Summoning of Parties on Criminal Cases in the Courts of Appeal

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Abstract: The article analyzes some aspects of summoning the parties to the trial at the examination of criminal cases in the court of appeal, general provisions regarding the summons procedure, the powers of the prosecutor and the appellate court in this regard. The scientific relevant problem solved is in analysis and re-evaluation of the legislative and practical framework of the stage of summoning the parties to criminal cases in the court of appeal. According to art. 412 para. (4) Code of Criminal Procedure of the Republic of Moldova the judgment of the appeal is made with the legal summons of the parties and the handing over of the children on the appeal. According to para. (5) their non-presentation does not prevent the examination of the case. The provisions of art. 235 - 243 Code of Criminal Procedure of the Republic of Moldova regulates the procedure of summoning the parties. Thus, the parties who took part in the trial in the court of first instance must be legally summoned to the court of appeal.

Keywords: criminal proceedings; appeal; parties to the proceedings; summons; the procedure for summoning the parties

JEL Classification: K41

Introduction

Once the criminal case has been filed with the appellate court, the parties to the proceedings are summoned. It must be ascertained whether the parties and persons concerned have been duly summoned and if their legal summons has taken place. Verification of the organization of the hearing of the court of appeal involves verifying compliance with the summons of the parties, if the defendant participates in the court hearing, who is under arrest, if he has been provided with legal assistance guaranteed by the state. If one of the parties was not legally summoned and did not appear at the court hearing, or the defendant, who is under arrest, was not escorted to court, or the defender did not show up, whose participation is

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mandatory, the judgment of the appeal is postponed for another time, with repeated compliance with legal requirements. The prosecutor, as a guarantor of compliance with the law, will verify whether the appellate court complies with the provisions of art. 402 para. (6) Code of Criminal Procedure of Republic of Moldova, as well as art. 345 Code of Criminal Procedure (hereinafter CCP of RM), on summoning the parties and providing sufficient time for preparation.

Methods and Materials Applied

Theoretical, normative, and empirical material was used in the elaboration of this article. Also, the research of the respective subject was possible by applying several methods of scientific investigation specific to the theory and doctrine of criminal procedure: logical method, comparative analysis method, systemic analysis, etc.

The Purpose of the Research

We have examined and analyzed the normative framework, judicial practice and of the doctrine regarding the procedure for summoning the parties to the examination of criminal cases in the courts of appeal.

Results Obtained and Discussions

The parties who took part in the trial in the court of first instance must be legally summoned to the court of appeal (Decision of the Supreme Court of Justice of 13.02.2007. File no.1ra-115/2007, p. 9; Decision of the Supreme Court of Justice of 12.04.2005. File no.1ra-204/2005). The remittance of copies of declared appeals is a mandatory requirement, non-enforcement which lacks the opportunity to state its position and infringes the right of defense (Decision of the Criminal Panel of the Supreme Court of Justice of 12.10.2004. File no.1ra-623/2004, pct. 2).

Compared to the first instance, the attendance in person of the defendant in the appellate court does not have the same decisive importance. The modalities of application of art. 6 ECHR on appeal, depending on the particularities of the procedure in question and the whole procedure in the national system must be considered, and the role of the appellate court (ECtHR case of Hermi v. Italy (GC), §. 60).

Based on the full jurisdiction of the appellate court, art. 6 The ECHR does not necessarily guarantee the right to a public hearing and the right to appear in person (ECHR case of Fejde v. Sweden, §. 31). The particularities of the procedure must be considered and how the interests of the defense party were presented and protected

before the appellate court (ECHR case of Seliwiak v. Poland, §. 54; ECHR case of Sibgatullin v. Russia, §. 36).

According to Paraschiv C.S., "In practice, the Bucharest Court of Appeal decided that, if the appeal declared by the defendant or the prosecutor does not concern the civil side of the trial, but only the criminal side, the civil party who did not challenge the judgment should not be summoned to the appellate court. ... But if the call of the prosecutor was made without reservations – which means it has a full devolving effect -, citation of all parties is mandatory" (Paraschiv, 2019, p. 169).

The trial of the appeal takes place in the presence of the defendant, with the exceptions provided in art. 321 CCP of RM and it is necessary to check all the addresses of the defendant known from the materials of the criminal case, in compliance with the provisions of art. 412 para (3) and 242 CCP of RM, legal summons of the defendant (Decision of the Plenul of the Supreme Court of Justice of the Republic of Moldova with title "Cu privire la practica judecării cauzelor penale în ordine de apel/Regarding the practice of judging criminal cases in order of appeal", no.22, of 12.12.2005, pct. 6.2].

Proof or receipt of the summons received by the party to the proceedings, with the indication of the date of receipt, is returned to the appellate court. The lack of a certificate is the basis for establishing another trial term (Decision of the Supreme Court Plenum of Justice of the Republic of Moldova with title "Cu privire la practica judecării cauzelor penale în ordine de apel/Regarding the practice of judging criminal cases in order of appeal", no. 22, of 12.12.2005, pct. 13].

"The summons procedure is not legally fulfilled if the summons is displayed without including any information regarding the apartment number from the address of the summoned person or without mentioning the block and the block entrance, although the apartment number is indicated. In these cases, the case for scrapping is indecent (Supreme Court of Justice of Republic of Moldova (hereinafter SCJ), decision no.1499 of 21.03.2001)" (Dolea, 2016, p. 568).

In another case, the trial in the first instance took place in the absence of the defendant, who was not legally summoned, because from the proof of fulfillment of the procedure for the term of the meeting it resulted that he was summoned to the address from Braila, without indicating the number of the property, thus violating the criminal procedural provisions, which stipulate that the address of the person summoned must include, in cities and towns: town, county, street, number and apartment where he lives. The Court of Appeal allowed the defendant's appeal, he overturned the sentence and sent the case to the same court for retrial (Galati Court of Appeal, Criminal Section, decision no.409/2002) (Pamfil, Movileanu & Munteanu, 2008, p. 130).

"In the national jurisprudence (SCJ, decision no.1re-1284/2008 of 26.12.2008) it was shown that due to improper citation, the way of administering the evidence in support of the accusations submitted to the defendants may be unfair within the meaning of art. 6 to the ECHR" (Dolea, 2016, p. 585).

If the defendant has not been legally summoned and was not assisted by a lawyer at trial in the first instance, it is considered that the merits of the case have not been resolved (Decision of the Criminal Panel of the Supreme Court of Justice of 18.07.2018. File no.1ra-1540/2018).

The only legal solution for the appellate court in these cases is quashing the sentence of the first instance and the order of the retrial by the court whose judgment has been set aside, pursuant to art. 415 para. (2) pt. 3) CCP of RM.

"It is necessary to bring to the attention of the judicial bodies the fact that the domicile of the defendant was changed during the criminal trial, to redirect the summons to the new address. If the defendant does not fulfill this obligation, he can no longer invoke the trial in his absence and not be summoned to this address, since in this way he would use his own fault (Bucharest Court of Appeal, Section II penal, decision no.226/1997)" (Pamfil, Movileanu & Munteanu, 2008, p. 135).

According to the article 238 para (3/1) CCP of RM - *The suspect, the accused or the defendant has the obligation to inform, within a maximum of 3 days, the criminal investigation body, the prosecutor, the court about changing residence. At the hearing, the suspect, the accused, or the defendant shall be informed of this obligation and of the consequences of failure to comply with it*.

Under these rules, in a criminal case, the trial of the case and the pronouncement of the first instance sentence took place in the absence of the defendant (Decision of the Criminal Panel of the Supreme Court of Justice of 18.07.2018. File no. 1ra-1540/2018, pp. 2-3).

It is incumbent upon the court to state in the judgment the grounds on which the decision to examine the case was based in the absence of the defendant and fulfilling all legal requirements by summoning the defendant and ensuring his presence at the trial. The finding of the fact of the defendant's avoidance to appear at the trial is to be analyzed by the appellate court, with an additional check on the defendant's dodge or the possibility of establishing its location, for example, ordering the summons, announcing the search, requesting the police inspectorate to search for the defendant (Decision of the Balti Court of Appeal of 20.12.2017. File no. 03-1a-1704-29032017).

It has been established in the jurisprudence of the ECtHR that, "In 2007 the applicant was sentenced to four years in prison in the Netherlands, and in 2009 he was released from prison. He was soon arrested in Norway for other crimes. In 2010 the Dutch

appellate court sentenced the applicant in absentia to eight years' imprisonment. The Court held that, the appellate court's refusal to consider the measures which would have allowed the applicant to attend the hearing made it difficult to understand how much his sentence increased to eight years. The Court agreed with the Government that the arrest of the applicant in Norway had been a direct consequence of his conduct and recognized as legitimate the interests of the victim's surviving relatives and society to see that the criminal proceedings against the applicant concluded. However, given the prominent place of the right to a fair trial, nor the presence of the applicant at first instance hearings, nor the active conduct of the defense they could not make up for the applicant's absence before the second instance" (Ialanji, 2019, pp. 171-172).

Ialanji A. mentioned that "the search warrant procedure is a prerequisite for the decision to try the case in the absence of the defendant, however, there is a lack of national regulation of the procedure and a deadline after which the court may order the examination of the case in the absence of the defendant at the time of his announcement in the search" (Ialanji, 2019, p. 184).

The author proposed the completion of art. 389 para. (1) CCP of RM with the phrase: "The conviction handed down in the absence of the defendant contains the factual and legal grounds for the trial in absentia" (Ialanji, 2019, p. 189).

We support the proposal made. Often the courts do not argue in the court decision the solution regarding the ordering of the trial of the case in the absence of the defendant and the reasoning of a decision is expressed by the fact that the judge is obliged to indicate the reasons for the solution adopted.

According to ECtHR, the trial is fair if the accused has been allowed to appeal the sentence in his absence and had the right to be present at the appellate court hearing, thus opening the possibility of a new factual and legal examination of the accusation (*Idalov v. Russian Federation, of 22.05.2012, §. 171, Jones v. The United Kingdom, of 09.09.2003*) (The decision of the Constitutional Court on the inadmissibility of the referral no.16g/2017 "privind excepția de neconstituționalitate a unor prevederi din articolul 334 alin. (2) din Codul de procedură penală al Republicii Moldova (îndepărtarea inculpatului din sala de judecată)", no.11 of 02.02.2017).

After admitting the appeal request Submission of the case for retrial to the first instance it is also possible in the case where the trial at first instance took place in the absence of a party was unable to appear and to inform the court of this impossibility (Pamfil, Movileanu & Munteanu, 2008, pp. 139-140).

The court is obliged to summon the detainees to the place of detention even if the summoned person is serving a sentence abroad. According to art. 238 para. (5) CCP

of RM – "*Detainees are summoned to the place of detention by the administration of the detention institution*".

If necessary, the appellate court may recognize the presence of the obligatory party and take appropriate measures to ensure their presence. In the decision of the SCJ of the Republic of Moldova on criminal case no. 1ra-516/2018 of 22.05.2018, it was found "*the appellate court also disregarded the arguments of the lawyer participating in the court hearing, O.T. requested that the case be adjourned because there is no evidence that all parties are legally summoned (f.t. 18, vol. II), and the refusal of the courts to verify the defense's arguments regarding the improper citation and to give him a chance to appear before the authorities, could raise the issue of violating the provisions of art. §. 6 para 1 of the Convention (ECtHR Vasiliciuc v. Republic of Moldova, §. 40)*".

The participation of the defender in the judgment of the appeal is mandatory if the interests of justice so require. The SCJ of the Republic of Moldova on criminal case no. 1ra-376/2005, explained that "without fulfilling the legal summons of the defendant and her lawyer, the appellate court violated the defendant's right of defense and the right to a fair trial. Art.6 ECHR guarantees the right of the accused to participate in the examination of his own criminal case".

At the same time, the right of the defendant to be defended by a chosen lawyer is not an absolute one (ECtHR case of Meftah and others v. France (GC), §. 45; case of Pakelli v. Germany, §. 31). The choice of a lawyer by the accused must be respected (ECtHR, case of Lagerblom v. Sweden, §. 54]. National courts they may not consider this choice in cases where there are sufficient grounds and the predominance of the interests of justice (ECtHR case of Meftah and others v. France (GC), §. 45; case of Croissant v. Germany, §. 29). The specific nature of the proceedings may justify a specialist lawyer presenting oral defense arguments (ECtHR case of Meftah and others v. France (GC), §. 47).

In a criminal case, the injured party filed an ordinary appeal against the decision of the appellate court, and he argued that he was not legally summoned to the appellate court hearing and thus was unable to attend the trial in the appellate court. A copy of the summons sent to the injured party for the hearing was attached to the file, but there was no data on reception. Likewise, there is no other evidence regarding the summoning of the injured party in the hearing of the appellate court on the day the appeal was heard. Therefore, the case was tried on appeal without the legal summons of the injured party, which was the basis for ordinary appeal and quashing of the decision provided by art. 427 para. (1) pt.5) CCP of RM. From the provisions of art. 17 para. (2) CCP of RM it results that the court was obliged to ensure that participants in criminal proceedings fully exercised their procedural rights (Decision of the Criminal Panel of the Supreme Court of Justice of 17.02.2009. File no.1ra-75/2009, pct. 4.2).

If the injured party has not been legally summoned to attend the appellate court hearing, the decision taken will be considered illegal (Decision of the Criminal Panel of the Supreme Court of Justice of 15.12.1998. File no.1r-1115/1998).

When appointing and preparing the court hearing in the appellate court, judges must ascertain whether the persons whose interests are affected have been notified of the appeals and if copies of the calls have been provided with an explanation of the right to submit a written and timely reference, which must meet the deadline set for declaring the appeal. Judicial practice is attributed to this category of convicted persons (acquitted), who did not contest the sentence and their defenders, as well as the persons in respect of whom the judgments were adopted in absentia (Головко, 2017, p.1099). The ECtHR considers that a violation of the right to a fair trial in the context of Article 6 of the Convention (Decision ECHR case of Sevastyanov v. Russia, no. 37024/02 of 22.04.2010, §. 70-76].

In case of criminal prosecution of citizens of other states, the prosecutor sometimes hesitates to summon them to their state of origin, where they would be legally located, because at the time of leaving the territory of the Republic of Moldova, they were not restricted in their freedom of movement by any preventive measures. Prosecutor wrongly considering that it is sufficient to summon him to the place of temporary residence in the Republic of Moldova. Article 539 para. (1) CCP of RM provides that the – "witness, the expert or the person being pursued located outside the Republic of Moldova if not searched may be summoned by the criminal investigation body for the execution of certain procedural actions on the territory of the Republic of Moldova. In this case, the summons may not contain summonses of forced bringing before the court of law (The Decision of the enlarged Criminal Panel of the Supreme Court of Justice of 15.05.2018. File no.1ra-745/2018, p. 9).

"In the case of the ECtHR Hermi v. Italy (18.10.2006, no. 18114/02, §. 90), The Grand Chamber, examining the material of the case, considered that the applicant knew sufficient Italian to understand what was written in the opinion, informing him of the date on which the hearing before the Court of Appeal will take place. ... More than that, ... at the time of his appeal the applicant had lived in Italy for at least ten years, and during an arrest in 1999 he was able to give the carabinieri details of the charges against him. These elements were sufficient to lead the national judicial authorities to believe that the applicant was able to understand the meaning of the opinion, which informed him of the date of the hearing and no translation or interpretation of this opinion was required. The Court also notes that the person concerned did not inform the prison authorities that he might not be able to understand the disputed document" (Dolea, 2016, p. 879).

"Persons who had the capacity of parties to the trial in the first instance, but who did not appeal and who are not covered by the appeal statement they are no longer

parties to this procedural phase. Consequently, the non-summons of the civil party in the appeal declared by the defendant only regarding the settlement of the criminal action does not constitute a violation of legal provisions" (Pamfil, Movileanu & Munteanu, 2008, p. 46).

Thus, the legal summons of the parties to the trial ensures the observance of the right to access to justice, to a fair trial and the administration of justice.

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