RAIS Journal for Social Sciences | VOL. 5, No. 2, 2021
ISSN 2574-0245 (Print) | ISSN 2574-1179 (Online) | DOI: 10.5281/zenodo.5722278

Regulation of the Double Degree of Jurisdiction in Criminal Proceedings in Romania

Bogdan BUNECI

Dr. Univ. Lect, Ecological University of Bucharest, Law School, Romania
bogdanbuneci@yahoo.ro

ABSTRACT: In criminal cases, after the trial on the merits, the legislator has established legal provisions that give the parties and the Public Ministry the right to challenge these judgments in the first instance, or in situations where there is a presumption of error by the magistrate who tried the case criminal, or when there were other elements or evidence that were not taken into account in the trial of the case in the first instance (merits). The possibility of going through the dual degree of jurisdiction is an essential condition when a person is found guilty of a crime, having the right to request the examination of the case by a higher jurisdiction, being also a component of the right to a fair trial.
KEYWORDS: double degree of jurisdiction, appeal, criminal case

General aspects

The double degree of jurisdiction in criminal matters has existed in Romania since the publication of the Constitution of 1866, so that criminal proceedings were carried out in accordance with the legal provisions of the respective historical period, to ensure the validity and legality of a criminal solution be in accordance with the reality of the facts and the provisions of the law. In this way, the legislator made it available to the parties and the Public Ministry, when they are not satisfied with the solution given by the courts of first instance, to have the possibility of a control by higher courts in order to establish the truth and correctly resolve the criminal law conflict.

The trial on the merits of a criminal case is always indispensable for the realization of criminal justice, in order to have a criminal judgment in question, without the trial in the appeals being mandatory, the parties or the Public Ministry having the right to request the trial in the - the second degree of jurisdiction.

The trial in the second degree of jurisdiction determines a new phase of trial to which the criminal cases are subjected in order to be able to correct the mistakes due to the magistrate judging the criminal case or the parties, but also for the reason that not all elements or evidence were known to the trial on the merits of the criminal case.

The reason for the double degree of jurisdiction is in fact the control exercised by the superior courts over those of a lower degree who proceeded to a trial of a criminal case.

Regulation of dual jurisdiction and remedies

From the point of view of the Romanian Constitution (1991), published in the Official Gazette of Romania (21 November 1991, no. 233), according to art. 129 against the decisions of the court, the interested parties and the Public Ministry may exercise the means of appeal under the law.

This article must also be interpreted in accordance with the provisions of art. 20 paragraph 1 of the *Constitution and of the jurisprudence of the Constitutional Court*, which

are in line with art. 2 of Protocol no. 7 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, as well as the jurisprudence of the European Court of Human Rights, on the right to dual jurisdiction in criminal matters. (Council of Europe, 2019, 42. "*Any person convicted of a crime by a court has the right to have the examination of a conviction or conviction by a higher court examined law, including the reasons for which it can be exercised, are governed by law"*).

It is important to point out that this right is exercised under the law, as only the legislator can establish the conditions for exercising it (name and number of appeals, formal conditions, time limits within which an appeal can be exercised), but the requirement the right to dual jurisdiction presupposes that an appeal against a judgment of first instance cannot be suppressed. Moreover, also in the provisions of art. 5 point 4 of the European Convention on Human Rights there is the right of a person deprived of his liberty by arrest or detention to appeal to a court, so that it can rule in a short time on the legality of his detention and order the release if detention is illegal.

By adopting the *Code of Criminal Procedure* entered into force on 1 February 2014 (OG, 15 July 2010, no. 486), in order to meet the requirements of legality, speed and fairness of the criminal process, the legislator introduced the institution of the preliminary chamber (Parliament of Romania, 2017, 176-179, articles 342-348), having as object the verification, after sending to court, of the competence and legality of notifying the court, as well as the verification of the legality of the administration of evidence and execution of acts by the criminal investigation body . The idea was that this institution of criminal procedural law produces a direct, positive effect on the speed of solving a criminal case and removes a gap in the old criminal procedural provisions that prevent for a longer period of time, in some cases, the start of judicial investigation. In this way, the preliminary chamber procedure contains rules that eliminate the possibility of subsequent restitution, in the trial phase, of the case to the Prosecutor's Office, due to the fact that the legality of evidence and prosecution are resolved at this stage (statements in the explanatory memorandum preliminary chamber).

Also, in this context, the *Code of Criminal Procedure* provided express provisions on the trial on the merits (Parliament of Romania, 2017, 179-189, art. 349- 407), so that the trial was conceived as a complex of procedural acts and specific procedures, with the aim of pronouncing a legal and sound solution, based equally on law and truth.

Considering that the procedural provisions ensured a speed of the criminal process and the reduction of the duration of solving the criminal case as the guarantees were increased in the criminal investigation phase and in the trial in the first instance in the case of appeals only the way was provided, ordinary appeal against the sentences handed down by the court of first instance in criminal matters and the appeal that can be exercised only when the law expressly provides for it, namely in the case of preventive measures ordered by the judge of rights and freedoms.

In the *Code of Criminal Procedure*, in the provisions of art. 426-477 (Parliament of Romania, 2017, 207-225) were regulated the extraordinary means of appeal, namely: the annulment appeal, the cassation appeal, the review, the reopening of the criminal case in case of trial of the convicted person in absentia, and to ensure a unitary judicial practices the appeal was introduced in the interest of the law, in order to ensure the uniform interpretation and application of the law by all courts, and when at the Courts of Appeal or the court invested with solving a case the referral to the *High Court of Cassation and Justice was introduced in order to issue a preliminary ruling for resolving legal issues.*

When a criminal case is tried in the first instance, there is a possibility that the court erred in establishing the exact facts or legal provisions, as the trial activity is a human activity, the legislator adopting various procedural remedies through the existence of appeals.

In Romanian procedural law, appeals can be ordinary (ordinary) when an indefinite court decision is appealed and in the present situation we have the appeal, thus being in the

trial of a criminal trial in two degrees of jurisdiction: merits and appeal. The double degree of jurisdiction applies to all criminal and rare judgments or it happens that a criminal case, after the trial on the merits, is not appealed by one of the parties or by the prosecutor.

The extraordinary remedies mentioned above may be relevant in a criminal case only after a criminal judgment has become final and are limited to the cases expressly provided for in the *Code of Criminal Procedure.*

Ordinary appeal

In a criminal case the appeal is made against a sentence adopted by a court of first instance by the prosecutor and the defendant, both in terms of the criminal side and the civil side of the case, by the civil party in terms of the criminal side and the civil side, by the civilly liable party only in respect of the civil side, and in respect of the criminal side only in so far as the solution on that side influenced the solution in the civil side. The injured person may also appeal against the criminal side as well as other participants in the criminal proceedings if their legitimate rights have been violated by the sentence of the merits.

The ordinary way of appeal not only gives efficiency to the principle of double degree of jurisdiction prev. of art. 2 paragraph 1 of Protocol 7 to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, but it has a suspensive, devolving and extensive effect. The appeal has suspensive effect as the decision cannot become final and cannot be enforced as long as the appeal has been declared, until its judgment (the term for declaring the appeal is 10 days from the date of communication of the decision). With regard to the devolving effect of the appeal and its limits, the court judges the appeal only with regard to the person who declared it and the person to whom the statement of appeal refers and only in relation to the quality that the appellant has in the process. The law thus distinguishes between a full devolution of the criminal case and its settlement which must be limited only to the interests represented by the appellant and therefore the law limits the devolutive effect only according to the quality of the appellant and his role in criminal proceedings (applying the rule *tantum devolutum quantum appelatum*). Within these limits on the devolving effect, however, the court is obliged, in addition to the grounds relied on and the claims made by the appellant, to examine the case in all *aspects of fact and law*.

With regard to the extensive effect, although there is the principle that an appeal benefits only the user, the appellate court examines the case by extension and with regard to the parties who have not lodged an appeal or to whom it does not refer, and may also decide in without being able to create a more difficult situation for these parties. In situations where the criminal judgment is appealed only by the defendant, a solution cannot be adopted on appeal that may create a more difficult situation for him (*non reformatio in pejus*). But when the merits decision is appealed by to the Public Ministry or by the civil party (which can appeal both in terms of the criminal side and the civil side), the decision can be reformed to the detriment of the defendant (Parliament of Romania, 2017, 204, art. 418).

In practice, there have been situations where it has been necessary to resolve issues of law in criminal matters concerning the application of the more favorable criminal law until the final judgment of the case, in order to know whether the principle of non-aggravation of the situation in its appeal The first instance in favor of the defendant from the previous Criminal Code may also be mentioned by the court of judicial control, invested only with solving the appeal declared by the defendant, since for the analyzed criminal deed the more favorable criminal law would be the current Criminal Code. Thus, the High Court of Cassation and Justice - Panel for resolving legal issues in criminal matters (OG, 2014, no. 502, decision no. 10/2014) ruled that the mitigating circumstances are assessed globally, depending on the incrimination and sanction. In the event of the entry into force of a new law that brings changes both on penalties and on mitigating circumstances, the circumstances as

part of the institution of the sanction of a crime cannot be viewed and analyzed separately from the institution of punishment. The removal of the mitigating circumstances does not prejudice the principle of non-aggravation of the situation in its own appeal provided in art. 418 of *the Code of Criminal Procedure*, when in concrete terms, for the same deed, a less severe sanction is established (Parliament of Romania, 2017, 204).

The importance of the double degree of jurisdiction

Given that the criminal procedural law provides for two degrees of jurisdiction, it is always necessary for the court to go through all the procedural stages in order not to deprive defendants of a degree of jurisdiction, by resolving the case directly by the appellate court (given the devolutive and extensive), after the re-administration of the evidence on appeal.

We consider that the notion of resolving the merits of the case should not be viewed restrictively in the sense that in a criminal case it means only pronouncing the solution regardless of the conditions, but legally carrying out the judicial procedure that necessarily leads to it, for that otherwise the judicial investigation would be useless. It is necessary for the first instance to carry out a trial activity through which to resolve the merits of the case with which it was referred, because otherwise the appeal will be admitted and the sentence will be annulled in its entirety with the case being sent for retrial to the court of first instance.

Also, the appellate court cannot fully replace the trial phase in the first instance because in this way a degree of jurisdiction is artificially eliminated, to the detriment of the procedural interests of the defendants, for which the criminal procedural legislation provides for the prosecution of two degrees of jurisdiction (High Court of Cassation and Justice, Criminal Section, Decision No. 144/A/2021)

The devolution of the criminal case is both before the court of first instance and the court of judicial control. When, for example, before the court of first instance there was no trial in compliance with all procedural guarantees, not taking into account all the evidence administered and for this reason cannot be considered the first degree of jurisdiction, for compliance with the provisions of art. 2 of the Additional Protocol 7 to the European Convention for the Protection of Human Rights, it is necessary to refer the case for retrial. We specify that according to the legal provisions (The Romania Parliament, 2017, 205, art. 421- paragraph 2) the retrial of a criminal decision is ordered even when the court has not ruled on a deed retained in the charge of the defendant by the act of notification, or on civil action, or when there is one of the cases of absolute nullity except in the case of incompetence when the retrial is ordered by the competent court. This retrial must be done within certain limits, and when retrying the case the court will consider all the evidence administered during the criminal proceedings and the trial, not being necessary to re-administer the evidence in the first procedural cycle, but only on the issues imposed by the appellate court.

Moreover, the unitary judgment is necessary in order not to prejudice the provisions of art. 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the right to a fair trial, which is closely linked to the dual degree of jurisdiction in criminal matters.

References

Council of Europe. 2019. *European Convention for the Protection of Human Rights and Fundamental Freedoms.* Strasbourg Cedex: Strasbourg.

High Court of Cassation and Justice, Criminal Section, Decision No. 144/A/2021. OG, 2014, no. 502, decision no. 10/2014)

The Romanian Constitution adopted on November 21, 1991, published in the Official Gazette of Romania Part I, No. 233, and came into force after its approval by the national referendum of 8 December 1991.

The Romanian Parliament. 2017. *Code of Criminal Procedure* entered into force on 1 February 2014, Official Gazette of Romania (OG), July 15, 2010. Part I, no. 486.