

RETURN OF THE CASE TO THE PUBLIC PROSECUTOR'S OFFICE FOR THE LACK OF INDIVIDUALIZATION OF THE COSTS IN THE BILL OF INDICTMENT

Sandra Sophie-Elise OLĂNESCU*

Alexandru Vladimir OLĂNESCU**

Abstract

In the second stage of the criminal trial, when a person is sent to court, the bill of indictment also includes the criminal prosecution body's request to order the defendant, under art. 274 para. (1) of the Criminal Procedure Code, to cover judicial expenses advanced by the State up to a specified amount.

However, in almost any case the amount due by the person sent to the court is set unilaterally by the prosecution authorities, without specifying the way in which they are determined and without submitting to the case the documents on which the request is based.

A serious problem is raised in the hypothesis that, in a criminal case, several persons are brought to court by the same bill of indictment and the amount is set at global level, without making any distinction between the defendants and the concrete activities that have generated an expense for each party.

A fundamental principle that operates in law is that any allegation must be proved and that the person making such claim must justify it. Under the circumstances, in a criminal case, a claim of a pecuniary nature is made by the Public Ministry through the bill of indictment, without it being substantiated and based on supporting documents, a procedure which gives an inequity character to the litigants that are subject to such measures.

The practice at national level is not uniform in this respect, as there are, on the one hand, courts which consider this situation to be circumscribing as a reason for the illegality of the bill of indictment, the vice which may be referred to in the procedure of a preliminary chamber and, on the other hand, there are courts of law that consider it to be a matter related to the substance of the case, and the court is to assess when the final decision is rendered.

From this point of view, we consider that the conduct of prosecution authorities should be sanctioned from the stage of the Preliminary Chamber Procedure, this being a flaw that can lead to the cause being returned to the Prosecutor's Office in the event that the prosecutor does not explain and prove each activity that has generated any costs which the prosecutor requests under art. 274 para. (1) of the Criminal Procedure Code.

Keywords: *bill of indictment, judicial expenses, inequity, prosecution authorities, sanction.*

1. Introduction

1.1. What matter does the paper cover?

This paper addresses a common theme in judicial practice, namely the particularities of the Preliminary Chamber Procedure regarding a specific problem encountered by defendants during a criminal trial, in respect of the unlawful manner of setting judicial costs by criminal investigation bodies.

1.2. Why is the studied matter important?

The chosen topic is important from the perspective of the solution to be applied by the Judge of the Preliminary Chamber notified with an indictment in which the individualization of judicial expenses is not done accurately and proven, to ensure that the right to a fair trial and the right to defense are also respected from this point of view.

The Preliminary Chamber Procedure was introduced in 2014 by amending the Criminal Procedure legislation as an intermediate stage between the first phase of the criminal trial, respectively the criminal investigation phase and the trial stage, the phase in which the judge must observe the relevance of the indictment, the legality of performing criminal prosecution acts.

This legislative solution was also received in the national Criminal Procedural legislation precisely in order to create a buffer between the criminal investigation phase and the investigation stage of the case before the court, being necessary to clarify all the criticisms when judging the case on the merits which the parties have regarding the regularity of the bill of indictment, of the administration of the evidence and of the performance of the acts of criminal investigation. Thus, the judgment shall concentrate exclusively on the validity or unfoundedness of the criminal accusation.

Misunderstood by many legal practitioners, not without criticism and changes due to the admission of

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: sandra.olanescu08@gmail.com).

** PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: alexandru.olanescu@cliza.ro).

exceptions of unconstitutionality, the Preliminary Chamber procedure is particularly important because this procedure can exempt the person sent to trial to go through the third stage of the criminal trial, which is often of long duration, in the situation where there is no proper description of the deed within the indictment, or definitively certain evidence or all evidence or acts of criminal investigation have been annulled.

Precisely from this perspective, the Preliminary Chamber represents a guarantee of respecting the right to defense, the right to a fair trial, as well as the legality of the criminal trial that is conferred to the investigated person throughout the criminal trial by the Criminal Procedure Code, within the provisions of art. 2, art. 8, art. 10 of the Criminal Procedure Code, as well as in the provisions of art. 6 of the ECHR.

2. Procedural aspects and remedy solution of the Preliminary Chamber Judge on the defects of judiciary costs requested by the bill of indictment

Regarding the regularity of the act of notification of the court, it aims on the one hand, the complete description of the deed or facts for which the bill of indictment was ordered, the achievement of the legal classification for each deed as well as the mention of the evidence administered both in favor and to the detriment of the defendant or defendants.

From a descriptive point of view, it is important for the indictment to present the factual circumstances that substantiate the accusation, the theoretical exposition of the objective side and the subjective side of the crime retained by the person sent to trial, the evidence supporting the accusation and those that would substantiate the defense thesis. The last period of time, the idea begins to crystallize according to which the way of establishing and justifying the court costs would fall into this descriptive sphere.

By observing the provisions of art. 328 para. (1) of the Criminal Procedure Code, it is established in the charge of the prosecutor who investigated the criminal case the obligation to mention and to limit the content of the indictment to the following:

“the deed and the person for whom the criminal investigation was carried out [...], the data regarding the deed retained in the charge of the defendant and its legal classification, the evidence and the means of proof [...].”

Also, regarding the legal classification of the deed, as shown in the literature, the “law” section of the

indictment must include an actual analysis of the constituent elements of the crimes for which the criminal prosecution began, by exemplifying the elements that are circumscribe the objective side, the subjective side and the manner in which the deed was committed (including in the situation when they are not met).¹

In the sense of those mentioned above, within judicial practice it has been ruled that:

„regarding the description of the deed, this must include the act, the action, the inaction, the attitude of the perpetrator so as to result with certainty the acts retained in his charge, and in the case of crimes in a continuous form, each material act must be described in the same manner mentioned above.”²

Otherwise, the non-observance of these exigencies imposed by the provisions of art. 328 para. (1) of the Criminal Procedure Code do not allow the person sent to trial to fully understand the scope of the accusation, as required by legal and conventional norms that guarantee the right to a fair trial in criminal matters.

Consequently, in the situation where the descriptive elements are missing, the ordered bill of indictment is lacking in clarity because the criteria and reasoning that formed the basis of the sentencing solution ordered by the prosecutor cannot be established, which contravenes both the legal provisions in force and the provisions of art. 6 of the ECHR, which regulates the right to a fair trial.

The indictment also includes mentions regarding the obligation of the person subject to the bill of indictment to pay the court costs, expenses that are generated, on the one hand by the administration of the evidence and, on the other hand, by the performance of specific criminal prosecution acts.

By way of example, we find in the sphere of incidence of legal expenses, the costs generated by the search activities, the interception activities of the pursued person, the performance of expertises, in cases where the administration of such evidence is ordered, authorized translations, if the case file has foreign elements.

Regarding the court expenses, especially in the period immediately following the entering into force of the Criminal Procedure Code, it is appreciated that the way of establishing the court costs is a matter related to the merits of the case, so that neither the parties nor the courts, *ex officio*, do not criticize within the Preliminary Chamber Procedure, the defects regarding the setting, the amount and the justification of the expenses.

¹ In this respect, please see Udroui, M., Predescu, O, *The European protection of human rights and the Romanian criminal trial*, C.H. Beck Publishing House, Bucharest, 2008, p. 703.

² In this regard, please see, Decision no. 93 of the Mureş Tribunal, crim. s., rendered in case file no. 2557/102/2008 on June 23, 2011, available on <http://legeaz.net/spete-penal/restituirea-cauzei-la-procuror-pentru-93-2011>.

However, once the case was settled, the issues related to the court costs were ignored, the courts ordering the defendant to pay the costs occasioned by the settlement of the criminal investigation phase as requested by the criminal investigation body in the structure of the indictment, in case of conviction.

Also, the negligence of the critics regarding the argumentation and justification of the court expenses incurred in the first cycle of the criminal process, made that, within the structure of the bill of indictment, the prosecutor mentions a global amount to which the defendants are obliged, without a minimum description of the algorithm that determined that amount.

In this respect, the indictments issued by all the structural prosecutor's offices include the request of the criminal investigation body to dispose of the obliged persons sent before the court, pursuant to art. 274 para. (1) of the Criminal Procedure Code, for the payment of the judicial expenses advanced by the state, without specifying the manner of establishing and without submitting to the case file documents on which the advanced request is based.

Or, considering the amount that is requested, the prosecutors must explain and justify each activity carried out exclusively for each person and attach evidence of these costs.

Moreover, there are cases in which several defendants are investigated and sent to trial and not infrequently evidence was gathered regarding other persons and facts but all defendants were obliged to the same amount without a tie being made, this being a mandatory element even in the case of joint and several liability.

In addition, some of the supervision measures used and the prosecution proceedings carried out in criminal cases could concern persons and offenses for which the case has been closed and it would be unfair that such expenses incurred in administering such evidence or performing such criminal prosecution documents to be borne by the persons for whom the bill of indictment was ordered.

Regarding the legal basis of the judicial expenses advanced by the state in the criminal cases investigated by the prosecutor's offices, this is represented by art. 177 of the Internal Regulations of the Prosecutor's Offices, approved by the Order of the Minister of Justice no. 2632/C/30.07.2014.

Thus, according to the provisions of art. 177 of the Internal Regulations of the Prosecutor's Offices:

"the establishment of judicial expenses is made according to the procedure provided by the order of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice."

Also, the order of the general prosecutor regarding which art. 177 is supplemented by the criteria

established by the Internal Regulations of the Prosecutor's Offices.

Thus, in the content of Section 7 of the Regulation, having the marginal name "*Calculation of judicial expenses advanced by the state and evidence of the execution of ordinances ordering the payment of judicial expenses and judicial fines*" within art. 178-180, stipulates the express obligation of the criminal investigation bodies to highlight, justify and prove every expense they invoke:

"Art. 178 - Recovery of legal expenses

(1) The chief clerks and the first clerk, under the guidance of the prosecutors who carry out the criminal investigation or its supervision, shall ensure, according to the provisions of the Criminal Procedure Code, the recovery of judicial expenses advanced by the state during the criminal investigation and enforcement the judicial fine provided by the Criminal Code was ordered.

(2) The evidence of the judicial expenses and of the judicial fines shall be kept in the Register of evidence and execution of the obligations ordered in case of renunciation of the criminal investigation and of the judicial expenses (R-12), completing the rubric in relation to the concrete situation.

Art. 179 - Establishment of judicial expenses

The establishment of judicial expenses is made according to the procedure provided by the order of the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Art. 180 - Evidence and manner of execution of ordinances

The leaders of the prosecutor's offices will control, directly or through designated prosecutors, the evidence and the manner of execution of the ordinances by which fines, judicial expenses or the obligations provided in art. 318 para. (6) of the Criminal Procedure Code and will propose measures to eliminate the irregularities found."

In addition, it is important to mention that the National Anticorruption Directorate, as a specialized structure of the Prosecutor's Office attached to the High Court of Cassation and Justice, also has its own Internal Rules of Procedure of the National Anticorruption Directorate, which at art. 162 of provides that:

„when establishing the judicial expenses, will be considered the expenses made by the criminal investigation body and by other bodies for:

a) summoning, by postal services, by telephone, telex or fax, the parties to the proceedings, witnesses, experts, interpreters and other persons;

b) payment, in the cases and under the conditions provided in Article 190 of the Criminal Procedure Code, of the sums of money due to witnesses, experts and interpreters;

c) performing technical-scientific findings and expertise;

d) lifting and preservation of material evidence, including the cost of films, covers, disks, chemicals used, packaging, transport to storage, etc.;

e) taking judicial photographs and audio-video recordings;

f) travel in the interest of solving the cases: the cost of accommodation, per diem, transport;

g) payment of ex officio defenders' fees;

h) the equivalent value of the paper, printed matter and other materials that make up the criminal files;

i) the value of other works performed during the criminal investigation, which required payments from the budgetary funds."

Regarding the documents based on which the amount of legal expenses is established, the provisions of art. 163 of the same Regulation, according to which:

"the calculation of judicial expenses will be made, in each case solved by the prosecutor, on the basis of the following supporting documents:

a) the documents drawn up by the persons who performed the works, ordered by the criminal investigation body, in which the costs of the works are mentioned, under the conditions provided by law;

b) the documents on the basis of which the witnesses, experts and interpreters justify, the expenses incurred, under the conditions provided by law;

c) the documents issued by law firms, which mention the fees paid to the defense counsel ex officio;

d) the note drawn up by the chief clerk, under the guidance of the prosecutor who carried out the criminal investigation, regarding the expenses made by the Public Ministry during the criminal investigation, for correspondence, telephone, telex or fax calls, travel, consumption of materials, etc."

It follows that, during the criminal investigation phase, in its specific activities, the criminal investigation bodies incur expenses which, in the event that the person is found guilty, in addition to the main punishment, the accessory and complementary punishments, will have to bear the expenses incurred by the criminal investigation bodies, in addition to possible civil damages.

However, the simple mention, within the indictment, regarding the obligation of the defendant to bear judicial expenses is not enough to be considered complete the descriptive component of the bill of indictment. These costs must be argued and breakdown per each and every defendant.

At the same time, the case file must include all supporting documentation that represents the basis for the withholding of the respective judicial expense, the proof of the costs that the case prosecutor claims to be incurred being necessary.

A fundamental principle that operates in law is that any claim must be proven, and the claimant is required to justify it. Under these conditions, a pecuniary claim is formulated by the Public Ministry without this being argued and based on supporting documents.

From this perspective, the practice of the courts sanctioned this behavior of the criminal investigation bodies, being worth mentioning the recent Conclusion of the Bucharest Tribunal, issued on May 10, 2021, within the file no. 32671/3/2020/a1, by which the court remitted the indictment to the Directorate for the Investigation of Organized Crime and Terrorism - Central Structure, stating that such conduct represents:

"non-compliance with the legal provisions regarding the manner of establishing the judicial expenses borne by the state during the phase of the criminal investigation".

Thus, given that neither specification is made in the act of indictment forwarded to the court regarding the object of the expenses occasioned by the criminal investigation in the case, at the part of expenses made strictly for the criminal investigation of the alleged deed committed by the defendant nor with regard to the documents proving the amount of these expenses, the Preliminary Chamber Judge of the competent court to judge the case in the first cycle must find that the request of the criminal investigation body is unjustified and the method of determining the amount of court costs is arbitrary.

The decision is natural, in our opinion, since once the case has reached the trial stage on the merits of the case, it is difficult, if not impossible, in the absence of a minimum description of the court costs incurred during the criminal investigation and supporting documents to be able to draw conclusions on this aspect, and for the judge to assess the veracity or not of the request of the criminal investigation bodies.

Also, although it could be considered that the insufficient description of the court costs and the lack of documentation on which the prosecutor of the case bases his accusation can find a solution once the Preliminary Chamber Procedure is over, by the court's assessment of the founded or not character of the claim, as it is analyzed and the merits of the accusation, we cannot agree with such a thesis.

This is because, the Preliminary Chamber Procedure aims, prima facie, at the regularity of the bill of indictment forwarded to court, regularity that implies a complete description of the deed as well as an effective argumentation of all the requests that the case prosecutor invokes before the court that will render the decision on the case.

3. Conclusions

In respect of the constitutive elements of the deed, the indictment is verified in the Preliminary Chamber procedure precisely because in the stage of the trial the descriptive elements of the accusation can no longer be invoked.

The same situation arises with regard to the matter of court costs which, on the merits, can be assessed as well-founded or not in relation to the necessity and usefulness of administering evidence (for example, conducting an expertise without utility in question), but the conclusions regarding the non-description of the costs and the supporting financial documentation can no longer be reiterated before the Court of First Instance or the Court of Appeal, if the party could effectively criticize these descriptive defects in the Preliminary Chamber Procedure.

From another perspective, it is necessary for the criminal investigation bodies to draft a bill of indictment in the most rigorous conditions, approaching in detail each component part of it, from the description of the factual circumstances of the deed, to the theoretical exposition of the two sides of the crime are the object of the indictment, the objective side and the subjective side, of the means of proof, of the description of the procedural and procedural acts performed, until the mention, in real and effective way, of the court costs that are requested to the defendant under the art. 274 para. (1) of the Criminal Procedure Code.

Consequently, the Preliminary Chamber Judge within the competent court to judge the case in the first instance must, from this procedure, order the restitution of the case to the prosecutor's office in order to remedy this irregularity of the bill of indictment, in case that the costs are not properly described within the indictment.

References

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