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THE OPENING OF THE CRIMINAL CASE: THE SETTLEMENT OF REQUESTS RECEIVED FROM THE CRIMINAL PROSECUTION PHASE

At all stages of the criminal proceedings, the court has the role of a leader at each stage. Therefore, the court has the obligation to create equal conditions for all parties and participants for a full and multilateral investigation of the case before it.

Thus, the trial of the case at first instance is divided into the following procedural stages: the opening of the criminal case - which also includes the pre-trial hearing - the judicial inquiry, the judicial debates, the defendant's last word, the deliberation and the adoption of the sentence. All these compartments comprise common but also distinct procedural activities which are required by the special procedural provisions.

The trial of the criminal case, as a distinct phase of the criminal process, is a specific activity and occupies a central place in the process of achieving criminal justice [6, p. 523]. The above does not diminish the criminal prosecution phase, the judicial control of the pre-trial procedure or the enforcement phase.

Keywords: criminal case, preliminary hearing, activity of the judge, protocol conclusions, list of evidence, adversarial proceedings, publicity, applications and requests.

PUNEREA PE ROL A CAUZEI PENALE: SOLUȚIONAREA CERERILOR PARVENITE DE LA FAZA DE URMĂRIRE PENALĂ

La faza judecării cauzei penale în toate etapele sale, instanța de judecată are rolul de diriguitor la fiecare etapă. Prin urmare, instanța de judecată are obligația de a crea, atât tuturor părților cât și participanților, condiții egale pentru cercetarea multilaterală și deplină a cauzei deduse judecății.

Astfel, judecarea cauzei în prima instanță este divizată în următoarele stadii procesuale: punerea pe rol a cauzei penale - care cuprinde și ședința de judecată preliminară - cercetarea judecătorească, dezbaterile judiciare, ultimul cuvânt al inculpatului, deliberarea și adoptarea sentinței. Toate aceste compartimente cuprind activități procesuale comune, dar și distincte, care sunt impuse de dispozițiile procesuale speciale.

Judecarea cauzei penale, ca fază distinctă a procesului penal, reprezintă o activitate specifică și ocupă locul central în procesul înfăptuirii justiției penale [6, p. 523]. Cele expuse nu vin să diminueze faza urmării penale, controlul judiciar al procedurii pre-judiciare sau al a fazei executării pedepsei.

Cuvinte-cheie: cauză penală, ședința preliminară, activitatea judecătorului, încheieri protocolare, lista probelor, contradictorialitate, publicitate, cereri și demersuri.

Specific objectives. The present research aims to analyse how the courts deal with the legal rules concerning the way in which claims, applications and complaints are dealt with after the case has been sent to court. The present study is an analysis of the legal safeguards provided by the Code of Criminal Procedure and whether they are sufficient to ensure the presumption of innocence.

One problem addressed and analysed concerns the fact that the current procedural rules of the preliminary hearing do not contain clear and predictable provisions on the resolution of requests, complaints and requests, especially those relating to the taking of evidence or the invalidation of evidence, which have not been resolved at the prosecution stage.

It should be noted that the right to a fair trial is guaranteed by the Convention and the case law of the European Court of Justice in cases concerning the use of evidence in criminal proceedings is applicable, with the appropriate differences. In its case law, the European Court notes that Article 6 § 1 of the Convention guarantees the right to a fair trial, „but it does not lay down any rules on the admissibility of evidence as such", which is therefore a matter primarily for national law. The European Court cannot therefore exclude, in principle and in the abstract, that evidence of this kind obtained unlawfully may be admissible [15, § 46].

The aim of this research is to analyse the judicial practice regarding the aspects related to the filing of the criminal case and its trial in the first instance, in order to identify the problems that have arisen in theory and practice, and to elaborate proposals and recommendations to improve the criminal procedural legislation governing the procedure of filing the criminal case.

Introduction. The trial of the criminal case is preceded by the bringing of the criminal case and represents the completion of a series of procedural steps. Many of these are carried out by or directed by the judge. The particular importance of this procedural phase has been noted by a number of specialist authors: Tudor Osoianu, Tatiana Vizdoagă, Igor Dolea, Vasile Nicoară, who recognise the importance of the judge's role at this stage.

A distinct phase of the criminal process is the trial of the case before the court. In order for a criminal case to be brought to trial, it must be put on trial. In the literature, the phases of the criminal trial are defined as its divisions, which encompass a complex of activities carried out successively, progressively and in a coordinated manner, between two prominent moments of the criminal case, based on characteristic legal relationships, in order to achieve specific tasks [14, p.21].

The judge's actions at the stage of the criminal proceedings are aimed at creating the conditions for the parties to be able to effectively exercise the rights arising from their procedural status during the judicial inquiry. This conclusion follows from the content of Article 315 of the Code of Criminal Procedure - „equality of rights of the parties before the court " [1]. The source of this principle of trial derives from the content of Article 21 of the Constitution of the Republic of Moldova, which enshrines the fact that „any person accused of a crime is presumed innocent until his guilt is legally proven in a public judicial process, in which he has been provided with all the guarantees necessary for his defense" [2]. The work of the judge at this stage is similar to that of an arbitrator who creates and ensures a level playing field for all parties to the proceedings.

At this stage, in addition to the fundamental principles of the criminal process, several specific principles come into play, some of which are even contradictory to those at the prosecution stage - for example, the principle of publicity. Another principle specific to this stage is that of non-disclosure. It „... expresses the requirement that the court that is to decide the case should take direct, direct

cognisance of the evidence adduced, as well as of the requests and submissions made by the prosecutor, the injured party and the parties to the proceedings, in person or through a lawyer" [13, p. 764]. The adversarial principle reflects the fact that the prosecution and the defence confront each other in court, so that the court ultimately arrives at a fair assessment of the evidence from this confrontation and thus adopts a legal solution. The Romanian author Vasile Pătulea mentions that „adversariality is a fundamental principle of criminal procedural law, which allows the parties to actively participate in the presentation, argumentation and proof of their rights and defences throughout the trial, having the right to discuss and combat the claims made by each of them" [8, p. 124].

We mention the importance of the principle of the presumption of innocence, which should guide the court up to sentencing. Thus, it is imperative that, both when the criminal case is brought and during the trial of the criminal case, it should be noted that the principle of the presumption of innocence is enshrined both in Article 6 & 2 ECHR and in Article 21 of the Constitution of the Republic of Moldova. Article 8 of the Code of Criminal Procedure states that a person accused of committing a criminal offence is presumed innocent until proven guilty in the manner provided for in this Code in a public judicial trial, in which he or she will be provided with all the guarantees necessary for his or her defence. The presumption of innocence places the burden of proof in criminal proceedings on the accuser (eius incumbit probatio qui dicit, non qui negat).

According to paragraph 39 of the Constitutional Court's Decision No 109 of 07.11.2017, the Court noted that the in dubio pro reo rule is an element of the presumption of innocence, an institutional principle reflecting the way in which the principle of finding the truth is reflected in the matter of evidence. It is explained by the fact that, despite the evidence adduced in support of the accused's guilt, doubt persists as to guilt and is equivalent to positive proof of innocence.

Subsequent to paragraph 40 of the same decision, the Court reiterated that in criminal matters the standard of „beyond reasonable doubt" has been established, the essence of which is that, in order to convict, the charge must be proved beyond reasonable doubt" [4]. The above standard follows from Boicenco v. Republic of Moldova [12, §104].

Discussions and results. The term „setting the criminal case in motion", used by the legislator in Title II, Chapter II of the Special Part of the Code of Criminal Procedure, is associated with the actions of the judge aimed at organising the trial process in the future. Thus, the procedural actions of the judge at this stage can be divided into actions of control over the file sent to the court. This is where the judge's actions to check the applications, unsolved complaints at the stage of prosecution or at the stage of completion of the prosecution are concerned. The second category of the judge's actions at this stage concerns the direct settlement of requests and submissions from the parties at the pre-trial hearing. It should be noted that it is only by resolving all these requests that it is possible to proceed to the pre-trial stage.

In the legal literature, some authors note that, „the referral of the case for trial disqualifies the prosecutor from his capacity as the leader of the criminal proceedings, if applicable - from the direct exercise of the criminal proceedings, as he is unable to take any action whatsoever, without being able to intervene in the subsequent conduct of procedural activities in this capacity. Thus, viewed as a procedural act, the committal has a double functionality: on the one hand, it puts an end to the criminal prosecution phase, and on the other - it produces the referral to the court" [9, p. 258].

The actions of the reviewing judge concerning unresolved applications and com-

plaints at the prosecution stage. This competence derives from the content of Art. 297 para. (4) of the Code of Criminal Procedure, which states that „all applications, complaints and requests submitted after the case has been referred for trial shall be dealt with by the court trying the case" [1]. From a practical point of view, this regulation raises many controversies and procedural incidents. As a result, the defence often submits applications with the following content: „A complaint that was filed before the case was referred to the court for examination was not dealt with in the criminal proceedings" [10]. On this aspect, the Constitutional Court was also seized by decision no. 91 of 19 September 2019, which was declared inadmissible [5].

However, the Court, in paragraph 20 of the said decision, noted the following: „the current organisation of the stages of the criminal proceedings does not prevent the parties from challenging the abuses committed and using the remedies" [5]. Based on the findings of the Constitutional Court, the said inadmissibility decision has led to the formation of a judicial practice which, in our view, is contrary to the prosecutor's control of the legality of actions, inactions, acts and judicial control of the prejudicial procedure. Thus, based on the content of the Court's decision no. 91 of 19 September 2019, both the prosecutor, the superior prosecutor and the investigating judges do not resolve within the procedural deadlines the requests submitted by the parties and send to the court the criminal cases to be tried on the merits, without resolving these requests, with which they have been invested, and after sending the case to the court - decline jurisdiction in favour of the court seized with the trial of the case. By way of judicial practice, we mention criminal case No 1-213/2017, in which, on 17 August 2017, a complaint was filed by the lawyer, so when the criminal case was not finished, the criminal prosecution was still ongoing. Despite the fact that the complaint filed on 17 August had not been resolved, the criminal case was sent to the court on 22 August 2017" [11].

We consider that the failure to resolve within the time limit the complaints filed at the prosecution stage and to send the criminal case to court without resolving them seriously infringes the right to timely resolution of the claim, and consequently - the right to a fair trial. Moreover: this practice is contrary to the institution of pre-trial supervision. Consequently, at the pre-trial stage, the courts would have to penalise abuses at the prosecution stage. Thus, the provisions of Article 297 para. (4) of the Code of Criminal Procedure states that „all applications, complaints and requests submitted after the case has been sent to court shall be dealt with by the court trying the case" and are quite clear - only applications received after the criminal case has been sent to court will be dealt with by the court, not those that were submitted before the case was sent to court. At the same time, we note that, however clearly a legal rule is drafted, in any system of law there is an unavoidable element of judicial interpretation, including in a rule of criminal procedural law. This interpretation is a matter for the courts and it is a direct obligation of the Supreme Court of Justice to provide consistent and predictable judicial practice.

The positive obligation of the courts to develop a predictable jurisprudence is regulated by the provisions of Art. 115 para. (1) of the Constitution of the Republic of Moldova - „Justice shall be administered by the Supreme Court of Justice, by the courts of appeal and by the judges", „thus, the foundation of the judicial power is the totality of the courts of different competences, formed according to constitutional and legal provisions, acting independently from the bodies of the representative power and the executive power, having their own powers exercised in accordance with the constitutional and legal principles and provisions" [3, p. 419].

A different approach than the one out-

lined above transforms the institution of the hierarchical prosecutor's control as well as that of the judicial control of the pre-trial procedure - which, in fact, are presented as effective guarantees in order to respect the procedural rights of the parties by resolving complaints in concrete terms - into illusory control mechanisms.

The existing judicial practice at the moment is limited to the fact that the court invested to judge the merits of the case, upon receiving the declinations of jurisdiction from the criminal prosecution phase, in accordance with Art. 297 para. (4) of the Code of Criminal Procedure, it issues a protocol order in which it informs the parties concerned that it will address the given issue together with the merits of the case. It is a solution in favour of the parties, as a rule - that of the defence. We maintain the position that it is a solution to the detriment of the parties, given that it violates the procedural deadlines for resolving claims, and it is well known that Articles 299 and 313 of the Code of Criminal Procedure provide for express deadlines within which complaints are to be resolved. Similarly, we consider that, depending on the nature of the right violated, it could constitute a violation of Article 13 of the Convention, or the effective remedy also implies the resolution of complaints within reasonable time limits.

Another problem noted in judicial practice is that, according to the provisions of Article 298 para. (2) of the Code of Criminal Procedure, „the complaint shall be addressed, within 15 days, to the prosecutor conducting the criminal prosecution and shall be filed either directly with the prosecutor or with the criminal prosecution body. The time limit for lodging a complaint by the persons referred to in para. (1) shall be calculated from the moment when they became aware of the act or learned about the inaction of the prosecution body or the body performing special investigative activity". And until the expiry of the 15-day period provided for in Art. 298 para. (2) of the Code of Criminal Procedure, the prosecutor sends the case to the court and then who is competent to resolve the complaints filed within the 15-day period? In our view, in such situations, depending on the nature of the right infringed, there is a conflict of jurisdiction between the court hearing the case and the investigating judge.

We reiterate that the subject matter of the trial at first instance is limited to the act and the person(s) indicated in the act of referral to the court, therefore - the subject matter of the trial at first instance concerns the act and the person(s) for which the indictment was ordered to be drawn up and the criminal case referred to the court.

Thus, the judge at the preliminary hearing cannot fully replace the institution of the investigating judge, or, by its subject matter, the pre-trial review differs from the subject matter of the preliminary hearing - the investigating judge judges on appeal and, therefore, the subject matter of the preliminary hearing cannot be broadened. Similarly, it should be noted that the judicial review of the pre-trial procedure guarantees human rights and freedoms, also due to the fact that it allows for the operative liquidation of errors and violations of law admitted by the prosecution body, while during the pre-trial proceedings it is practically impossible to ascertain and liquidate the violations admitted at the pre-trial stage.

The above position is based on the content of Article 29(2). (3) of the Code of Criminal Procedure, which stipulates that „within the court, as a judicial body with its own powers in the conduct of criminal proceedings, investigating magistrates shall function in the criminal prosecution phase". Their function is „limited to the judicial control of the pre-trial procedure and is separate from the function of the court, which resolves the merits of the criminal case as a result of the unbiased examination of the evidence, with the participation of the parties" [7, p. 7].

Conclusions. The work of the court in dealing with applications received from the prosecution phase is a cognitive process that will have implications throughout the trial of the case at first instance. It is important to note that the work of the court in dealing with applications, complaints and representations during the pre-trial proceedings is to be judicious so as to avoid any prejudice that could affect one of the parties. It is no less important to ensure that the parties effectively implement the rights of the defence and the principle of equality of arms.

We are of the opinion that one of the main urgent tasks of the Supreme Court of Justice is to urgently analyse the situation of judicial practice in criminal matters, including the aspect of judicial practice regarding the way to resolve requests received from the prosecution phase and which have not been resolved within the procedural deadlines regulated by law.

Amendments to the Code of Criminal Procedure are required in the section on the commencement of criminal proceedings, i.e. in relation to the processing of applications and complaints submitted during the criminal proceedings, the court should be able to return them to the prosecutor or investigating judge, as appropriate. However, the current provisions of the Code of Criminal Procedure have led to an uneven judicial practice as regards the stage at which applications received by declining jurisdiction at the prosecution stage are to be dealt with.

We reiterate that ensuring a fair trial depends to a decisive extent on the possibility for the judge to be able to effectively assess the work of the prosecution at the stage of the criminal case and the preliminary hearing: to what extent the body has respected the requirements of a fair trial. However, at the prosecution stage, breaches may be admitted which will affect the preliminary hearing and, implicitly, may prevent the timely resolution of the criminal case.

For the reasons set out above, the commencement of the criminal case also implies a check on the previous phase of the trial. This conclusion also follows from the purpose of the preliminary hearing, since effective justice cannot be achieved unless the judge removes the obstacles when the matter is referred to him.

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