COMPARATIVE ASPECTS REGARDING THE SETTLEMENT UNDER THE CODE OF CRIMINAL PROCEDURE OF 1969 BY THE HIGH COURT OF CASSATION AND JUSTICE OF AN APPEAL AGAINST AN UNREASONED CONVICTION SENTENCE DELIVERED BY THE COURT OF APPEAL SUBSEQUENT TO THE ACQUITTAL DECISION ISSUED BY THE TRIAL COURT

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Abstract:

This article examines, in relation to the national law (the Code of Criminal Procedure of 1969) and the provisions of the European Convention on Human Rights, the judgment of an appeal filed against an unreasoned sentencing decision delivered by the appellate court subsequent to a decision for acquittal rendered by the first-instance court (trial court). The article approaches this issue in light of the domestic and the international case law, with a highlight on several sentences that are deemed illegal due to their superficial reasoning or to a reasoning that fails to describe the circumstances, the evidence adduced and the grounds based on which the sentencing was ordered, as well as by reference to cases where the higher courts, after reassessing the evidence and the facts established by the lower court, delivered a decision to sentence, yet without reexamining the evidence that had been deemed sufficient by the first-instance judge to question the reasonableness of the charge and to render a sentence of acquittal. The author further illustrates the importance given by the Romanian legislator, and in particular by the European Convention on Human Rights, to the duty of the law courts to state the reasons of their sentencing decisions, particularly in cases where the trial court delivered a judgment of acquittal.

Keywords: *failure to give reasons, reassessment of evidence, appeal, fair trial, retrial.*

I. Introduction

The right to a fair trial, as guaranteed under Article 6 paragraph 1 of the European Convention on Human Rights, means, inter alia, the right of the parties to the proceedings to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are duly considered by the trial court.

Article 6 of the Convention establishes the duty of the law court to conduct an effective examination of the submissions, the arguments and the evidence adduced by the parties to the proceedings.

Moreover, a fair trial requires that a higher court should give extensive reasons for its decision instead of just limiting itself to upholding the reasoning of the lower court, and to conduct a thorough examination of the key issues that are brought before it, such obligation being constantly acknowledged by the case law of the European Court.

II. Content

Having regard to Article 383 (1) of the Code of Criminal Procedure of 1969, the decision of the appellate court, which makes the object of our consideration, should have contained in its recitals the grounds in fact and in law which have led to the delivery of the sentence, including an actual and effective examination of the submissions and evidence adduced by the parties in the case during the three stages of the trial (prosecution, trial on the merits and appeal), as well as of the offenses the defendant(s) is are charged with.

Failure of the appellate court to fulfill its duty described above represents an infringement of the mandatory provisions of Article 356 (c) of the Code of Criminal Procedure of 1969, which establishes both the obligation of the court to "*consider (a) both the evidence that served as the basis for judging on the criminal aspect of the case, and the evidence that were dismissed ...",* as well as the appellate court's duty to "*examine (a) any elements in fact based on which the decision delivered is grounded".* These obligations are also stipulated in Article 403 (1) (c) of the new Code of Criminal Procedure (enacted on 1 February 2014 by Law no. 135/2010, with further amendments and additions).

Under the provisions of article 383 (1) of the 1969 Code of Criminal Procedure, the decision of the appellate court should have included in its introduction the references provided for in Article 355 of the 1969 Code of Criminal Procedure, and in its recitals, the factual and legal grounds for admission of the appeal and the reasons that led the court to deliver its decision, as specified in article 379 (2) (a) of the 1969 Code of Criminal Procedure (admission of the appeal, cancellation of sentence and retrial of the case by the court of first instance).

It is worth mentioning that, according to the provisions contained in Article 384 of the Code of Criminal Procedure of 1969, judging of the case by the

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court of appeal is regulated by the provisions contained in the special part, Title II, Chapters I and II of the Code.

Consequently, the judgment of the case on the merits, conducted by the court of appeal after cancellation of the sentence, is governed, according to the reference mentioned above, by the specific rules of judgment applicable to a court of first instance.

Thus, articles 356 (b) and (c) of the 1969 Code of Criminal Procedure provide that the recitals of court decision delivered in the case should contain:

- a description of the offense subject to accusation, specifying the time and place of the offense and the legal classification of the offense under the complaint,

- the examination of the evidence that served as a basis for the settlement of the criminal aspects of the case, including evidence that were dismissed by the court, as well as the examination of any facts on which the decision is grounded.

In the case of a conviction sentence, the recitals have to also describe the offense or every offense the court finds the defendant to be guilty of, as well as the form, degree of guilt, aggravating or mitigating circumstances, repeated offense (if any), the amount of time to be deducted from the punishment imposed and the acts determining its length.

In addition, in the event that the appellate court failed to actually check the judgment appealed against based on the evidence administered during the examination by the court of first instance (Article 379 (1) of the 1969 Code of Criminal Procedure), and ruled only formally and contradictory to the court of first instance with regard to the grounds for appeal (Article 379 (3) of the 1969 Code of Criminal Procedure), the appellate court was deemed to have violated the procedural obligations that are currently contained in Article 420 (8) (1) of the new Code of Criminal Procedure.

The content of a court judgment should describe not only the decision per se, but also the grounds and the legality of the decision delivered by the court.

This is exactly why the main duty of the judge (judges) called upon to decide in a criminal matter is to ground his (their) judgment on the evidence adduced in the case before them and to examine it in accordance with Article 63 of the Code of Criminal Procedure of 1969, following a thorough assessment thereof, such assessment to be clearly reflected by the sentence delivered.

To this end, the entire evidentiary material must undergo an unbiased examination and any contradictions in the conclusions drawn from the substance of every piece of evidence adduced should be subjected to the deliberations of the court, which are designed to review and evaluate the evidence by confrontation, so that truth may come out, which is the primary function to be properly fulfilled in all the stages of the criminal lawsuit.

Insofar as "*to state the reasons means to demonstrate, to highlight the concrete facts that, used as premises, lead to formulation of a logical conclusion",* and "*the mere assertion of a conclusion without indicating concrete facts […] or reference to […] the acts the case in general does make a proper reasoning"* (High Court of Cassation and Justice, Criminal Division, decision 656/2004), the court's failure to give reasons is obvious in the case of the decision analyzed herein.

There may be situations where the judgment appealed against suffers from an obvious lack of an effective and comprehensive examination of the evidence adduced, despite the fact that the decision of the lower court, which was cancelled, had been an acquittal decision, and in spite of the fact that the specific circumstances of the case brought before the court had demonstrated the complexity of the facts and the need for an extensive reasoning with regard to both the admissibility of Prosecution and the delivery of the sentencing decision (including the length of imprisonment).

Failure to state the grounds of the decision is an issue regulated by the provisions of article 6 § 1 of the European Convention on Human Rights.

Seen from this perspective, the lack of reasoning is a circumstance which should automatically lead to cancellation of the unreasoned decision and the sending of the case for retrial back to the first-instance court.

In the case under our consideration we are not dealing with a failure to give sufficient reasons, but with a total lack of reasons for the criminal sentence delivered by the judge of the trial court.

In a situation where the criminal proceedings were been virtually eliminated before the court of first instance, the court of appeal would be required to directly censor the judgment of the first instance, which is an aspect that was not contemplated by the legislator, and the defendant would be deprived of the legal and conventional right of the double degree of jurisdiction in criminal matters (Article 2 paragraph 1 of Protocol 7 enshrines the right of the person convicted of a criminal offense by a court to require the examination of the statement of guilt or of the sentence of conviction by a higher court), all the more as the scope of the circumstance of cassation has been drastically narrowed by the amendments brought by Law no. 2/2013.

The intention of the legislator to speed up the settlement of criminal cases by removing undue decisions to send back the case for retrial should not be deemed as the complete cancellation of the stage of judgment of the case in the court of appeal, as it happens in such a case.

Besides, a sound reasoning of the judgment is an imperative obligation that cannot be neglected in favor of speed.

It should be noted that, according to Article 6 § 1 of the European Convention on Human Rights,

everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which decides on the grounds of any charges brought against him/her. The same article stipulates in point 3 (c) that everyone charged with a criminal offense has the right to defend himself against all charges brought against him.

According to the unanimous opinion expressed in the specialized literature, the reasoning of the judgment should be relevant, complete, grounded, uniform, compelling and accessible. The reasoning is also of essence for any court decision and represents the guarantee for the parties to the proceedings that their applications are properly analyzed.

In this regard, the practice of the Supreme Court has constantly held that the absence of reasoning leads to cancellation of the unreasoned decision and to retrial of the case by the court violating the legal provisions governing the obligation to give the grounds of the court decision.

The same conclusion can be drawn from the Case Law of the European Court of Human Rights, regarding the right to a fair trial.

For example, in its judgment of July 1 2003, delivered in the case *Suominem v. Finland*, the Court held that Article 6 requires that any judgment be reasoned so that the litigant may know which of his submissions were accepted and the reasons why some of his defenses were dismissed.

In the case *Garciz Ruiz v. Spain*, the judgment of 21 January 1999, the Court noted that judgments of the court should adequately state the reasons on which they are based.

In the case *Boldea v. Romania*, judgment of 15 February 2007, the Court ruled that there had been a violation of article 6 § 1, noting that the Romanian court decisions had failed to give adequate reasons and that the applicant had not been given a fair hearing in the proceedings that had led to his conviction. In the considerations of its judgment, the Court recalls that the right to a fair trial guaranteed by article 6 § 1 of the Convention includes, inter alia, the right of the parties to bring before the court any submissions as they may deem relevant to their cause. The Court further recalls that the Convention is not intended to guarantee rights that are theoretical or illusory, but rights that are practical and effective (*Artico v. Italy of 13 May 1980*), and this right can only be seen to be effective if the observations are really "heard", this is to say are duly considered by the trial court. In other words, Article 6 § 1 implies in particular the duty of the court to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (*Perez v. France, Van der Hurk v. Netherlands).*

Lack of reasons for the court judgments has been sanctioned by the ECHR in the cases *Albina v. Romania*, judgment of 28 April 2005, and *Dumitru v. Romania*, judgment of 1 June 2000, when the ECHR held that Article 6 § 1 was violated, with the Court emphasizing the fact that any judgment should be reasoned in response to the arguments adduced by the parties to the proceedings.

We are in a similar situation in this case, unless the court of appeal hears the defendants and the witnesses, despite the fact that it proceeds to reinterpretation of the evidence and, hypothetically speaking, to determining of a different state of facts than that upheld by the court of first instance.

I believe that in the situation described above we are dealing with an infringement of the right of the defendants to a fair trial, guaranteed by Article 6 (1) of the Convention. Moreover, the European Court of Human Rights has held that "*when a court is called upon to examine the case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence […] that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offe*nce" (judgment of 26 May 1988 in the case *Ekbtani v Sweden*, Series A no. 134, p 14, § 32, and *Constantinescu v Romania*, no 28871/95, § 55, ECHR 2000-VIII).

ECHR case law has consistently held that whenever the issues a court is called upon to consider have a deeply factual character, which is likely to call for a new assessment of the evidence and in particular of the statements, the right solution is the reassessment of the evidence.

In other words, if the appellate court bases its decision essentially on a new interpretation of the evidence adduced during the trial in the first instance, a new hearing of the defendants and of the witnesses that are relevant to the case is required, all the more as the trial court was the only court that had conducted the inquiry, being the only court that had administered the evidence and that can assess directly the submissions, witness declarations and other evidence adduced by the defendant in the case file.

Undoubtedly, the appellate court is entitled to interpret the information provided by the evidence, holding that the defendants are considered guilty, but it also has the duty to reconsider the same evidence that was sufficient for the trial judge (first-instance judge) to question the grounds of the charge and to render a decision of acquittal.

In the same line of reasoning is the by decision no. 1687/20, of May 2013, rendered by the High Court of Cassation and Justice, Criminal Division, stating that "*It appears that, in spite of the fully devolution effect of the appeal, which is provided under article 371 (2) of the Criminal Procedure Code, and despite the obligation of the court to proceed to hearing the acquitted defendants, the Court has limited itself, in a totally unjustified manner, to record in its conclusions only the legal standing of the defendants, after which, without assessing any further evidence and dismissing all the requests made in this regard by the defense, except for the circumstantial documents, and*

thereafter to find the defendants guilty, ruling on the several issues of a deeply factual nature, by a new interpretation of the evidence adduced during the criminal investigation and the inquiry.

Firstly, there is an infringement of article 378 (1)[1] of the Criminal Procedure Code, according to which, during the judgment in appeal, the court is obliged to hear the defendant present in court according to the provisions of the special part Title II, Chapter II, if the defendant was not heard by the trial court and when the trial court has not rendered a sentence of conviction against the defendant.

*The text was introduced following the convictions of Romania by the European Court of Human Rights, with the European Court ruling that, when a court is called upon to examine the case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence […] that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offe*nce.

As such, the direct assessment of the evidence adduced by the defendants cannot be achieved by simply acknowledging the upholding of their previous statements and of the fact that they are innocent, because such a hearing does not meet the requirements of article 378 (1)[1] of the Code of Criminal Procedure and the provisions of Article 6 (1) of the ECHR, the appellate court having the duty to hear them in detail, according to the procedure laid down in Articles 323 and 324 of the Code of Criminal Procedure (to which even of article 378 (1)[1] of the Code of Criminal Procedure refers), because such a legal standing is not equivalent to the exercise of the right to remain silent.

Secondly, the High Court finds that, indeed, the appellate court has based its decision on a new interpretation of the evidence, including the witnesses' statements, the defendants being found guilty on the basis of the same evidence that led to the delivery by the first instance of a decision of acquittal under Article 10 (a) of the Criminal Procedure Code.

It is true that, according to article 378 (1) (2) of the Criminal Procedure Code, the court verifies the judgment under appeal, based on the work and material in the case file, including any further piece of evidence, being able to give a new assessment of the evidence adduced in the first instance court. But these procedures, which allow the appellate court to make a fresh assessment of the evidence, can only be interpreted in conjunction with Article 6 of the Convention and the case law of the European Court in this matter, which has direct application in the legal order of the Contracting States.

The High Court holds that, even in cases handed down against Romania, the European Court held that the manner of application of Article 6 in the courts of appeal or recourse depends on the status of the appeals procedure. When the internal procedure allows the court of appeal or the court of recourse to reassess the evidence of the facts established by the lower courts, article 6 applies in full to them, too. In this regard, the Court has consistently found violations of the right to a fair trial where the appellate court rendered a conviction sentence based on a new interpretation of the declarations of the witnesses heard in the court of first instance, the same declarations which had led the first-instance judges to doubt the merits of the allegations and deliver a sentence for acquittal.

The fact that, given the decision of acquittal rendered by the first instance, the applicants did not specifically request further evidence to be taken by the court, is considered by the Court as irrelevant, insofar as article 6 of the Convention does not preclude that court from taking positive measures to ensure the right to a fair trial (Constantin and Stoian v Romania).

Under these circumstances, the failure of the Court of Appeal to hear witnesses in person and the failure of the Supreme Court to remedy the situation by sending the case back to the Court of Appeal for a new examination of evidence has substantially reduced the applicant's rights to defend himself. The Court reiterates that in its case law it has pointed out that one of the requirements of a fair trial is to give the accused to chance to confront witnesses in the presence of a judge who must decide in the case before him, because the judge's observations as to the behavior and credibility of certain witnesses may have certain consequences for the accused. Previous considerations are sufficient to lead the Court to conclude that in this case the national courts have failed to comply with the requirements regarding a fair trial."

We therefore consider that, in this case, all the considerations above call for the one obvious decision: admission of the appeal, cancellation of the Decision of the court of first instance and the retrial of the case by the Court of Appeal, with the hearing of the defendants and of the witnesses in this case under the provisions of article 385 index 16 (c) of the Code of Criminal Procedure of 1969, in relation with Article 6 (1) and 3 (c) of the European Convention on Human Rights.

III. Conclusions

The duty to state reasons for court judgments is the result of the requirements arising from the Convention. In this regard, the conventional text enshrines, on the one hand, the right of every person to present arguments and defense before the court, but, on the other hand, requires the Courts to examine the parties' submissions effectively. In this regard, it is noted that the obligation to state reasons for the judgment of the court is the only means to check compliance with the rights of the parties, but it is at the same time a requirement which helps to ensure

compliance with the principle of sound administration of justice.

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