THE REASONABLE DOUBT IN THE ROMANIAN CRIMINAL TRIAL

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Abstract

This work represents a doctrinary approach with certain judiciary practice highlights of the manner in which the standard regarding the evidence "beyond any reasonable doubt" can be found in the new Criminal Procedure Code. The research made led to the ascertainment that the acknowledgment of this standard of evidence consecrated at the European level and its assimilation into the Romanian juridical regulations ensured a guaranteeing of human rights within the criminal trial.

Keywords: *reasonable doubt, criminal trial, human rights protection, criminal law*.

1. Introduction

The Romanian criminal trial has been in a continuous transition in the last 25 years under the influence of the various factors that modify, condition and modernize it at the same time. As early as the 1990s, after adopting a new social and political organization system, consistent and important changes occurred, the objective of which was to align the criminal trial to the standards specific to a democratic state. The most important factor for the regularization of the national criminal trial is the standard for the protection of human rights imposed by means of the jurisprudence of the European Court of Human Rights. Through the ratification of the European Convention of the human rights by means of Law No. 30/1994[1] and through the acceptance of the jurisdiction of the European court, Romania took on the assimilation in its internal legislation of the guarantees and protection mechanisms for human rights imposed at the European level.

One of the most important and delicate aspects from the economy of the entire criminal trial, regardless even of the system in which such trial takes place, is represented by evidence. In the legal definition, evidence means any *de facto* element which serves at ascertaining the existence or inexistence of a crime, at identifying a person who perpetrated it and at knowing the circumstances necessary for the just solving of the cause. The doctrine observes, with regard to the notion of "evidence" that evidence shall be construed any *de facto* circumstance which has an informative relevance in the cause and which may be physically verified[2].

2. The evidence in criminal trial

The importance of evidence is beyond any question mark, as there are opinions in accordance with which from the very moment when the criminal trial as initiated and until its final solving, all the merits issues of the cause are solved by means of the evidence, so that the very *perpetration of criminal justice depends primarily upon the system of evidence*[3].

From the lawmaker's perspective, the aspects that should be clarified by means of evidence are circumscribed to the object of the evidence detailed by Art. 98 of the Criminal Procedure Code. On the strength of this legal text, the following form the object of producing evidence: a) the existence of the crime and its perpetration by the defendant; b) the facts regarding civil liability, when there is a civil party; c) the facts and the *de facto* circumstances on which law enforcement depends; d) any circumstance necessary for the just solving of the cause. The manner in which the quoted legal text is worded indicates that the norm has an exemplary nature in its essence because letter d) of Art. 98 of the Criminal Procedure Code allows the extension of the object of evidence also to any other circumstance necessary for the just solving of the cause. The doctrine shows that the object of evidence means the ensemble of the facts or of the *de facto* circumstances which require being evidenced in a criminal cause for the purpose of solving it[4].

In any case, the object of evidence is formed only of the facts and of the *de facto* circumstances[5]. National juridical norms, presumed facts, obvious facts, notorious facts, unchallenged facts and facts established by means of a Court order should not be

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[1] The law for ratifying the European Convention of Human Rights, published in The Official Gazette of Romania, Part I, No. 135 of May 31, 1994.

[2] A. Zarafiu, Procedură penală, C.H. Beck Publishing House, Bucharest, 2014, p. 155.

[3] I. Neagu, M. Damaschin, Tratat de procedură penală. Partea generală, Universul Juridic Publishing House, Bucharest, 2014, p. 412-413.

[4] A. Zarafiu, op. cit., p. 157.

[5] Gr. Theodoru, Tratat de drept procesual penal, 3rd edition, Hamangiu Publishing House, Bucharest, 2013, p. 284.

evidenced[6]. The following evidence is not admissible, representing an exception from the principle of freedom of evidence: the evidence forbidden by the law, the evidence contradicting the moral or scientific convictions about the world, as well as the evidence regarding undetermined negative facts[7].

The requirements to be met by evidence are: admissibility, pertinence (it should be connected with the solving of the cause), conclusiveness (decisive role in the solving of the cause), its production should be possible, utility (its production should be necessary). The production of evidence is the exclusive attribute of the judiciary body.

As far as the appreciation of evidence is concerned, the doctrine is unanimous in showing that *the principle of the freedom of appreciating over the evidence* is traditionally working in the Romanian criminal trial. This principle assumes that judiciary bodies may appreciate the evidence in a file freely, without any legal constraints, its contents being listed also by Art. 103 para. (1) of the Criminal Procedure Code: "the evidence has no value pre-established by law and is subject to the free appreciation of judiciary bodies further to the evaluation of all the evidence produced in the cause".

A special meaning is held by the legal provisions included in Art. 103, para. (2) of the Criminal Procedure Code by means of which the internal regulation takes over a classic standard in the field of evidence reflected in the jurisprudence of the European Court of Human Rights. According to the internal norm: "in making the decision regarding the existence of the crime and of the guilt of the defendant, the court will decide in a motivated manner with reference to all the evaluated evidence. Sentencing shall be ordered only when the court is convinced that the accusation was proven beyond any *reasonable doubt*" (our underlining – B.M.).

3. Reasonable doubt as standard

Generally, the standards for appreciating the evidence from the two major trial systems present significant differences[8]. In the continental system, were traditionally adopted, with regard to evidence, the *principle of the free appreciation of evidence* and the *principle of the free or intimate conviction of the judge*. Adversarial systems, however, have limited in time this freedom of the judge, imposing *various standards for the appreciation of evidence*. Such standards include the standard of the *preponderance of evidence*, consisting in the adoption of the solution that is supported by preponderant evidence; this standard is regularly used in civil trials. In the criminal field, the *standard of the proof beyond a reasonable doubt* particularly imposed. It is obviously a standard that is higher than the first one, because the condemnation requires that the proof supporting the guilt should create the conviction of the judge. This conviction can be affected by the existence of a doubt, but the doubt must be maintained within reasonable limits. When doubt exceeds reasonable limits, there cannot be ordered a solution of condemning the defendant. The lawmaker expresses its opinion in the same respect in Art. 4 of the Criminal Procedure Code with regard to the presumption of innocence: "(1) Any person is considered innocent until his/her guilt is established under a final Court decision. (2) After the production of all the evidence, *any doubt in forming the conviction of judiciary bodies shall be interpreted in favour of the suspect or of the defendant.*" (our underlining B.M.). The doctrine observes that the reasonable doubt may originate either in the insufficiency of the evidence brought by prosecution in support of the charges, or in the exclusion of the evidence which was unlawfully obtained[9]. We believe that the evidence produced with breaching the principle of loyalty is in the same situation[10]. The principle finds its express regulation in Art. 101 of the Criminal Procedure Code, based on which: "it is forbidden to use violence, threats or other means of constraint, as well as promises or guidance for the purpose of obtaining proof". The principle has two more components regarding: the prohibition of the use of hearing methods or techniques which affect a person's capacity to remember and report consciously and voluntarily the facts that constitute the object of proof (even in the assumption in which the person consents to it), namely the interdiction of challenging a person to perpetrate or continue the perpetration of a criminal deed, in order to obtain a proof. In an ideal manner, even the proofs that were obtained in breach of these interdictions should be subject to the sanction by exclusion. The doctrine shows that the exclusion of the proofs unlawfully or unfairly produced is the very trial-related sanction which applies to the proofs which are not appropriate from the perspective of the two principles invoked, even in case in which rights and liberties guaranteed by the European Convention of the Human Rights were breached (*e.g.* in the assumption that torture was used)[11]. The sanction regards also the proofs which were impaired by the flaw which determined exclusion, as well as all the proofs deriving therefrom, being applied in this field the doctrine of *the remote effect* or *the fruits of the poisonous tree*[12]. Nonetheless, there is also the opinion according to which, by reporting to the provisions of

[6] A. Zarafiu, op. cit., p. 158-159.
[7] I. Neagu, M. Damaschin, op.cit., p. 421-422.
[8] C. Ghigheci, Principiile procesului penal în noul Cod de procedură penală, Universul Juridic Publishing House, Bucharest, 2014, p. 79 *et seq.*
[9] C. Ghigheci, op.cit., p. 81.
[10] B. Micu, A.G. Păun, R. Slăvoiu, Procedură penală, Hamangiu Publishing House, Bucharest, 2014, p. 87.
[11] M. Udroiu, op.cit., p. 655.
[12] I. Neagu, M. Damaschin, op. cit, p. 433.

Art. 102, para. (3) of the Criminal Procedure Code, exclusion is not an autonomous trial-related sanction, as it is subsumed to the sanction by nullity, in the sense that it occurs only in case of ascertainment of the nullity of the act by means of which the production of a proof was ordered or authorized or by which such proof was produced[13].

In other hypotheses, the reasonable doubt may occur also when all the proofs produced are maintained, not being subject to the sanction by exclusion in the stage of filtering the evidence in the preliminary room, the court considering that such proofs were lawfully and fairly produced. This effect may appear also due to the fact that some of these proofs cannot be vested with full evidentiary value, as they are affected by certain limitations. It is, for example, the case of the statements made by the undercover investigators included by the European Court of Human Rights in the category of "anonymous witnesses"[14]. With respect to the statements made by these anonymous witnesses, the European court deemed that their use to order the sentencing of a person is not, *per se*, incompatible with the provisions of the European Convention of Human Rights, but the European court underlines that, should its anonymity be maintained throughout the entire criminal trial, the defence shall face particular special difficulties. The court has constantly appreciated that, if this solution of preserving anonymity is chosen, the disadvantage faced by the defence shall have to be counterbalanced in a sufficient manner by means of the procedure followed by the judiciary authorities. In the assumptions that the balance between weapons cannot be ensured, the proofs obtained from witnesses should be extremely carefully inspected, and the sentencing of a person cannot rely exclusively or decisively on the anonymous testimony[15]. In this respect, in the case Saidi versus France, the European Court of Human Rights ascertained the breach of the provisions of Art. 6, paras. 1 and 3, letter d) of the European Convention, since anonymous testimonies represented the only basis for the sentencing, after having previously been the only basis for suing[16]. In the same category of anonymous witnesses, the European court includes also the civil party heard as a witness, the injured party, as well as the witnesses who no longer want to make any statements.

In case the produced proofs include exclusively or decisively proofs affected in their probative component, although at a summary appreciation, they might form the basis for sentencing a person, being liable to contribute to the removal of the presumption of innocence beyond any reasonable doubt, this effect should not be obtained. The reason for which this doubt might appear is not rooted in the sanction by the exclusion of any of the respective proofs, but the fact that, in fact, their probating force is diminished.

In no case can be issued a solution of sentencing a person when there is a reasonable doubt regarding the existence of the deed, the criminal nature of such deed, and assigning the respective deed to the defendant, in fact regarding the object of probation. Otherwise, symmetrically, by reporting to the provisions of Art. 103, para. (2) of the Criminal Procedure Code, Art. 396 of the Criminal Procedure Code, which regulates the solving of the criminal action provides that: "the court decides with respect to the charges made to the defendant, ruling, as applicable, on the sentencing, waiver of the application of punishment, postponement of the application of punishment, acquittal or termination of the criminal trial". Either of these solutions is issued, however, only if it is ascertained ***beyond any reasonable doubt*** that the deed exists, is construed as a crime and was perpetrated by the defendant" (our underlining – B.M.).

Also in the internal judiciary practice we can note the wider and wider acceptance of the standard of proof "beyond any reasonable doubt", even if it is not referred to as such, being most frequently related to its component of complementarity to the presumption of innocence. Thus, in a decision related issued in a case, the High Court of Cassation and Justice indicates[17]: "therefore, with respect to the crimes of taking bribe, in case of informers M.C.D. and I.G.A., the Court found that, in the case, the presumption of innocence of which the defendant benefits on the strength of the provisions of Art. 66, para. (1) of the Civil Procedure Code[18] was not dropped and, according to the *in dubio pro reo* rule, any doubt operates in favour of the defendant, the Court found that the first Court correctly ordered … the acquittal of defendant T.L. for the perpetration of the crime of taking bribe (in the version of claiming)". The same decision also underlined that in the respective case "the Court took into account the fact that the defendant's guilt is established on the basis of secure and certain proofs and, since the proofs produced in the case leave room for an uncertainty with respect to the defendant's guilt, it is required to give efficiency to the rule according to which *any doubt is in favour of the defendant* (*in dubio pro reo*)". On the same occasion, the Court deemed that the *in dubio pro reo* rule constitutes a complement of the presumption of innocence, an institutional principle reflecting the manner in which the principle of finding the truth, consecrated in Art. 3 of the Civil Procedure Code is found in the field of probation. And by reference to the European conventional norms, the

[13] M. Udroiu, op.cit., p. 659.
[14] M. Udroiu, O. Predescu, Protecția europeană a drepturilor omului și procesul penal român, Editura C.H. Beck, București, 2008, p. 226.
[15] European Court of Human Rights, Case Delta versus France, decision dated December 19, 1990.
[16] European Court of Human Rights, Case Saidi versus France, decision dated September 20, 1993.
[17] High Court of Cassation and Justice, Criminal Sentence, Decision 389/2014, www.scj.ro.
[18] The quote from the decision refers to the 1969 Criminal Code.

High Court stated that "the same idea is included in the provisions of para. 2 of Art. 6 of the European Convention of Human Rights, providing that *any person accused of a crime is presumed to be innocent until his/her guilt shall be legally established*, thus imposing that the Court should not start from the idea that the defendant perpetrated the deed for which s/he was referred to judgment, the task of producing the proof being incumbent on the prosecution, while the defendant benefits from the doubtful situation". By reporting to all these legislative and principle issues invoked in the case which is subject to analysis, the supreme court indicated that "as it has been shown, the entire probative material produced in the case does not reveal the existence of *decisive, complete and secure proofs liable to lead to the conclusion that defendant T.L. would have perpetrated the crimes of* taking bribe, in case of informants M.C.D. and I.G.A". (our underlining – B.M.)

Similarly, in another decision, the High Court indicated that "it is, however, ascertained that the probating material produced in the case indicated without a doubt the fact that this defendant perpetrated this crime, all the legal conditions for engaging the defendant's criminal liability being met…"[19]. The High Court underlined also in another situation: "The proofs produced suggest, *beyond any reasonable doubt,* that the defendant would have used the very office held by him in order to directly finance the trading activity of certain business companies which were used for the perpetration of tax evasion crimes, with high prejudices, as well as to ensure the protection of the persons involved in this criminal activity ….". (our underlining – B.M.)

4. Conclusions

Effective February 1, 2014, Romania has a new legislation in the criminal field. Although this legislation is not beyond any criticism, both the doctrine and the jurisprudence already remarking certain difficulties generated by the provisions included in the two codes or in the legislation for putting these codes into application, it is already active, being more important at this time for it to be understood and applied in a reasonable manner rather than criticized at all costs. Many of the matters traditionally regulated in the criminal procedure field were maintained by making efforts for the modernization and connection to the European standards regarding the protection of human rights. One of the matters with respect to which a considerable modernization was desired is that referring to proofs, as they are consistently contiguous to the standard of proof which is transparent from the jurisprudence of the European Court of Human Rights. In this field, although the principle of the free appreciation of proofs was maintained, it was expressly imposed by the lawmaker's will and by the standard of appreciation "beyond any reasonable doubt" often imposed also by the European Court.

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[19] High Court of Cassation and Justice, Criminal Sentence, Decision 385/2014, www.scj.ro.