation of the provisions of Code of Criminal Procedure, relating to the verification of the legality of the referral to the court, the legality of the management of evidences and documents of the prosecution, has proved the fact that in front of the judges of preliminary chamber has come, not infrequently, the request of the exclusion of the evidences governed during the criminal prosecution in rem, on the ground that these evidences have been managed either in total or in the majority of them, at this stage absolutely secret of the criminal prosecution, even though the offender of the deed was known and in this way, the future suspect or charged, has been deprived of any realistic and concrete possibility to defend himself, to assist with the help of a lawyer in the management of theses evidences and to combat them by appropriate procedural means.

This raises the question which is the size of the evidences that reasonably can be taken during the criminal proceedings in rem, thus the suspect/ defendant should not be harmed in his procedural rights, in particular with regard to his right of defence.

To search for an answer to this matter, this is very present in the proceedings in front of the judge of preliminary chamber, legal provisions must be primarily examined that implicitly separates the criminal prosecution in rem from the moment of further performing of the prosecution towards a certain person.

Keywords: *Evidence, prosecution, in rem, procedural, suspect, defendant.*

1. Introduction

The criminal process represents the activity, through which the specialized bodies of the state discover the criminal offences, identify and catch the criminals, gather and manage the samples, accomplish the penal liability and apply the penalties.[1]

The judicial bodies carry out a complex activity which exceeds the strict limits of the resolution of criminal case within the framework of the jurisdictional detent, executing a series of legal procedures in order to conduct the act of justice in good conditions.

On the basis of succession of judicial activities carried out by the competent bodies for the sole purpose of making the truth and pull the penal liability of persons who committed crimes found the samples, the nature of the evidence and processes of evidence.

Underlying succession of judicial activities carried out by the competent bodies for the sole purpose of finding out the truth and criminal responsibility of individuals who committed crimes find evidence, evidence and evidence procedures.

2. The proof. General considerations

2.1. Evidences, means of evidence and proceedings of evidence.

The legislator defines the notion of *proof* in the content of the provisions of Article 97 (1) as being "any element of fact which serves at the disclosure of the existence or non-existence of an infringement, at the identification of the person who committed it and at the knowledge of the necessary circumstances for the fair resolution of the cause and which contributes to finding out the truth in the criminal trial."

The means of the proof represents the means of investigation or of discovery of the evidences and the management of the evidence in the criminal trial.[2]

The evidence is obtained in the criminal trial by the following means that sample: the declarations of the suspect or of the defendant, the declarations of the injured person, the declarations of the civil party or of the responsible party from a civil point of view, the declarations of the witnesses, expert reports or findings, reports, photos, material means of sample or by any other means of sample which is not forbidden by law.

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[1] Nicolae Volonciu, „Tratat de procedură penală Vol I", ed. Paideia, 1993, p. 9;

[2] V. Dongoroz, Curs de procedură penală, București, 1942, p. 207.

2.2. The object of the evidence and the aim of the evidence

The object of the evidence represents all the facts and the circumstances which have to be proved, for the purpose of solving the criminal cause and also shows the limits of the judicial research and the performance of the evidence.

According to the article 98 of the Code of Criminal Procedure, the object of the proof is constituted by tye existence of the offence and its commission by the defendant, the facts concerning civil liability, when there is a civil part, the facts and the circumstances of fact which depends on the enforcement of the law and any necessary circumstance for a fair resolution of the case.

The charge of the proof mainly belongs to the prosecutor in the criminal proceedings, civil parts or, as the case may be, the prosecutor who pursues the civil action in the case in which the injured person lacks the capacity of exercise or has a capacity of limited exercise.

The suspect or the defendant benefits of the presumption of innocence, not being obliged to prove his innocence, and he has the right not to contribute to his own indictment. Thus, in the case in which the prosecution fails to fully overturn the presumption of innocence, the fact will be interpreted as an evidence in favour of the innocence of the defendant (*in dubio pro reo).* According to the judicial practice, even if the defendant reports himself the Court cannot order his sentencing, if the presumption of innocence has not been overturned during the criminal trial, whereas any doubt takes advantage of the defendant and the defendant's admission does not have absolute evidential value.

3. The management of the evidences during the prosecution stage

3.1. The beginning of the criminal proceedings and the continuation of the criminal prosecution against a person

The informed body of the criminal prosecution by denunciation or complaint has the obligation to check in the first stage the fulfilment of *the conditions of form of the information* and respectively of the mentions from the content of the information which relates to the way of describing the deed, in order to establish, if the conditions of form are met, on the one hand, and, on the other hand, if the description of the deed is complete and clear. The verification of the criminal prosecution body has a judicial result in refunding the denunciation or the complaint through administrative way to the petitioner, where the conditions relating to the form or conditions relating to the description of the deed are not fulfilled.

The article 305 (1) from the Code of Criminal Procedure provides that "When the document of information accomplishes the conditions laid down by the law, the criminal prosecution body disposes the beginning of the criminal prosecution relating to the committed deed or whose commitment is prepared, even if the author is shown or known."

According to the article 305 (3) from the Code of Criminal Procedure "When there are evidences indicating reasonable suspicion that a certain person has committed the deed for which the the criminal prosecution has started and there is not one of the cases provided by the article 16 (1), the criminal prosecution body disposes that the criminal prosecution should be carried out in front of him, who acquires the quality of suspect. The measure ordered by the criminal prosecution body shall be carried out within 3 days of the confirmation of the prosecutor who supervises the criminal prosecution, the criminal prosecution body being obliged to present the prosecutor even the case file. "

The fact that it is not immediately possible the acquisition of the official quality of suspect as soon as the criminal prosecution bodies were informed relating to the commitment of a criminal deed by one or more people represents a guarantee justified by the necessity to protect the rights of the people against whom such a referral was made, in order they may not be the subject of such criminal charges without a minimum verification of support, to the effect of indicating both the existence of the deed and the non-existence of a case which prevents the exercise of the criminal action, and the reasonable suspicion that they have committed a deed prescribed by the penal law.

Reported to the administration of numerous evidences and sometimes of all evidences in the stage of criminal prosecution *in rem* and to the existence or not of a physical injury of the right of defence of the suspect/ defendant, by the impossibility to assist through a lawyer, I their management, especially in the conditions in which after further criminal prosecution *in personam,* the request of re-administration of the evidences was rejected by the prosecutor, different solutions have been pronounced in jurisprudence.

3.2. The management of the evidences within criminal prosecution *in rem*

Thus, in a case, in which the defendant, in the procedure of preliminary chamber requested the exclusion of the evidences managed before being brought to the attention the charge and the beginning of the criminal prosecution against him (criminal investigation that began three years ago, without being brought to attention of the charge meanwhile), the judge of the preliminary chamber kept in mind that the sanction that would be incident in this case is that of relative nullity, only that this penalty cannot operate because the defendant has not proved the existence of a physical injury which could not be removed otherwise than the cancellation of the procedural act concerning the management of the evidences and the exclusion of all evidences thus managed.

It was argued the solution through which the criminal prosecution is characterized by the lack of advertising and contradiction, which means that although the defendant had, at least virtually, the possibility of assisting by the defender at the interrogation of the witnesses, this fact did not suppose for the defender an active interrogation of the witnesses. Especially that during the criminal prosecution the prosecutor meets in his person the functions of process of accusation, defence and resolution of the case and in very few exceptions, such as for example, the confrontation, and all parties are present at the same time to carry out the criminal prosecution.

It was also noted that the nullity may not interfere only if the physical injury cannot be removed differently or, in case, the remedy is given by the possibility of re-interrogation of the witnesses directly by the Court, during the judicial investigation and that the criminal law of process does not restrict the administration of all evidences only after disposition of further carrying out of the criminal prosecution, the contrary conclusion leading to the necessity of re-administration of all managed evidences in the stage of criminal prosecution *in rem*, *or* this is not the purpose of the legislator.

Therefore, it was concluded that the defendant was not caused any physical injury to found the request of exclusion of the evidences.

To the contrary, the Court has decided in a supreme decision of the case, prior to coming into force of the new criminal provisions of process, but the reasons remain valid and they are fully applicable in relation to the new provisions[3].

Thus, the Supreme Court held that the provisions of art. 6 paragraph 3 (c) of the European Convention of the human rights, European standard of protection in the field of the right to dispose of the necessary time and facilities to prepare the defence, it also applies at the stage of criminal prosecution, being an element of the notion of fair trial, to the extent that the initial failure of this right might compromise the fair character of the criminal trial. (imbroscia against Switzerland, 1993)

The Supreme Court, taking into account that the injured person and the majority of the witnesses have been interrogated in the stage of prior acts (the correspondent of the criminal prosecution *in rem*), the request of re-interrogation has been rejected on the grounds that they were interrogated by the prosecutor respecting all the guarantees and thus being managed the most important evidences in the preceding act stage, stated that the equality of arms has been violated, the accused being placed in a position where he no longer can present the cause in such way as not to be disadvantaged compared to the incrimination (case S against Switzerland 1991). The Court held that the presence of the lawyer in the administration of these evidences would have conferred the right to make requests, conclusions, and complaints according to the rights conferred by extension of the sphere of judicial assistance in criminal prosecution stage including the possibility granted by the prosecutor to ask questions on the occasion of the interrogation of the injured person and of witnesses.

He further held that the hearing of the injured person and of witnesses on the occasion of judicial research cannot complete the obligation of the prosecutor to manage the evidences with the respect of the rights of defence.

In a third case[4], clarifying for the problem in question, from my point of view, it was held that the evidences managed between the moment of the beginning of the criminal prosecution *in rem* and the moment of the disposition by the prosecutor to continue to carry out the criminal prosecution against the suspect and, respectively, bringing to the attention of this person the quality of suspect, cannot be stuck by nullity, as long as the time intervals between the two moments mentioned above, reported to the dates and the circumstances of the case, are justified, a condition which the judge considered as being fulfilled in question, since it is a period of time of only 15 days. It was held that in the lack of an obvious abuse in the timing of the stages of process during the criminal prosecution, the judge cannot censure the way in which the body of the criminal prosecution has planned the beginning and the continuation of the criminal prosecution, not having data in the file to the effect that the prevention of the defendant in the exercise of the right of the defence had been sought.

3.3. The continuation of the criminal prosecution against a person. The phrase "reasonable suspicion"

In the recent doctrine[5] drawn up on the New Code of Criminal Procedure, it was stated the opinion according to which the order of the carrying out of a further criminal prosecution against the suspect in the case in which the conditions provided by the article 77 and art. 305 (3) of the Code of Criminal Procedure are fulfilled constitutes a positive procedural obligation of the body of criminal prosecution, and not a faculty of this one, being regulated in order to ensure an effective guarantee of the right to defence of the people accused in criminal proceedings. The precise determination of the moment of the formulation of an accusation in criminal matters (the notion of accusation in criminal matters signifying the official notification issued by an authority accusing a person of committing an offence, fact that attracts important repercussions on that person) is of particular importance because the respective person becomes the holder of rights and obligations at this point, having guaranteed the rights

[3] Decizia penală nr. 242/3 decembrie 2012 a Înaltei Curți de Casație și Justiție, disponibilă pe www.juridice.ro;
[4] Încheierea penală nr. 345/CO/CP/2.09.2016 a Curții de Apel București, secția a II-a penală, nepublicată;
[5] M. Udroiu, Procedură penală, Partea specială, Ediția a 4-a, Editura C.H.Beck, p. 52.

provided in art 6 of ECHR. It was shown next that the acquisition of the quality of suspect interferes with ex law, when the conditions provided by article 77 and art 305 (3) of the Code of Criminal Procedure are fulfilled which impose the body of criminal prosecution on acknowledging the existence of a charge in criminal matters and to order the carrying out of the further criminal prosecution against the suspect and on bringing to the attention of the rights. The violation of the positive procedural obligation, by carrying out the criminal prosecution *in rem* beyond the moment when it could be made a charge in criminal matters in a reasonable way, may lead to a significant and substantial injury of the right of a fair trial for the defendant, such as to draw the incidence of the penalty of relative nullity provided in art 282 of the Code of Criminal Procedure, relating to act of process or the evidences managed after this moment, being essential for the retaining of the injury of process, being as after a further criminal prosecution *in personam* , the right to defence may have been affected in its essence by the impossibility of obtaining the re- administration of the evidences or the participation at other acts of process.

It was also stated the opinion that the prolongation of the criminal prosecution *in rem* beyond the time when there are evidences to the effect of reasonable suspicion that a certain person committed the deed for which the penal prosecution was initiated is a procedural abuse.[6]

The European Court, in its jurisprudence[7] has stated that a person acquires the quality of suspect that draws the application of the guarantees provided for in the art. 6 ECHR, not from the moment in which the quality is notified to him,but from the moment in which they had plausible reasons to suspect the concerned person of committing the offence.

The European Court has stated that even at the time of the preceding acts, according to the Code of Criminal Procedure of 1968, the art guarantees were applicable 6 of the ECHR even if they were not provided for national law.

The European Court has shown that, at the time of the Acts prior to, according to the Code of penal procedure in 1968 was applicable to guarantees of Article 6 of the European Court for Human Rights in Strasbourg, even if there were laid down in national law.

It was shown in the case of Argintaru against Romania that the delay in the fulfilment of the obligation to provide further criminal prosecution against the suspect, and consequently, the extension of the placement of the person to whom there is a penal accusation in concreto apart from the penal trial, constitutes an infringement of the right fair trial.

The European Court has shown that even at the time of the fulfilment of the preceding acts, according to the Code of Criminal Procedure from 1998, the guarantees were applicable in art. 6 of ECHR, even if they were not provided in national law.[8]

In our opinion, this issue was, in principle, discovered in the recitals of the Decision no. 236/2016 of the Constitutional Court[9], by which, although the exception of unconstitutional of the provisions of art. 305 (1) and (3) of The Code of Criminal procedure were rejected as unfounded, it was held that "the interval of time that separates the moment of the beginning of the criminal prosecution *in rem* from the moment of the beginning of the criminal prosecution *in personam* is not strictly and expressly determined by the provisions of the Code of Penal Procedure." However, the criminal provision of process states that the prosecutor provides that the criminal prosecution should be further carried out to a person, when the existing dates and the evidences in question have effect in reasonable clues that this one has committed the deed for which the criminal prosecution has started. Thus, the prosecutor is obliged that, in the moment when there are reasonable clues that a person has committed the deed for which the criminal prosecution has started, to provide further criminal prosecution towards this person. This has the effect from the use of the legislator of the verb at imperative mood "provide", and not "may provide", so that it could be interpreted that there is a faculty of the prosecutor to postpone the time of the beginning of the criminal prosecution *in personam* until the necessary fulfilment of the probation for the beginning of the penal action and the direct order of this measure.

In principle, the existence of reasonable clues is concomitant with the formulation of an accusation *in personam* which has the valences of an accusation in criminal matters. However, there may be situations in which the two elements do not have a simultaneous existence. To the extent in which, in disagreement with the above provisions, the prosecutor does not comply with those requirements, then, in the case of issuing the bill of the indictment, the suspect has become a defendant and may submit to the censorship of the judge of preliminary chamber the examination of the legal administration of the evidences and the carrying out of the acts by the bodies of criminal prosecution, thus according to the art. 342 and art. 345 (1) and (2) of the Code of Criminal Procedure, in the filter procedure, the judge of preliminary chamber has the possibility to ascertain the nullity and to exclude the acts of criminal prosecution and the managed evidences with breaking the law which confers ,among other things, an effective right to defence.

The Court has noted in this respect that the provision of the art. 282 (1) of The Code of Criminal Procedure establish that breaking the legal provisions determine the nullity of the act when by the failure to

[6] Viorel Paşca, Principiul egalităţii armelor în procesul penal roman-O realitate sau o ficţiune, Revista Universul Juridic;
[7] Cauza Brusco contra Franţei, Hotărârea din 14 octombrie 2010, cauza Sobko împotriva Ucrainei;
[8] Curtea Europeană a Drepturilor Omului, cauza Argintaru contra Romîniei, decizia din 8 ianuarie 2013;
[9] Decizia CCR nr. 326/19 aprilie 2016, publicată în M.Of. nr. 426/7 iunie 2016;

comply with the legal requirements was brought a harm of the rights of the parties or of the main subjects of process that cannot be removed other than by the abolition of the act. Therefore, whenever all or most of the evidences from the criminal prosecution stage have been managed only during the criminal prosecution *in rem* , then the aspects of implementation of law with overlooking of the specific guarantees to the right to a fair trial can be called into question, such as the right of the suspect to be informed regarding the deed for which he is investigated and the legal classification of this one, the right to consult the file, under the law, to have a chosen lawyer or one of the office for cases of compulsory assistance, to propose the administration of evidences, to raise exceptions and to put conclusions, to make any other requests relating to the resolution of the civil and penal side of the case, to appeal to a mediator, in cases allowed by law, to be informed regarding his rights, or to the right to benefit from other rights stipulated by law. As long as depending on the particularities of each case it is proved the suspects/ defendants are deprived of the rights conferred by the Code of Criminal Procedure, being severely affected the right of defence during the criminal prosecution, then the evidences and the documents drawn up with the failure to comply with the legal requirements may be removed until the completion of the procedure of the preliminary chamber.

Towards the evolution of the jurisprudence of the European Court on the matter of the right to defence, towards the vision of the Constitutional Court on the fair interpretation of the provision of art 305 (1) and (3), the conclusion that is drawn up is that, in the event of ordering a further criminal prosecution against a person beyond the moment at which the body of criminal prosecution had to order in this respect in a reasonable way with the consequence of the lack of the suspect of the rights conferred by law, in particular that one to be able to assist, through a lawyer, at the interrogation of the parties, of procedural subjects, of witnesses, to be able to take part in carrying an expertise, etc., the compensatory in such situation would be the re-administration of the managed evidences in the criminal prosecution stage in rem or the removal from the appreciation of those evidences managed in the breach of the rights of the suspect.

Conclusions

Thus, to the question which is "the quantity" of evidences that can reasonably be managed in the criminal prosecution stage in rem, from the corroborated interpretation of the provisions of art 305 (3) of the Code of Criminal Procedure and art 99 paragraph 3letter c of the ECHR, the answer is that, in the criminal prosecution stage in rem must not be administrated only those strictly necessary evidence to provide reasonable clues that a person committed the offence with which the body of criminal prosecution has been referred to, not being necessary to have evidences at the level of those who found the sentencing to court.

Under no circumstances at this stage may not be administrated all the evidences during the criminal prosecution, in such a case, the injury caused to the suspect being not only evident but also irremediable. In such a case, even the re-administration of the evidences can no longer constitute a remedy for the removing the injury, because in case of a contradiction of the evidences, there will be a tendency for the body of criminal prosecution to take into account those administrated at the stage in rem. Neither the re-administration of these evidences at the judicial research stage is a remedy, such as some courts have stated, because the progress of the proceedings in compliance with the procedural guarantees in the criminal prosecution stage is essential, being possible that on the conditions of the management of the evidences with the full respect of the right to defence, the result of the criminal prosecution should be other than that of a made research without compliance with those guarantees. On the other hand, the administration of the evidences in this manner sometimes deprives the defendant of the possibility to use the simplified procedure, because it is possible to wish to admit the deed but at the same time he may invoke the existence of certain mitigating legal circumstances, of some causes of non- immutability, for which in front of the court, legally it is no longer possible to request evidences.

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