

THE APPEAL

Sorina SISERMAN

Resumé

L'appel est une voie habituelle d'attaque par laquelle l'instance supérieure à celle qui avait prononcé la décision prononce un nouveau jugement sur le fond de l'affaire avec la possibilité de présenter de nouvelles preuves. Dans cette étude, nous nous proposons d'analyser l'importance de cette voie d'attaque.

Mots clés: appel, voie d'attaque

The appeal is a way of contesting a verdict ; it has got a long tradition and is applied almost universally. Its origins go back to the Roman procedural law, where the convicted person had the right to appeal to the people for rejecting a ruling issued, by using the so-called 'provocatio ad populum'¹.

'Provocatio' was enacted in the XII Tables as well. It was only allowed in favour of the male citizen. As regards the slaves and the women, 'the domestic jurisdiction' was being exercised and in case of foreigners it was the magistrate's unlimited 'imperium'. When the appeal would appear against a conviction ruling, the magistrate would call the people's assembly, which either annulled or confirmed the verdict, without being able to alter it. Before the people's assembly, the magistrate would take up the prerogatives of the public ministry, pleading for maintaining his decision.²

In the Romanian law, the roots of appeal may be found in Moldavia's Organic Regulations, which at section 263 stipulated that the prosecutor was entitled to lodge an appeal.³

This legal remedy that can also be found in the Criminal Procedure Code of 1864 and then in the Criminal Procedure Code of 1936, was excluded from our legislation on the occasion of the 1948 reform. The appeal was reinserted by means of Law 92/1992, conceived as an ordinary

¹ T. Pop, *Criminal Procedural Law. The Special Part*, book IV, National Printing House S.A. Cluj, page 391.

² *Ibidem*.

³ I. Neagu, *Criminal Procedural Law. The Special Part*, The Global Lex Publishing House, Bucharest, 2004, page 191.

legal remedy, where the court that was higher than the one which had issued the verdict carried out in the merits a new judging of that case, while assessing the pieces of evidence in the file and having the possibility to come up with new evidence.⁴

1. The decisions subjected to the appeal

The appeal is an ordinary legal remedy, devolutive in character, which, technically speaking, may be exerted against any judicial ruling.

The following waivers from this rule were set up by section 361, 2nd par., of the Criminal Procedure Code.

The aforesaid text stipulates that the following may not be attacked by appeal :

- a) The verdicts on the criminal offences for which the criminal case is initiated as a result of the damaged person's prior complaint ;
- b) The verdicts ruled by the military trial courts regarding military order and discipline offences, which are punished by the law with maximum 2 years of imprisonment ;
- c) The verdicts ruled by the Courts of Appeal and by the Military Court of Appeal ;
- d) The verdicts ruled by the Criminal Department of the High Court of Cassation and Justice ;
- e) The divesting rulings ;
- f) The verdicts ruled in the matter of the criminal rulings execution, as well as those regarding rehabilitation.

The verdicts ruled by the first court may be contested with appeal only jointly with the merits. This category includes all the verdicts ruled by the Court during judgment, for which the legislation has not provided a separate legal remedy: for instance, the verdicts by means of which the Court has ruled by virtue of the pieces of evidence requested by the parties, those by which it has ruled on the requests of grouping the causes for indivisibility or connection purposes, or the verdicts by which the revision request has been allowed in the main.

The appeal declared against the ruling is deemed to be made against the verdicts, too, even though the same have been issued after the ruling had been pronounced.

⁴ *Ibidem.*

2. The Persons Entitled to Appeal

Pursuant to the stipulations of Art. 362 of the Criminal Procedure Code, the following may appeal :

- a) The prosecutor – as regards the criminal and the civil part of the case. The prosecutor’s appeal regarding the civil part of the case is inadmissible in the absence of the appeal declared by the civil party, save where the civil action is exercised *ex officio*.**

Article 63 of Law 304/2004 stipulates that the Public Ministry, through the prosecutor’s agency, is contesting the judicial decisions, under the terms provided by the law. According to these legal stipulations, the prosecutor, who has got the task of representing the general interests, of defending the lawful order and the citizens’ rights and liberties, is compelled to examine all the criminal decisions and, without being only the representative of the accusing party, to attack all the decisions inconsistent with the truth and/or those issued while having broken the law.⁵

Not being party in the criminal trial, the prosecutor may only exert the appeal from the criminal standpoint and, as for the civil viewpoint, only when the appeal has been exercised by the civil party or when the civil action has been exercised *ex officio*.

Till the Art. 362, 1st par., letter a), was modified by Law 356/2006, the prosecutor could exert the appeal from both points of view, as the appeals from the civil standpoint were not conditioned by the civil party’s appeal.

- b) The defendant – from both the criminal and the civil viewpoints. A defendant may appeal against the acquittal or the cessation of the criminal trial.**

The appeal can be brought in by the defendant in person, as far as both sides of the case are concerned. The defendant’s appeal is independent from the other trial parties’, which means that it can only attack those parts of the decision that concern its own situation.

In pursuance of Art. 362, last par., for the defendant the appeal can also be lodged by the legal representative, by the counsel for the defence or by the defendant’s spouse.

As for the appeal brought in by the defendant’s counsel for the

⁵ A. Șt. Tulbure, *The Romanian Criminal Procedure. Academic course*, Constant Publishing House, Sibiu, 2006, page 367.

defence, who may be either selected or assigned *ex officio*, it is to be noted that it is about the counsel for the defence that has assisted the defendant before the first court, who is entitled to use the legal remedy of the appeal (which should not call for a new lawyer's power-of-attorney), or about a new counsel for the defence, in which case a new power-of-attorney is to be issued.⁶

In cases of a mandatory legal assistance, the *ex officio* counsel for the defence can lodge an appeal for the defendant, even though he was unable to actually assist him before the first court, issuing conclusions.⁷

c) The injured party from the criminal standpoint

The text of Art. 362, letter c), which stipulates the injured party's right to bring an appeal for the criminal part had another content before the modification made in the Criminal Procedure Code by the Law 356/2006. The enactment, in its previous form, entitled the injured party to only lodge the appeal where the criminal action was initiated upon the prior complaint of the injured party.

Both the theorists and the practitioners have commented on these decisions - obviously discriminatory in character, which situated the injured parties on different levels and which, for instance, allowed the injured party that had suffered an injury as a result of the perpetration of a hitting offence, to declare appeal in due time, whereas the injured party in a robbery lawsuit did not enjoy that right.⁸

Both the legal representative and the counsel for the defence may bring an appeal.

In practice there are countless situations where the injured party adds this status to that of a civil party when it has suffered material damage. In this hypothesis, the injured party can contest, by means of the appeal, the decision of the first court, both from the criminal point of view and from

⁶ Gh. Mateuț, *The Criminal Procedure*, book II, Lumina Lex Publishing House, Bucharest, 1998, page 207.

⁷ The Supreme Court – The Criminal Department – Decision no. 317/1970 in the Alphabet Index of Judiciary Practice in Criminal Matters for 1970-1975, page 374, apud G. Mateuț, op. cit., page 207.

⁸ By Decision 100/2004, published in the Official Journal no.261 dated March 24th, 2004, the Constitutional Court ascertained that the following disposition : 'in the cases where the criminal action is initiated upon a prior complaint, but only from the criminal standpoint', included in Art. 362, 1st par., letter c), of the Criminal Procedure Code, in its form before the modification made by Law 356/2006, is unconstitutional.

the civil one.⁹

d) The civil party and the civil responsible party as regards both the criminal and the civil side of the case

The text of Art. 362, 1st par., letter d), in its current form, is the consequence of the alterations made to the Criminal Procedure Code by Law 356/2006. Prior to this alteration, the text had the following content : the civil party and the civil responsible party as regards the civil side of the case.

By Decision 482/2004, published in the Romanian Official Journal no.1200 dated December 15th, 2004, the Constitutional Court ascertained that the stipulations of Art.362, 1st par., letter d), in its form prior to the modification made by Law 356/2006, were unconstitutional to the extent in which they allowed neither the civil party nor the civil responsible party to exercise the ordinary legal remedy of the appeal as regards the criminal side of the case.

e) The witness, the expert, the interpreter and the counsel for the defence – as regards the expenses due to them

As it can be noticed, these persons, even though they are not parties in the criminal lawsuit, may bring an appeal on their own behalf, but only against those stipulations from the decision by which their rights linked to the expenses requested, have been infringed.

As for the right of the counsel for the defence to lodge an appeal, specification has to be made that in the hypothesis regulated by Art. 362, letter d), one is entitled to exercise the legal remedy on his own behalf and only for the payment of the expenses incumbent to him/her, unlike the hypothesis foreseen by Art. 326, last par., when the counsel for the defence lodges the appeal on behalf of the party that one assists.

f) Any person whose legitimate interests have been prejudiced by a measure or by a document of the Court

The text of Art. 362, letter f), allows any person not involved in the case, whose legitimate interests have been prejudiced, to request the cancellation of the decision ruled by the Court.

As concerns the subject-matter of the appeal of such a person, we share the opinion that¹⁰ such an appeal does not envisage elements linked to the merits of the case. Such a conclusion arises from the person's position

⁹ I.Neagu, *op.cit.*, page 196.

¹⁰ I. Neagu, *op. cit.*, page 199.

towards the cases settled in the criminal lawsuit, namely : this holder of the appeal, given that it is not a party in the lawsuit, does not have any rights or obligations that arise from the settlement of the cases in the criminal lawsuit and, as a consequence thereof, the prejudice caused to him/her is not linked to the merits of the case.

3. The Appeal Entrance Term, the Term Reinstatement and the Appeal Exceeding the Term

a) The term of the appeal and the moment from which it is effective

The setting up of a lapse of time within which the people entitled thereto may lodge an appeal enables to avoid the situations where a lawless or ungrounded decision would be ruled enforceable, unless a legal remedy is foreseen by the law or there is a state of uncertainty or of doubt in the option with the possibility of contesting such decisions by appeal any time.

Unless otherwise foreseen by the law, pursuant to Art. 363 of the Criminal Procedure Code, the term of appeal is 10 days, this term being effective from the moment when the decision has been ruled or let know, as such case may be.

The Criminal Procedure Code foresees one situation in which the term of appeal is not 10 days. This term is stipulated by Art. 417, 1st par., and it is 3 days from the ruling. It envisages the offences to which the gross offences proceeding and judging special procedure has been applied.

For the prosecutor, the term is effective from the decision ruling, when he/she has taken part in the debates.

Where the prosecutor has not taken part in the debates, the term is effective from when the file dispatch letter has been recorded at the Prosecution Department. In this case, after the decision is drawn up, the Court shall immediately send the file to the prosecutor and this one shall return it after the expiry of the term of appeal.

As for the party who was present at the debates or at the ruling, the term is effective from the ruling.

As regards the parties who missed both the debates and the ruling, as well as the detained defendant or the military in service, the military with a reduced service, the called up recidivist, the student of an educational military facility, or the defendant retained in a a re-education center or in a medical-

educational institute, who have missed the ruling, **the term is effective from when the copy of the enacting terms has been let know.**

The witness, the expert, the interpreter and the counsel for the defence may exert the way of attack immediately after the ruling of the conclusion by which a decision has been made concerning the judicial expenses, however not later than 10 days from the ruling of the verdict that has settled the case. The appeal judgment is only made after the case settlement, save where the trial has been suspended.

b) The term reinstatement and the appeal exceeding the term

The appeal lodged after the expiry of the term provided by the law is deemed as being lodged within the term if the court of appeal finds out that the delay has been determined by a solid hindering cause and if the appeal petition has been submitted within maximum 10 days from the commencement of the punishment execution or of the civil redress.

Until **the settlement of the term reinstatement**, the court of appeal may suspend the execution of the contested decision.

The content of Art. 364 of the Criminal Procedure Code shows that the admission of the term reinstatement petition **asks for the cumulative existence of two conditions, namely :**

- 1) **The delay should be determined by a solid cause for hindering the appeal entrance ;**
- 2) **The appeal petition should be made within maximum 10 days from the commencement of the punishment or of the civil redress.**

Whereas in case of the term reinstatement the one that requests that was present both at the judgment and at the verdict ruling, **in case of the appeal exceeding the term, the party missed both the judgment and the verdict ruling.**

In this regard, the Art. 365 of the Criminal Procedure Code, bearing the marginal name of ‘appeal exceeding the term’, stipulates that the party who missed both all the judging terms and the verdict ruling one may also lay an appeal after the term, however not later than 10 days after the date, as the case may be, of commencement of the punishment execution or of the enforcement of the decisions concerning civil redress.

Any lodging of an appeal after the term does not suspend the

execution. This supposes that when the appeal term has expired, the execution court proceeds to the enforcement of the decision and the only one that may decide to suspend the execution of the contested decision is the court of appeal.

4. Lodging an appeal, waiving an appeal and withdrawing an appeal

a) Lodging an appeal

The procedural document by which the competent court is vested to settle the appeal case represents, in fact, the written request of the person displeased with the decision of the first court. The request must be signed by the person who lays that appeal.

In case of the people unable to sign, the request shall be certified by a clerk belonging to the court whose decision is attacked or by the counsel for the defence. The request may also be certified by the mayor or by the secretary of the local council or by the clerk appointed by the same, belonging to the place where they reside.

Any appeal requests not signed or not certified may be confirmed in the trial court either by the party or by the representative thereof.

The Art. 365, last par., entitles the prosecutor and the parties present at the decision pronouncement to lodge an oral appeal within the session where the decision has been ruled. The Court takes cognisance thereof and puts that down in a minutes.

The appeal petition is to be submitted to the court of law whose decision is contested.

Seeing that the defendant investigated while being imprisoned before trial is unable to go to the trial court whose decision is contested, the law has foreseen, at Art. 367 of the Criminal Procedure Code, that whoever finding themselves in such a situation may lay the appeal petition at the administration of the retention location, too.

Any document submitted by registered letter to the administration of the retention location or to the post office within the term stipulated by the law shall be deemed to be, pursuant to Art.187 of the Criminal Procedure Code, as submitted within the term.

The registering or the certification made by the administration of

the retention location on the submitted document, the receipt of the post office and the registering or the certification made by the military facility on the submitted document shall act as a proof of the document submission date. After being drawn up, these ones are to be immediately forwarded to the trial court whose decision is attacked.

b) Waiving an appeal

According to the provisions of Art. 368 of the Criminal Procedure Code, **after the decision is ruled and until the expiry of the appeal lodging term, the parties may expressly waive this approach.**

This waiver may be reverted to within the term set up for laying an appeal, save the appeal regarding the civil side of the case.

The content of the aforesaid enactment shows that within the time span comprised between the decision ruling and the expiry of the appeal lodging term, the parties may waive the appeal and then get back thereon, as the law does not condition the party insofar as the numbers of reverts is concerned. The only limitation imposed by the law envisages the civil side of the case when the law does not allow any reverting to the waiver.

The waiver or the revert to the waiver may be made either in person by the party or through the agency of a proxy.

c) Withdrawing an appeal

Any party may withdraw its lodged appeal until the foreclosure of the debates at the court of appeal.

The withdrawal has to be made in person by the party or through the agency of a special proxy, and if the party is detained, by means of a statement attested or put down in a minutes by the administration of the detention location. The appeal withdrawal statement can be made either at the courthouse whose decision has been attacked or at the court of appeal.

Unlike the waiver to the appeal, which may only be made by the parties, **the withdrawal of the appeal may be made both by the parties and by the prosecutor.**

With an aim to defend the under-aged defendants' rights, who by their will might prejudice their interests, the law has forbidden them to withdraw any appeals. In this respect, Art.369, 2nd par., stipulates that an

under-aged defendant may not withdraw his/her appeal lodged personally or by his/her legal representative. This decision is imperative in character and it may not be deputized by the mere presence in the trial court of the legal representative, alongside with the under-aged person that makes the appeal withdrawal statement.¹¹

The appeal lodged by the prosecutor and withdrawn may be taken by the party in whose favour it will have been lodged.

As far as the appeal laid by the prosecutor is concerned, it may be withdrawn by the hierarchically superior prosecutor.

5. The effects of the appeal

The appeal lodged within the term stipulated by the law, furthered by one of the persons foreseen at Art. 362 of the Criminal Procedure Code, subject to the limits provided by the status that they have within the trial, entails the following effects :

- the suspensory effect ;
- the devolutive effect ;
- the non-worsening of the situation in one's own appeal ;
- the extensive effect.

a) The suspensory effect

Art. 370 of the Criminal Procedure Code stipulates that the appeal lodged within the term is suspending the execution of the decision contested, both from the criminal and the civil points of view, save otherwise decided by the law.

Given, on the one hand, that the enforcement of a decision supposes that that decision is final and seeing, on the other hand, the assumption of innocence granted to the defendant all along the criminal lawsuit, an appeal lodged in the case is natural to suspend the enforcement.

Depending on the status that the parties have in the lawsuit and on the limits bestowed by the law, the appeal of the defendant, of the civil party and of the civically responsible party suspends the execution both of the criminal side and of the civil one, whereas the injured party's appeal

¹¹ The Tribunal of Bucharest, the 2nd Criminal Dept., Decision no.208/1990 from the Criminal Judicial Practice Compendium for 1990, *apud* Gh. Mateuț, *op. cit.*, page 251.

only suspends the execution from the criminal standpoint of the case. Consequently, if the prosecutor, the defendant, the civil party and of the civil responsible party have laid an appeal both from the criminal and the civil viewpoints, the execution of the decision in its entirety will be suspended.

The suspensory effect of the appeal does not operate in the following situations:

- in case of acquittal or of cessation of the criminal trial. In this situation, as per Art. 350 of the Criminal Procedure Code, the trial court has the obligation to decide the immediate release of the defendant in preventive custody.

- if the trial court rules an imprisonment punishment at least equal to the duration of the preventive retention and custody, it has the obligation to rule the immediate release of the defendant.

- where the Court rules the conviction of the defendant to the punishment of imprisonment under suspension on parole, suspension under supervision or under enforcement at one's workplace.

- in cases of deferral of the punishment execution, foreseen by Art. 453, letters a) and b), of the Criminal Procedure Code. In this case, the decisions by which the deferral of the punishment execution is ruled are enforceable from the date when the first court's decision is pronounced.

- in the situation envisaged by Art. 471 of the Criminal Procedure Code. In the event that the educational measure of reprimand has been taken towards the under-aged person, this measure shall be put into practice at once, during the session where the decision was ruled.

b) The devolutive effect

The term 'devolutive' derives from the Latin verb *devolvo-volvi-volutum-vere*, which means to transmit or to pass on something. Transposed in the field of law, the devolutive effect of the appeal supposes the passing of the case from one court to another, in order to continue the judgment.

However, the devolution only happens within certain limits. In this regard, **Art. 371 of the Criminal Procedure Code stipulates that the Court only judges the appeal as regards the person that has lodged it and the person envisaged by the appeal lodging and only from the viewpoint of the status that the appellant has in the trial.**

Within the aforementioned limits, the Court is obliged, besides the grounds pleaded and the requests entered by the appellant, to examine the case under all its de facto and de iure aspects.

The content of Art. 371 of the Criminal Procedure Code shows that the appeal lodged by the defendant only devolves the case as regards the *de facto* and the *de iure* aspects that concern him/her and which can aim at the way of settlement of the civil or criminal side or of the case in its entirety.

The appeal of the civil party and of the civil responsible party can devolve the case either in part or in whole, depending on the elements that are pleaded and that regard that respective part. For instance, the civil party can appeal the decision in its entirety when it considers, for example, that how the criminal side was settled reflected itself in the way of settlement of the civil side, seeing that in case of offences, such as the faulty physical injuries produced in a road accident, the damages are calculated *pro rata* the fault assigned to the vehicle driver. In some other situations, the civil party's appeal can only envisage the way of settlement of the civil side, more precisely the amount of the compensations granted by the Court, the civil party not being interested in the punishment inferred to the defendant.

The injured party's appeal only devolves the case as regards the solution ruled from the criminal point of view.

The prosecutor's appeal devolves the case in terms of the solution pronounced for the criminal side, and for the civil side only when the civil action has been exercised *ex officio* or when the appeal lodged by the prosecutor on the way of settlement of the civil side is joined to the one laid by the civil party.

The prosecutor's appeal regarding the civil aspect is unallowable in the absence of the appeal lodged by the civil party, save the cases where the criminal action is exercised *ex officio*.

The appeal laid by the witness, the expert, the interpreter, the counsel for the defence only devolves the case in connection to the solution pronounced by the same regarding the judicial expenses due and the appeal of the person whose legitimate interests have been harmed by a measure or a deed of the Court only devolves the case in terms of the solution given towards him/her and only as regards the harm caused to him/her.

One last note concerning the devolutive character of the appeal :

Pursuant to Art. 371, 2nd par., of the Criminal Procedure Code, within the abovementioned limits the Court has the obligation to examine the case under all its *de facto* and *de iure* aspects, besides the grounds pleaded and the requests entered by the appellant. This check supposes the Court's obligation to ascertain *ex officio* any harm sanctioned by absolute voidance or any aspect linked to the correct settlement of the case insofar as the appellant is concerned. For instance, in the appeal of the defendant dissatisfied with the amount of the punishment inferred to him/her, the court of appeal cannot only limit itself to this element when, for instance, it has found out, as a result of the checks made, that the legal defence is mandatory and that the defendant has not been provided this right whose infringement is sanctioned by absolute voidance.

c) The extensive effect of the appeal

According to the provisions of Art. 373 of the Criminal Procedure Code, the court of appeal examines the case by extension and regarding the parties that have not lodged an appeal or whom this one does not cover ; the Court may also decide in their respect, as well, without however causing a more difficult situation to these parties.

This effect represents a procedural remedy meant to eliminate any unfair situations that would be generated by the criminal verdict remaining final as a result of the failure to exercise the appeal, towards the parties that have not lodged an appeal, and by the modification of the ruling towards the people belonging to the same procedural group as a result of the appeal exercise.¹²

We share the opinion expressed in jurisprudence¹³ according to which the extensive effect of the appeal can only operate if the following conditions are met :

- if there is a valid appeal laid by the party that belongs to a procedural group ;
- if there are parties sharing mutual interests ;
- if there is procedural unity, meaning if the parties are judged at the same time and in the same file ;
- if there is a functional utility, that is to say the appeal lodged and

¹² A. Șt. Tulbure, *op. cit.*, page 377

¹³ *Ibidem*

the grounds pleaded, in case of admission, should be benefited from by the other parties from the procedural group, too.

When the appeal is lodged by the prosecutor to benefit one of the parties, it can be extended to the unmentioned parties that belong to the same group by means of trial solidarity.¹⁴

d) The non-worsening of the situation in one's own appeal

Technically speaking, a legal remedy benefits to the one that has promoted it, save the exceptions shown above.

In order to avoid the situations where the parties, fearing a judicial control that would reveal that the solution ruled by the trial court favours them, would have reserves in furthering an appeal, the law consecrated, in Art. 372 of the Procedure Code, an extremely important principle, namely the non-worsening of the situation in one's own legal remedy.

The **non reformatio in peius** rule basically supposes that a legal remedy can never turn against the one that has exercised it. For instance, in the defendant's appeal by which it requests the diminishment of the punishment, the Court cannot increase the punishment, not even if it is lawless, because this principle would be violated.

The Decision no.5217 dated September 15th, 2005 of the High Court of Cassation and Justice gave a ruling according to which in the absence of an appeal lodged in the detriment of the defendant by the prosecutor or by the other parties that may lay an appeal for the criminal side, during the judgment of the appeal lodged only by the defendant, the Court cannot rule his/her preventive custody, for it would break the provisions of Art. 372, 1st par., of the Criminal Procedure Code, thus causing him/her an even more difficult situation in the appeal. The same solution is also called for when the case is judged in the second appeal, in accordance with the stipulations of Art. 395⁸ of the same code.¹⁵

What is more, the court of appeal may not worsen a party's situation within the appeal lodged by the prosecutor in its favour.

The things are however different when the party is not the only holder of the appeal. For instance, on the occasion of settling the appeal laid

¹⁴ Ibidem

¹⁵ Ioana Cristina Morar, *Preventive Custody & Temporary Custody, A Compendium of Judicial Practice*, C.H.Beck Publishing Pouse, Bucharest, page 139.

by the defendant for reducing the punishment and by the prosecutor for increasing the punishment, the Court will be able to increase the punishment, because the principle described above only operates when the party is the only one that has lodged an appeal. *Idem*, in case of the civil party's appeal, the claims set up by the trial court in favour of the same cannot be diminished, but when the defendant has laid an appeal in this regard, too, a diminishment of the claims is possible.

Departing from the fact that, in countless situations, when only the defendant has lodged an appeal, the courts could not possibly eliminate certain inequalities existing in the decision of the trial court, for not breaking the principle of non-worsening the situation in a party's own legal remedy ; this rule was therefore legitimately¹⁶ considered to be a waiver of the principles of lawfulness and truth finding.

We deem the conciliation of the three principles only possible by the introduction of certain provisions in the Criminal Procedure Code, which stipulate that the Court may not worsen the party's situation in its own way of attack for ungroundness reasons. This limitation of *the non reformatio in peius* principle would allow the judicial control courts to eliminate serious lawlessnesses, such as : the application of lawless punishments, that is to say within limits other than the ones foreseen by the law ; the trial court's not retaining the recidivism condition ; the application of suspension or of the suspension under supervision without meeting the conditions stipulated by the law etc.

6. The Appeal Judgment

The norms relative to judging in the first instance are greatly applicable in case of judging the appeal, as well. The peculiarities of the settlement of a case in the appeal are regulated by Art. 375-378 of the Criminal Procedure Code.

Thus, **the following measures are taken for preparing the judgment session:**

- **setting up the judgment term** : In this respect, the Art. 375 of the Criminal Procedure Code stipulates that the president of the trial court, upon receiving the file, sets up a term for judging the appeal.

¹⁶ I. Neagu, *op. cit.*, page 214.

The trial court's president's establishing the judgment term does not represent, in fact, a peculiarity of settling the appeal, but an omission of the legislation¹⁷. As a matter of fact, the setting up of the judge panel and the establishment of the judgment term are also made in an aleatory way, just like the first court.

- **the parties' summoning** : The rules regarding the parties' summoning are the same as those applicable for summoning the parties in the first court and the judgment of the appeal can only take place in the defendant's presence, when the same is detained.

Not once in practice did the Courts wonder what the parties' summoning meant, given that from amongst the people who had the status of parties in the trial that took place before the first court, only part of them lodged an appeal, even though they requested the continuation of the judgment, whereas some others were either not interested in or pleased with the decision of the first court.

This problem, apparently insignificant, gives birth, in fact, to numerous consequences. Suffice is to think at the expenses made for summoning the parties or due to the time wasted by the latter ones in participating at a trial that does not affect them in any way, but which can cause them certain damages. In a lawsuit where the defendant's appeal is settled and by which the reduction of the punishment is requested, the summoning of the civil parties, followed by their showing up before the Court, supposes lots of expenses, inferred first of all to the State and secondly to the civil parties that have to bear their own transportation expenses. Should the defendant's appeal be allowed, these expenses remain at charge of whoever has borne them, seeing that in this situation the defendant cannot be forced to pay the same.

We share the opinion according to which¹⁸ it is about summoning the parties upon whom the appeal is likely to have an effect. For example, in the appeal of a defendant that was not compelled to pay compensations,

¹⁷ The Law 356/2006 altered Art. 313 of the Criminal Procedure Code, which, in its form prior to the modification, stipulated that the setting up of the judge panel and the establishment of the judgment term are made by the Court's president. Due to an omission of the law, Art. 375 has remained unchanged, even though at present the Courts set up both the panel and the judgment term only aleatorily.

¹⁸ Gh. Mateuț, *op. cit.*, page 255.

neither the civil parties that had not attacked the decision nor the civil responsible party will be summoned.

Subject to the procedural position had within the appeal, the appeal lodging party is named appellant and the party aimed at by the appeal is referred to as appellee.

- providing the defence

In the cases where the appointment of an *ex officio* counsel for the defence is mandatory, the judge of that case takes measures for appointing the same, alongside with the establishment of the judgment term. In addition, the necessary measures are taken for the parties to have the opportunity to study the file, so that at the judgment term the case should not be deferred on that ground.

- the prosecutor's presence

In pursuance of the provisions of Art. 376 of the Criminal Procedure Code, the prosecutor's participation at the appeal judgment is mandatory in all situations, **unlike the first instance judgment, where the prosecutor's presence is only mandatory in the situations foreseen by Art. 315 of the Criminal Procedure Code.**

- the order in which the floor is granted

At the judgment term set up, after opening the session, the Court checks up whether the appeal is under judgment. This supposes the examination of the following aspects :

- whether the parties have been legally summoned ;
- whether the detained defendant is present ;
- whether the defendant's legal assistance, when the same is compulsory, is provided by the presence in the trial court of the defendant's selected counsel for the defence or by the presence of the one appointed *ex officio*.

Depending on the facts that it will ascertain, the Court will proceed either at the case deferral or at the judgment continuation.

If the judgment continuation is proceeded at, the immediately following activity will consist in checking whether the appeal has been laid properly. This check supposes :

- to determine whether the decision attacked by the parties is subjected to the appeal ;
- to determine whether the appeal has been lodged by a person

having got the status required by the law for laying an appeal ;

- to determine whether the appeal has been lodged in due time. The judgment will only go on after the Court decides the term reinstatement or after it allows that the conditions for the term reinstatement are met.

If at the term set up the appeal is under judgment, the judging panel's president grants the floor to the appellant, then to the appellee and finally to the prosecutor. If the prosecutor's appeal is amongst the appeals laid, the first floor will be the prosecutor's.

In the event that the prosecutor or the parties plead the necessity of coming up with new items of evidence, he/she will also have to indicate the evidence and the means of proof with the help of which they can be obtained.

Both the prosecutor and the parties are entitled to reply to the new issues appeared on the occasion of the debates.

The defendant will be the final one to have the floor.

- the appeal judgment

The Court checks up the contested decision, according to the works and to the paperwork within the case file, as well as on the basis of any new pieces of evidence brought in before the court of appeal.

We share the opinion according to which¹⁹ in the appeal, unlike the judgment in the first court, the judicial examination may not exist, for the court of appeal usually verifies the contested decision on the basis of the works and of the paperwork within the case file and of any new documents. In this case, the judgment is reduced to debates and the order in which the floor is granted is the aforesaid one.

If the prosecutor or the parties plead the need of coming up with new items of evidence, the judgment can be accompanied by a judicial examination.²⁰ These pieces of evidence can be requested by the parties, but they can be administered *ex officio* as well as by the trial court. In order to solve the appeal, the Court can reassess the items of evidence displayed before the first court.

Upon judging the appeal, the Court is obliged to proceed at hearing the defendant present in the court, as per the stipulations of the

¹⁹ Șt. A. Tulbure, *op. cit.*, page 379.

²⁰ *Ibidem*, p. 380.

Special Part, Title II, Chapter II, when he/she has not been heard out at the trial court and when the trial court has not ruled a conviction verdict against the defendant.

7. The solutions in the appeal judgment

In accordance with the provisions of Art. 379 of the Criminal Procedure Code, the Court, judging the appeal, rules one of the following solutions :

1) it rejects the appeal, while specifying the decision contested :

a) if the appeal is tardy or unallowable

The appeal is rejected as tardy when lodged after the expiry of the term foreseen by Art. 363 of the Criminal Procedure Code and the Court ascertains that the party complies neither with the conditions provided by Art. 364 in order for it to be term reinstated, nor the ones stipulated by Art. 365 of the Criminal Procedure Code relative to the appeal exceeding the term. The appeal laid tardily does not vest the court of appeal, for it is deemed to be inexistent.²¹

The appeal is rejected as unallowable when lodged, against a decision for which the law does not stipulate any legal remedy, by a person not having the status of exercising such a contestation or when it is used against a final decision that has been checked before in the same legal remedy.

We consider being in none of the aforementioned situations when, for instance, the party wrongly entitles its request as being an appeal and not a second appeal, the Court being therefore compelled to qualify the way of attack and to settle it.

b) if the appeal is ungrounded

The appeal is rejected as ungrounded when the court of appeal ascertains that the decision of the first court is legal and solid in all regards.

2) it allows the appeal and :

- a) it annuls the decision of the first court, ruling a new verdict, and it proceeds according to Art. 345 *et seq.* concerning the judgment in the merits ;

²¹ *Ibidem*, page 381.

- b) it annuls the decision of the first court and decides the rejudgment by the Court whose decision has been annulled, for the following reasons :
 - the judgment of the case at that court of law took place in the absence of an illegally summoned party or which, legally summoned, was unable to notify the Court about this impossibility ;
 - there is any of the nullity cases stipulated in Art.197, 2nd par., except the non-competence case, when rejudgment is decided by the competent court.
- c) if the decision is annulled on account of having noticed the existence of any of the cases foreseen by Art. 331, 2nd par., the giving back of the case to the prosecutor is ruled, for he/she takes measures for reinitiating the criminal proceedings.

In case that the appeal is allowed, the decision attacked is annulled in whole or in part, but within the limits stipulated by Art. 371 and 373 (the devolutive and extensive character of the appeal).

The decision can only be annulled relatively to certain facts or persons or from the criminal or civil standpoint, if this does not hinder the fair settlement of the case.

Where the first court has decided the defendant's apprehension, the court of appeal may maintain the arresting measure in case of decision annulment.

3) Complementary issues

In conformity with the provisions of art. 381 of the Criminal Procedure Code, when deliberations are made on the appeal, the Court may, when such case may be, apply the stipulations related to resuming the debates and those linked to repairing the damage, to the impounding measures, to the judiciary expenses, to the any other issues on which the fair solving of the appeal depends. Additionally, the court of appeal verifies whether the first court has fairly applied the provisions regarding the reduction of the retention and of the arrest and it adds, if necessary, the arresting time elapsed after the pronouncement of the decision attacked by appeal.

The Court deliberates and decides on any other issue on which the complete settlement of the case depends.

In case-law it has been decided that the court's omission to deduct the duration of the retention, apart from that of the preventive custody, does not entail the admission of the appeal in this regard, because the court of appeal has got, by virtue of Art. 381 of the Criminal Procedure Code, the obligation to check whether an adequate deduction has been made and to directly proceed, without annulling the decision attacked, at the elimination of that omission.²²

In exchange, the omission of the trial court to subtract from the resulting punishment the duration of the prevention executed by the defendant from the punishment applied by a previous decision, as an effect of the recidivism condition foreseen by Art. 37, letter a, of the Criminal Code, and of the application of art. 83 of the Criminal Code to revoke the suspension on parole, calls for the modification of the first court's decision, provided the appeal is allowed.

In such case, the court of appeal is not in the situation encompassed by Art. 381 of the Criminal Procedure Code, because the stipulations of this article are incidental in the event of the defendant's retention and preventive custody within the case submitted to judgement.²³

8. The content of the decision

According to the stipulations of Art. 311 of the Criminal Procedure Code, the decision by which the Court rules a verdict in an appeal is called Decision. Just like the order of a court, it has three parts, namely the introductory part, the exposure and the enacting terms.

The court of appeal's Decision should include, in its introductory part, the specifications foreseen by Art. 355, and in the exposure, the *de facto* and the *de iure* grounds that have led, as the case may be, to the rejection or to the allowance of the appeal, as well as the grounds that have entailed the adoption of any of the solutions stipulated by Art. 379, section 2. The enacting terms have to comprise the solution provided by the court of appeal, the date when the decision was ruled and the specification that its pronouncement was made in public session.

The provisions of Art. 350 of the Procedure Code are adequately applied, which supposes the Court's obligation to rule, by its decision, the

²² Bucharest Court of Appeal, The 1st Criminal Department, Decision no. 30/1998, in V. Papadopol, *A Compendium of Criminal Judiciary Practice for 1993*, Șansa Publishing House, Bucharest, 1994, page 25, *apud* I. C. Morar, *op. cit.*, page 147.

²³ I. C. Morar, *op. cit.*, page 147.

taking, the maintenance or the revocation of the measure to preventively arrest the defendant and the taking or the revocation of the measure to compel him/her not to leave the town or the country, while motivating the solution ruled. In addition, the Court will rule the immediate release of the preventively arrested defendant when, as a result of the appeal allowance, it has ruled the defendant's acquittal or the cessation of the criminal lawsuit or when it has ruled a punishment equal to the duration of the retention and of the preventive arrest. The defendant will also be released at once when the Court has ruled the punishment of a fine – which is an educational measure – or the suspension on parole of the punishment execution, the suspension under supervision or the punishment execution at one's workplace.

When the rejudgment has been ruled, the decision has to indicate what is the last procedural document remained valid, from which the criminal suit is to be resumed.

9. The rejudgment procedure and the rejudgment limits

The judgment in the merits of the case by the court of appeal or the rejudgment of the case after the annulment of the contested attacked is carried out according to the stipulations of the Special Part, Title II, Chapters I and II, which are applied appropriately.

The rejudgment court has to comply with the decision of the court of appeal, to the extent in which the de facto situation remains the one envisaged at the appeal settlement.

Where the decision was annulled within the prosecutor's appeal lodged in favour of the defendant or within the injured party's appeal, the Court that rejudges can rule an even more severe punishment than the one specified in Art. 372, the 2nd par., and Art. 373.

Where the decision is annulled only as regards certain facts or persons or only from the criminal or civil viewpoint, the rejudgment court will rule within the limits in which that decision will have been rescinded.