Practical Reports on Cancellation Contestation in the Matter of Criminal Proceedings

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Abstract: In the current Code of Criminal Procedure, foreseen as an extraordinary way of attack, the appeal for annulment has not been subject to substantive changes to the provisions of the previous Code of Criminal Procedure, in view of the cases in which it can be invoked. However, in view of the changes made to the other procedural provisions, the verification of their compliance required the examination of the validity of the previous case-law, with the emergence of some new interpretations, including reporting to the case-law of the Constitutional Court.

Keywords: appeal in annulment; extraordinary appeal; cases

1. Introduction

In the course of the criminal proceedings, the extraordinary ways of appeal are procedural remedies that allow in the express and limitative cases provided by the law to correct the errors of the final court decisions. (Neagu; Damaschin & Iugan, 2016, p. 222).

The legislator's view regarding the new Code of Criminal Procedure assumed the maintenance of the appeal in annulment in the category of extraordinary ways of appeal, together with the revision, the appeal in cassation, the reopening of the criminal trial in the case of the absenceof the convicted person.

Although the amendments to the new Code of Criminal Procedure were not essential, some inadequacies in the wording of the text, the verification of the application of other criminal procedural rules, to determine the incidence of appeals in annulment and also the pressure exerted by the cessation of the appeal as an ordinary way of attack, have made the passage not to be unrelated of discussions and different solutions of judicial practice.

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2. The Characteristics of the Appeal in Annulment as an Extraordinary Way of Attack

As an extraordinary way of attack in the prevoius regulation, the appeal in annulment was aiming the removal of procedural errors and had the character of annulment, with the consequence, in case of admitting, of abolishing the final court ruling, and withdrawal, being settled by the court that pronounced the appealed judgment.

The current Code of Criminal Procedure maintained its character of annulment, in relation to the targeted purpose and withdrawal, having regard to the jurisdiction of the court which gave the judgment whose annulment is requested. (Tudor in Volonciu et all, 2014, p. 1068)

3. Comparative Analysis of the Cases of Appeal in Annulment

With regard to the cases of appeal in annulment it can be observed on one hand the preservation of the ones from the previous regulation, respectively those stipulated in art. 426 lit. a, b, h, i, Criminal Procedure Code, with some minor modifications, and the introduction of five new cases, which featured as grounds for appeal in the previous Code of Criminal Procedure, generally corresponding to absolute nullity cases.

A brief examination of the cases of appeal for annulment which find their correlation from the old one in the current regulation, with reference to the new procedural provisions, with the examination of the jurisprudence in the matter, reflects the following situation:

A) regarding the case of appeal in annulment provided by art. 426 lit. a of the Code of Criminal Procedure, it refers to the situation in which the judgment on appeal had taken place without the legal quorum of a party or when, although legally cited, it was impossible to present and to notify the court of this impossibility. With minor modifications of the wording, the text brings together the two cases of appeal stipulated in Art. 386 par. 1 lit. a, b Code of Criminal Procedure 1969.

As a procedural remedy, the first sentence of this case of an appeal for annulment takes into account the fact when the party was not legally summoned and, by failing that, she was absent at the time when the case was judged by the court of appeal, the changes of the interpretation being generated by the new legal provisions related to the citation procedure.

Thus, the case does not apply when the party had a term in the knowledge, under conditions of Art. 353 paragraph 7 of the Code of Criminal Procedure or was represented by a lawyer, without even being quoted,

according to art. 353 par. 1 and 2 Code of Criminal Procedure. (Tudor in Volonciu et all, 2014, p. 1071)

In the previous regulation, it was considered that if, in the absence of the defendant, the court takes note of the unilateral termination by the lawyer chosen for the legal assistance contract, and the next term, without the defendant being summoned in his absence, but in the presence of the ex officio lawyer, solves the case, it is applicable the case of scrapping provided by art. 385 ind. 9 par. 1 point 21 Criminal Procedure Code[1].

Following the entry into force of the new Code of Criminal Procedure, in judicial[2] practice, it was considered to be invoked this reason when the party was represented by an elected lawyer, and the latter terminated the legal assistance contract, also reported on the changes made to the citation procedure. For the solution of dismissing as unfounded the appeal in annulment, the court considered the following arguments: the whole process, on appeal, took place after the provisions of the new Criminal Procedure Code entered into force, and according to art. 353 par. 2 Criminal Procedure Code, the party to whom the summons was legally handed in for one of the terms of reference, is only quoted for the subsequent terms, even if they were absent from any of these terms, except the situation where their presence is mandatory. With regard to the unilateral termination of the contract between the defender elected and the defendant, it was considered that this occurred most probably because of the defendant's fault, which did not pay the chosen defender the agreed fee, that the defender elected was obliged, in addition to informing the court, he should also had notified his client of the unilateral termination of the legal assistance contract, and the defendant plays "culpa in eligendo", respectively, that he had chosen an unprofessional lawyer.

In another situation[3], the unlawful citation was invoked since, at the first term of the appeal, the defendant did not appear before the court, requesting a time limit for preparing the defense and formulating the grounds of appeal, a request approved by the court; the defendant did not appear in court at the second instance term and his elected defense counsel filled an application requesting a new term, indicating that he was on holiday leave. As the defender of the defendant did not provide for his substitution, given the fact that the defendant had already been granted a time to prepare his defense and taking into account that legal assistance is optional on the nature of the offense for which the trial was ordered, the

[1] Criminal decision no. 5908 of 7 December 2007 of the High Court of Cassation and Justice, www.scj.ro.
[2] Criminal decision no. 206 of 16.02.2017 of the Galati Appeal Court, unpublished.
[3] Criminal decision no. 253 from 02.03.2017 of the Galati Appeal Court, unpublished.

instance of appeal proceeded to the substantive debate of the case, rejecting the application for a new term. In the resolution of the appeal in annulment, it was considered that the court of appeal made a legal summoning of the defendant to all the addresses resulting from the documents and papers of the file: at home, at the chosen lawyer's office who provided legal assistance to the defendant during the first instance, and by displaying at the court door, and art. 259 par. 4 The Criminal Procedure Code provides that the citation of the suspect or defendant can also be made at the office of the chosen lawyer, if he did not show up after the first legal summoning, only if the defendant's presence is mandatory or judged as necessary by the judge. The case was considered not to have to be appealed at the lawyer's office, given that he was aware of the file, as he also filed a petition requesting a new term.

Concerning this case of an appeal for annulment, the previous doctrine and case-law judgments remain valid, according to which the citation procedure is verified only for the party that promoted the appeal (Tudor in Volonciu et all, 2014, p. 1070), because there is no harm caused by the lack of the procedure with the adverse party[1].

B) art. 426 lit. b The Criminal Procedure Code takes into account the situation in which the defendant was convicted, although there was evidence of a cause of cessation of the criminal trial, in the wording of art. 386 lit. C Code of Criminal Procedure 1969, having regard to the situation in which the Court of Appeal did not pronounce on a cause of cessation of the criminal proceedings between those stipulated in art. 10 par. 1 lit. F) - i ^ 1), in respect of which there was evidence in the file;

In the previous case-law, it was considered that when the court which has definitively resolved the case has ruled on that claim and considered that it is unfounded, the challenge to annulment can not be upheld[2].

In the doctrine, it was emphasized that although the condition that the court had previously been ruled out is not explicitly stated, it retains its validity, since the legislator did not intend to give more value to the opinions of other judges from the same court as the one who solved the appeal, because it would be granted judicial review powers, which could had been achieved by providing a ground for appeal in the cassation[3].

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[1] Criminal decision no. 570/1998 of the Bucharest Court of Appeal, Law Magazine no. 4/1999, p. 142.

[2] Criminal decision no. 999/1998 of the Bucharest Court of Appeal, Law Magazine 4/2000, p. 147.

[3] Criminal decision no. 10/2015 of the Bucharest Court of Appeal in M. Udroiu, A. Bontas, G. Bodoroncea, M. Bulancea, V. Constantinescu, D. Gradinaru, C. Jderu, I. Kuglay, C.

Also, if the court of appeals ruled on the cause of the case and considered it to be non-existent, the appeal for annulment can not be upheld because it would affect the security of the legal relationship and the extraordinary remedy seeks to remedy some procedural errors and not the judgment, and the substance of the case can not be called into question. (Tudor in Volonciu et all, 2014, p. 1075)

Thus, it was dismissed as inadmissible the contestation in substantive annulment of this case when the contestant alleged that he would like to conclude a mediation agreement because the procedural moment was exceeded just until the indictment had been read and the cause of termination had to pre-exist in the file, not to substantiate this during the appeal stage[1].

Similarly[2], it was noted that this case of admissibility of the appeal in annulment was not the case of an incident when the possibility provided by the new Criminal Code to reconcile the parties to the crime of qualified theft was invoked. Thus, the Criminal Code 1969, in force at the time of the final settlement of the case, did not provide the possibility of termination of the criminal proceedings by reconciling the parties for the offense of qualified theft, so that the contestation in annulment formulated on the provisions of Art. 386 par. (1) (c) of the 1969 Code of Criminal Procedure would had been inadmissible. Even if the new Criminal Code allows reconciliation of the parties for the offense of qualified theft, according to art. 159 para. 3 Criminal Code, reconciliation has the effect of terminating the criminal proceedings only if it intervenes until the court case had been read - a procedural moment that had already been exceeded.

Considering the divergent views on this solution, the High Court of Cassation and Justice, the Criminal Law Enforcement Division has decided that the court which resolves the appeal for annulment can not re-examine a cause of the cessation of the criminal proceedings, in the case when the court of appeal debated and analyzed the incidence of the cause of the criminal proceedings[3].

In another situation, it has been decided in the previous judicial practice that the ground of appeal in annulment provided in art. 386 par. 1 lit. C The Criminal Procedure Code 1969 concerns exclusively the omission of the court to adjudicate on one of the causes for the cessation of the criminal

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Meceanu, L. Postelnicu, I. Tocan, AR Rose, Criminal Procedure Code.Comment on articles, C.H. Beck, Bucharest, 2015, p. 1089;

[1] Criminal decision no. 109 of 01.02.2017 of the Galati Appeal Court, unpublished.

[2] Criminal decision no. 260 of 06.03.2017 of the Galati Appeal Court, unpublished.

[3] Decision 10 of 29.03.2017 of the High Court of Cassation and Justice, published in the Official Gazette no. 392 of May 25, 2017.

proceeding, by means of the appeal for annulment, the court's omission to adjudicate on a cause of acquittal[1] or reduction of punishment can not be invoked[2].

The statutes remain valid[3] also under the present Code of Criminal Procedure when the contestant has indicated the case of an appeal in annulment provided by art. 426 lit. B The Code of Criminal Procedure, however the reasoning is grounded on allegations to prove its guilt or the fact that the offenses that are the object of the conviction are not committed by him, but the authors of these facts are other persons. These allegations tend to bring into question the legality and merits of the final judgment of the criminal court, which is inadmissible, because they would violate the principle of res judicata and the extraordinary nature of such an appeal.

C) Art. 426 lit. H The Criminal Procedure Code takes into account the fact that the court did not hear the defendant present, if the hearing was legally possible, with the addition brought by O.U.G. 18/2016 according to which the judgment belongs to the appeal court; Similarly, Art. 386 lit. The Criminal Procedure Code 1969 provided the situation when, the court was judging the appeal or the retrial of the case, the defendant present in the court was not heard, and his testimony is mandatory according to art. 385 ^ 14 par. 1 ^ 1 or art. 385 ^ 16 par. 1.

From this perspective, previous jurisprudence is maintained in the sense that this ground can not be invoked when the defendant has used the right to silence[4].

D) art. 426 lit. The Code of Criminal Procedure deals with the situation in which two final judgments were pronounced against a person for the same deed, a case identical to the one provided in Art. 386 lit. C Code of Criminal Procedure 1969.

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[1] Criminal decision no. 3033 / 25.11.2014 of the High Court of Cassation and Justice in Udroiu et all, 2015, p. 1089).

[2] Criminal decision no. 3224 of 23.05.2005 of the High Court of Cassation and Justice (Tudor in Volonciu et all, 2014, pp. 1074-1075).

[3] Criminal decision no. 240 of 27.02.2017 of the Galati Appeal Court, unpublished.

[4] Criminal decision no. 1086 of 22.03.2010 of the High Court of Cassation and Justice (Tudor in Volonciu et all, 2014, pp. 1082-1083). Criminal decision no. 3033 / 25.11.2014 of the High Court of Cassation and Justice in (Udroiu et all, 2015, p. 1093).

4. Conclusions

Considering maintaining the characteristics of the appeal as an extraordinary appeal and the cases in which it could had been promoted, with the addition of new ones, the entry into force of the new Code of Criminal Procedure would not have led to discussions on its application .

The jurisprudential examination carried out in this article attests the fact that, for the most part, the theoretical and practical interpretations of the institution were maintained, but there were different interpretative solutions, starting from the contextual changes done by the legislator, and also from the necessity adaptation to the new criminal procedural provisions, where the limiting cases refer to them.

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*** Criminal decision no. 5908 of 7 December 2007 of the High Court of Cassation and Justice, www.scj.ro.

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