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NATIONAL AND ECtHR SELECTIVE JURISPRUDENCE ON DECISION-MAKING IN CRIMINAL APPEALS[1]

The European Union promotes human rights and strives to ensure that they are respected everywhere in world. The Republic of Moldova and those responsible in the field must engage to promoting human rights. Intensification of integration and globalization processes it requires the development of legal measures on adapting the national legal system to international standards which provides for the defense of human rights and freedoms. The author presents examples of national jurisprudence and the decisions of the European Court of Human Rights against the Republic of Moldova which shows the importance of the courts complying with criminal procedural rules call. Ignoring these judgments and practices may lead to new convictions from the European Court. Attention is drawn to the need to study the errors committed and lost cases at the ECHR in order to avoid such violations in the future.

Keyword: the criminal process, court of appeal, the procedural documents, ECHR decisions, the national jurisprudence.

JURISPRUDENȚA SELECTIVĂ NAȚIONALĂ ȘI A CtEDO CU PRIVIRE LA ADOPTAREA DECIZIILOR ÎN APELUL PENAL

Uniunea Europeană promovează drepturile omului și se străduiește să se asigure că acestea sunt respectate oriunde. Republica Moldova și cei responsabili în domeniu trebuie să se angajeze în promovarea drepturilor omului. Intensificarea proceselor de integrare și globalizare necesită elaborarea unor măsuri legale de adaptare a sistemului juridic național la standardele internaționale care prevede apărarea drepturilor și libertăților omului. Autorul prezintă exemple de jurisprudență națională și hotărârile Curții Europene pentru Drepturile Omului împotriva Republicii Moldova care

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arată importanța respectării de către instanțele de judecată a normelor de procedură penală. Ignorarea acestor hotărâri și practici poate duce la noi sentințe de condamnare din partea Curții Europene. Se atrage atenția despre necesitatea de a studia erorile comise și cauzele pierdute la CEDO în vederea neadmiterii pe viitor a unor astfel de încălcări.

Cuvinte-cheie: proces penal, instanță de apel, acte procedurale, ECHR decisions, the national jurisprudence.

1. INTRODUCTION.

The appeal court's activity does not end with the decision. After the appeal has been heard, the Court of Appeal shall strictly comply with the requirements of art.338-340 and art.art.417-418 Criminal Procedure Code of the Republic of Moldova (hereinafter referred to as Criminal Procedure Code. RM) [1], concerning the adoption and delivery of the decision, the handing over of copies of decisions or informing the parties of the decisions adopted, etc., with the subsequent attachment of the relevant documents to the materials of the criminal case. In case of failure to comply with these legal requirements, it is equal to a violation of the right of defense of the persons involved in the criminal proceedings [2, p.391-392].

The decision of the appeal court must conform to the requirements of the law according to the meaning of Article 417 in association with art. 394 of the Criminal Procedure Code. RM[1]. Also, the manner in which the decision of the court of appeal and the minutes of the hearing are drawn up must comply with certain requirements laid down in the jurisprudence of the Supreme Court of Justice [3].

2. THE METHODOLOGY.

Theoretical, empirical and normative material was used in the development of the present article. Furthermore, the research on this topic was possible as a result of the several scientific research methods that are specific to criminal procedural theory and doctrine: the logical method, systemic analysis, comparative analysis method, etc. We identified national court practice, including that referring to the European Court of Human Rights (hereafter ECtHR) decisions, identified and selected the jurisprudence of the European Court of Human Rights, which is of importance at the stage of the decisions of the appellate courts after the examination of criminal cases, both with regard to the drafting of the decisions and the protocols of the hearings.

3. RESULTS.

3.1. Introductory part of the Decision

The introductory part of the decision has to include the date and place of delivery of the judgment, the name of the Court of Appeal, the members of the court, their names

[1] Article 417 of the Moldovan Code of Criminal Procedure stipulates the content of the decision of the court of appeal. The decision of the court of appeal contains: 1) date and place of the decision; 2) name of the court of appeal; 3) names of the judges of the panel, the prosecutor, the registrar, as well as of the attorney, the interpreter and the translator, if they participate in the hearing; 4) name of the appellant, indicating his procedural status; 5) data on the identity of the person convicted or acquitted by the first instance, as provided for in Article 358 paragraph (1) of the CCP; 6) data on the time limit for the examination of the case; 7) the fact found by the first instance and the substance of the sentence; 8) the merits of the appeal; 9) the factual and legal grounds that led, as the case may be, to the rejection or admission of the appeal, as well as the reasons for the adoption of the given solution; 10) one of the solutions provided for in Article 415 of the CCP; 11) the mention of the last remaining valid procedural act from which the trial must resume its course. Otherwise, all the procedural acts shall be automatically abolished; 11) mention that the decision is enforceable, but may be subject to appeal, and the time limit for this appeal; 12) if the defendant is in custody, the decision shall indicate the time to be included in the term of the sentence; 13) if there are grounds provided for in Article 218 of the Criminal Procedure Code of the Republic of Moldova, the court of appeal shall issue an interlocutory decision.

and surnames, the Registrar, the interpreter, the names and surnames of the prosecutor, the defendant's attorney, if the injured party, plaintiff their guardian are participating. The name(s) and surname(s) of the appellant(s), their procedural status, the judgment under appeal, the name(s) and surname(s) and forename(s), the year of birth of the convicted person(s), acquitted person(s) or person(s) against whom the proceedings have been discontinued, according to their identity documents, shall be indicated below. In case the appeal court extends the appeal by way of extension to other defendants who have not appealed against the decision in question, their names and surnames shall be indicated. In case of non-application of the extensive effect it has to be stated that the sentence relating to these persons is not appealed and is not reviewed. Similarly, the introductory part of the decision is required to provide the contents of the operative part of the judgment or order under appeal, as well as information on the completion of the procedure for summoning the parties to the proceedings [3, point 22.1].

Specifically[2], in the content of the sentence under appeal and in the decision of the Cahul Court of Appeal, the defendant is indicated with the name "XXX Nicolai XXX". However, according to the copy of the defendant's identity card, which was attached to the materials of the criminal case, the name of the defendant is indicated - "XXX Nicolae XXX". Thus, the name of the defendant according to the copy of the identity card - XXX Nicolae XXX - shall be correctly stated in the sentence. [4, pct.8].

3.2. Descriptive part of the decision

After the introductory part of the decision, the court of appeal has to describe the fact that was found by the first instance for which the defendant was convicted [5]. The Court of Appeal is required to describe the criminal act as proven in the descriptive part of the decision of conviction [6].

In its decision, the court of appeal must state the factual and legal reasons which led either to the dismissal or to the admission of the appeal, as well as the reasons which led to the adoption of that decision [7].

The purpose behind the decision is to demonstrate to the litigants that they have been heard, and thus contribute to a better acceptance by the parties of the taken decision. Judges are committed to ground their decisions on objective arguments and to preserve the rights of the defense. However, the extent of the responsibility to state the reasons for the judgment may vary according to the nature of the decision and must be considered in the light of the circumstances of the case (ECHR judgment *Ruiz Torija v. Spain* since 09.12.1994, nr. 18390/91, §. 29) [8].

According to the judgment of the ECtHR in Van de Hurk v. Netherlands of 19.04.1994, no. 16034/90, §. 61 [9], the court is not required to provide a detailed answer to every argument raised. But it must be clear from the judgment that the issues raised in the appeal proceedings have been considered (ECtHR judgment *Boldea v. Romania* of 15.02.2007, no. 19997/02, §. 30 [10]).

National courts are required to state so clearly the grounds on which their judgments are based that the person concerned can usefully exercise his or her right of appeal (ECHR judgments *Hadjianastassiou v. Greece* of 16.12.1992, no. 12945/87, §§ 34-35 [11], and *Boldea v. Romania* of 15.02.2007, no. 19997/02, §§ 29-30 [10]).

When the Court of Appeal has administered new evidence at the request of the parties, it shall describe it in the content of the decision with its assessment. If the Court of Appeal, after hearing the appeal, allows the appeal with retrial, the decision of the Court of Appeal must include an analysis of the evidence relied on by the Court of Appeal in reaching its decision, and state the reasons why the evidence is to be reconsidered or rejected [3, para. 22.2].

In one case, the Court of Appeal based its conviction on evidence that was neither

[2] See: Criminal file nr.1-76/2015, PIGD- nr.19-1-568-03072015, Vol.1, f.d.192; Vol.3, f.d.127-133, 236-258. Archive of the Cahul Court, Taraclia seat.

examined in the trial court nor tested in the criminal case on appeal. For this reason, the Enlarged Criminal Panel of the Supreme Court of Justice quashed the contested judgment and ordered the case to be retried by the Court of Appeal, otherwise the right to a fair trial under Article 6 ECHR is violated [12].

If the appeal court in its decision does not make an assessment, in terms of relevance, conclusiveness, usefulness and veracity of the evidence presented in support of the charge, this constitutes grounds for reversal of the decision [13]. If the appeal court disagrees with the prosecutor's assessment of the evidence and comes to a conclusion to acquit, then it must disclose that conclusion by stating its view on each piece of evidence indicated by the appellant [14]. The decision of the Court of Appeal is also susceptible to be appealed when the appellate court determines only the value of some of the evidence given at first instance, without giving reasons for another part of it [15].

The Constitutional Court of the Republic of Moldova stated the following: "**28**. Furthermore, Article 101(1) of the Criminal Procedure Code requires the judge to assess each piece of evidence from the point of view of its relevance, conclusiveness, usefulness and veracity, as well as all the evidence as a whole, by corroborating them. Paragraph (4) of the same Article requires the judge to give reasons in the judgment for the admissibility or inadmissibility of the evidence. Moreover, Article 314 (1) of the Criminal Procedure Code obliges the court to investigate all aspects of the evidence submitted by the parties or administered at their request, including hearing the defendants, injured parties and witnesses, examining the *corpus delicti*, reading forensic reports, minutes and other documents, and examining other evidence provided for in the Criminal Procedure Code. **29.** In the same context, Articles 414(1) and 414(4) of the Criminal Procedure Code provide that the appellate court shall review the legality and reasonableness of the judgment under appeal on the basis of the evidence examined by the first instance and on the basis of any new evidence submitted to the appellate court, and has the power to re-evaluate the evidence." [16, paras 28-29].

The Court of Appeal, when hearing appeals, must rule on all the grounds raised by the appellants in their appeal. The court's decision has to state the reasons on which the decision is based. Failure to comply with these requirements is deemed to be a failure to resolve the merits of the case in the court of appeal [17].

"The guarantees set out in Article 6 §. 1 of the ECHR include the duty of national courts to give reasons for their decisions with sufficient clarity" (*H. v. Belgium* of 30.11.1987, complaint no. 8950/80, §. 53) [18, p.4].

The Constitutional Court of the Republic of Moldova noted that the motivation is expressed by the fact that in cases of admissibility of some evidence and dismissal of others, judges are required to expressly invoke the reasons for these solutions. *Erroneous* judgments can be corrected through the remedies provided by law. The Court also refers to the European Court, whose case-law has held that "unless a reviewing court has jurisdiction to examine both the facts and the points of law and to consider the question of guilt as a whole, it cannot, for reasons of procedural fairness, rule on those questions without a direct assessment of the statements of the person who claims not to have committed the act considered to be an offence (ECHR *Ekbatani v. Sweden* of 26.05.1988 [19] and *Constantinescu v. Romania* of 27.06.2000 [20]" [21, para.70, 75-76].

It is not acceptable to base the decision on contradictory assessments. The European Court of Justice has held that the right to a fair trial includes a duty for the courts to give reasons for their judgments, since the absence of reasons for a judgment may affect that right. Judges must state with sufficient clarity the grounds on which they base their judgments, as this is the only way for the party to the proceedings to exercise the remedies available under national law. The grounds for the judgment are closely linked to concerns about ensuring a fair trial, which allows the right of defense to be respected. The quality of the act of justice itself is indispensable and constitutes a safeguard against arbitrariness (ECtHR

judgments *Suominen v. Finland* of 01.07.2003, complaint no. 37801/97, §. 37 [22]), *Kuznetsov and Others v. Russia* of 11.01.2007, complaint no. 184/02, §. 85 [23])".

To maintain two arguments, positions, which are totally contradictory, would lead to a violation of the parties' right to a fair trial. However, the court's motivation must be clear and give the parties the certainty that they have been heard (Fomin v. Moldova of 11.10.2011, no. 36755/06, §. 31 [24]).

Moreover, the grounds for judgments are an important tool for ensuring the transparency of justice and the existence of social control over them (*Hirvisaari v. Finland,* of 27.09.2001, complaint no. 49684/99, §. 30) [25, p.8].

In a case where the courts of appeal do not rule on the arguments set out in the grounds of appeal, the appellate court is not entitled to rule on the appellants' arguments set out in the grounds of appeal. The cases are to be retried [26].

3.3 The operative part of the decision

The operative part of the decision of the appeals instance must correspond to the findings made by that instance in the descriptive part [3, para. 23].

For example, in a criminal case, the operative part of the judgment of the court of first instance was unclearly set out, without specifying and clarifying which of the appellants' claims were admitted and which were rejected, because, according to the grounds of the judgment, the appeals were not admitted in their entirety [27]. Such a decision is subject to the ordinary appeal procedure.

In this case, the appeal court, in the descriptive part of the decision, invoked the legal qualification of the defendant's actions under Article 264 para. (1) of the Criminal Code of the Republic of Moldova, and in the operative part of the decision the defendant was found guilty of committing the offence provided for in Article 261 para. (2) of the Criminal Code of the Republic of Moldova. Consequently, the reasoning of the appeal court's decision contradicts the operative part of the judgment, which constitutes a miscarriage of justice that cannot be corrected by the appeal court [28].

A further example: by the sentence of the Cahul Court of 23 December 2016, R.V. was convicted of committing an offence under Article 264 para. (3) letter b) of the Criminal Code. RM to imprisonment for a term of 4 years, to be served in an open penitentiary, with deprivation of the right to drive vehicles for a term of 2 years from the date of the final judgment. The judgment of the trial court was appealed by the defendant, who requested that the judgment be quashed and that a new judgment be handed down acquitting him of having committed the offence charged. According to the decision of the Cahul Court of Appeal of 7 June 2018, the defendant's appeal was sustained, the sentence was partially cancelled and a new judgment was pronounced. To R.V., convicted under Article 264 para. (3) letter a) of the Criminal Code RM, was sentenced to 3 years and 6 months imprisonment. According to the article 90 Criminal Code of RM, the execution of the sentence was conditionally suspended with the establishment of a probation period of 3 years. By the conclusion of the Court of Appeal of 11 September 2018, in response to the prosecutor's request, a material error was corrected, admitted in the operative part of the decision of 7 June 2018, namely: the phrase "with the privation of the right to drive vehicles for a period of 2 years" was added. However, the Court of Appeal quashed the decision of the Court of Appeal of 7 June 2018 and the judgment of 11 September 2018, ordered the retrial of the case, concluding that it was impossible to amend, pursuant to Article 249 of the Criminal Procedure Code. RM, by a conclusion of the operative part of the decision of the court of appeal in the part referring to the criminal penalty [29, paragraph 6 letter c].

3.4 The transcript of the hearing

The accuracy of the transcript of the hearing in the court of appeal is particularly important for the trial.

According to the provisions of Article 413 paragraph (8) of the Criminal Procedure Code of the Republic of Moldova, a transcript

shall be drawn up at the hearing of the Court of Appeal in accordance with Article 336 of the Criminal Procedure Code of the Republic of Moldova. The content of the transcript must correspond to the court hearings that took place, i.e.: the number and date of the court hearings; the approaches and requests made by the parties; the evidence that was checked and investigated; the annexing of all procedural documents - transcripts of hearings, copies of relevant court decisions, documents submitted by the parties, etc.

"The timeframes which are provided for in article 336 of the Criminal Procedure Code. RM are recommendatory, i.e., they cannot result in nullity. However, failure to comply with these deadlines may result in certain disciplinary sanctions for the officials responsible. In case of disagreements between the clerk and the presiding judge, the procedure will be according to Article 319 of the Criminal Procedure Code. RM." [30, p.940].

Frequently, due to an incomplete or defective report, the decision of the appeal court was not upheld by the higher court. In one case, according to the transcript of the hearing, the court of appeal did not reproduce and examine the image on a video-CD disc, which was attached to the file as material evidence. Therefore, the appeal court did not even have the legal opportunity to examine and assess this evidence, particularly in conjunction with the other evidence examined as a whole [31].

In a different case, the requalification of the defendant's actions under Art. 145 para. (2) (b), (e), (g), (i), (j), (k) into Art. 151 para. (4) of the Criminal Code. RM was made only on the basis of a selective statement contained in the statements of the injured party. The Court of Appeal did not indicate in the transcript of the hearing any of the evidence referred to in the descriptive part of its decision [32].

In a penal proceeding, the reasoned decision of the Court of Appeal and the interlocutory judgment were dated 15 February 2006, whereas the operative part of the decision of the Court of Appeal was dated 8 February 2006, an error that cannot be corrected by the Court of Appeal of its own motion [33, p.3].

As a result, the decisions of the courts of appeal in the above-mentioned cases were quashed by the ordinary appeal court and the cases were returned to the courts of appeal for retrial.

4. CONCLUSIONS.

The drawing up of decisions of the court of appeal and transcripts of court hearings must comply with the requirements stipulated in the criminal procedure law.

The drafting of court documents requires a serious and responsible approach on the part of the authors.

As a result of the errors admitted in the decisions and transcripts of the courts of appeal, the decisions handed down are dismissed by the College of the Supreme Court of Just and the cases are remanded to the courts of appeal.

The return of criminal cases to the courts of appeal has the effect of lengthening of the timeframes for examining criminal cases, creating a sense of uncertainty for the parties, incurring additional legal costs, and consequently damaging the prestige and image of the judiciary.

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