



Research Article

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Repetition of judicial review before the court of appeal - Problems encountered in Albanian judicial practice

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Abstract

Article 13 of the ECHR provides that: *“Every person whose rights and freedoms recognized by this Convention have been violated, has the right to lodge an effective appeal before a national institution even when this violation has been committed by persons acting within the exercise of their official functions”*. The right to effective appeal is a fundamental human right and implies the right of the individual to appeal, the existence of a certain body for reviewing the appeal, unconditional acceptance of the appeal for review, reasonable deadlines for its review, an objective review, judicial control, as a final check on the appeal.

The Court of Appeal judges as a court the fact and the law and as such it has the its own right but also at the request of the party to partially or fully repeat the judicial review.

Article 427, paragraph 4 of the Criminal Procedure Code has been amended recently by the Law 35/2017, whereby it is provided that: *“When the defendant is found not guilty, the court of appeal cannot find him guilty solely on the basis of a different assessment of the evidence obtained in the first instance trial”*.

Based on the grammatical and logical interpretation of this provision, it results that the criminal court of the reviewing jurisdiction cannot declare the defendant innocent by the criminal court of the original jurisdiction, on the basis of the same facts and evidence, but by assessing them differently, guaranteeing this way a provision the respect of the principle of non-compliance with the position of the defendant.

But what is put forward for discussion by the practice of the Courts is the fact that the Courts of Appeal have in some cases found the defendant guilty, on the same facts and evidence, on the basis of which he was declared innocent by the court of first instance, after the contrary assessment of the facts and evidence was made by the court of first instance, misinterpreting Article 427/4 of the Criminal Procedure Code.

Keywords: appeal, judicial review, evidence, repetition, reconsideration of the investigation.

1. Introduction

The Court of Appeal being a court of fact and the law reviews the appeals filed by the Court of First Instance on the basis of the appeals made by the parties.

According to the procedural provisions, the role of the court of appeal is that of controller in relation to the decision-making of the courts of first instance and this control relates both to the fair application of procedural norms regarding the respect of procedural guarantees, to the judicial investigation, to the manner of administration and evaluation of evidence, as well as to the fair application of the substantive law, regarding the final resolution of the criminal proceeding, the guilt of the defendant and the legal qualification of the criminal offense, or his innocence, always based on the analysis of evidence obtained and administered at trial (Gera, 2024).

According to Article 427 of the Criminal Procedure Code,¹ it is provided that when a party requests the retrieval of evidence collected in the first instance, judicial review or the receipt of new evidence, the court, if it deems that such a thing is necessary, decides the repetition of the judicial review in whole or in part (Miha, 2024). For evidence that is discovered after the trial of the first degree or those that appear immediately, the court decides, as the case may be, whether or not to take them. Repetition of judicial review is also decided mainly when the court deems it necessary. The court decides to repeat the judicial review when it is established that the defendant did not participate in the first instance, because he was not informed or could not appear for legal reasons. For the repetition of the judicial review, decided on the basis of the above paragraphs, it is proceeded immediately and when this is not possible, the judicial review is postponed for a period no longer than ten days.

So, if we interpret the above-mentioned provision, the lawmaker has given the right to the litigants to request during the trial on appeal the resumption of the evidence collected in the first instance or the receipt of new evidence. Also, the right to resume the judicial investigation was also exercised by the Court of Appeal, when it concluded that it could not judge on the state of the acts.

Also, the fourth paragraph of the provision has provided for the repetition of the judicial review when it is established that the defendant did not participate in the first instance because he had no knowledge or did not appear for legal reasons.

When the trial at the Court of Appeal is verified through the defendant or his defense counsel that his absence at the first instance trial was due to lack of knowledge or when he proves that the cause of the failure to appear at the trial was lawful, the Court of Appeal must repeat the judicial review.

Therefore, the lawmaker has closely linked the repetition of the judicial review to the case of trial in absentia or failure to appear without justified reasons, where the defendant is not aware that a trial is being held against him, and therefore does not appear in the process. Being unaware of this trial in the first instance, he was not able to present the evidence and was subjected to judicial debate. The criminal

¹ Law No. 7905, dated 21.3.1995 as amended by 6.3.2009 and no. 31, dated 17.5.2012 "Criminal Procedure Code".

proceedings, which are also directed against the defendant, have as their purpose, the guarantee of the defendant's rights. Because he lost this right in the first instance, he was guaranteed through this institute in the trial on appeal. One of the basic rights of the defendant is his right to participate effectively in this proceeding. This right essentially guarantees the principle of equality of the parties, adversarial proceedings as part of the right to a fair legal process (Peppo, 2023).

Referring to the practice followed by the Albanian High Court on the notification of the defendant in violation of Article 141 of the Criminal Procedure Code for the judge who was not served with the notice and did not make a declaration of absence, the judge made a request during the trial to the Court of Appeal to repeat the judicial review by justifying the reasons for the non-notification. The Court of Appeal has not accepted his request, which has violated Article 6 of the ECHR, of the right to a fair trial and this decision is inviolable as it turned out that the defendant was not informed of legal reasons and could not participate in the trial that was held against him in the Court of First Instance. The High Court has concluded that the Court of Appeal has violated the right to a fair trial and is obliged to repeat the judicial review in order to enable the trial judge in absentia to bring new arguments and evidence that he could not present in the first instance trial.

So, before the amendments to the Law, the Court of Appeal had no restriction that were based on the same evidence obtained by the Court of First Instance to plead guilty to the defendant. In this sense it could make different assessments of the evidence on which she could plead guilty to the defendant.

2. Repetition of judicial review after amendments to Law 35/2017

With the entry into force of Law 35 dated 30.03.2017, paragraphs 1 and 4 of the provision were amended, sanctioning that "When a party to the appeal act requests the retrieval of evidence allowed in the judicial review of the first instance or the receipt of new evidence, the court, if it deems that it cannot decide on the state of the acts, repeats the judicial review."²

For evidence that is discovered after the trial of the first degree or those that appear immediately, the court decides, as the case may be, whether or not to take them. Repetition of judicial review is also decided mainly when the court deems it necessary. When the defendant has pleaded not guilty, the appellate court cannot find him guilty, solely, on the basis of a different assessment of the evidence obtained in the first instance trial. In this case, the appeals court repeats the judicial review. Thus, through this amendment of the law, the Court of Appeal is limited to the right to various evaluation of evidence, and on the basis of which it cannot declare the defendant guilty. Only if she receives new evidence then on the basis of this new evidence if she establishes conviction on the guilt of the defendant can she plead guilty, but not on the evidence obtained by the Court of First Instance.

Referring to the first paragraph of the provision, it is determined that the request is made by the party who made the appeal act, and this request is defined in the appeal

² Article 427 of the Criminal Procedure Code as amended by Law 35/2017.

act, unlike the provision before the changes that this request was made at any time during the trial on appeal.

Exceptionally, the lawmaker in the third paragraph of Article 427 of the Criminal Procedure Code has allowed the possibility of repeating the judicial review, even mainly by the Court of Appeal, without the request of the parties. Paragraph 3 of Article 427 of the Criminal Procedure Code, which provides for the exclusion from the general rule of repetition of judicial review in the Court of Appeal, at the request of the parties, may not be interpreted separately from the first paragraph of this provision which provides for the general rule.

In the interpretation of the first paragraph, the repetition of the judicial review may take place only when the evidence permitted in the first instance judicial review or the receipt of new evidence is carried out, and also the guilty plea must be proved on the basis of new evidence and not on the assessment otherwise of the evidence obtained by the Court of First Instance.

2.1 Finding guilty on the basis of new evidence or reclaiming permitted evidence

In the repetition of the judicial investigation, either the same evidence is retrieved which has been allowed to be examined in the first instance trial, or false evidence is obtained when requested by the parties or mainly by the court itself.

For evidence to be assessed as new evidence it must first of all be of essential importance for the resolution of the case, which means that from its assessment together with other evidence it will show that the court's decision has been wrong and it is also very important that this evidence has been rediscovered, which means that the court at the time of giving the decision was not aware of the existence of this evidence.

In order to conclude what we will call new evidence in the process, it must be judicially proven that they were not previously known by the parties, so it is not enough just to affirm them by the interested parties as such before the court. Even the court in its interpretation holds that for the evidence to be considered new evidence, the evidence presented by the applicant must essentially question the veracity of the fact. They must be subject to judicial review, in order for this conclusion of fact to be verified by undergoing a new judicial investigation. Once the new evidence is subject to judicial review, the court will assess it together with the evidence, which has previously been subject to evaluation.³

For the Court of Appeal to change the decision of the Court of First Instance and to declare the defendant guilty on the basis of new evidence, or the retrieval of evidence allowed by the court, these evidence must not only contain notifications on the facts and circumstances related to the criminal offense for which the person must be declared guilty and convicted, but also have been obtained from one of the sources provided for in the criminal procedural law, in accordance with the rules set by him and which serves to prove his commission of the criminal offense.

³ See Decision No. 30 dated 09.02.2011 of the Criminal Chamber of the High Court.

Based on the unifying decision no. 6/2002 of the Supreme Court regarding the meaning of the terms 'new evidence, emerging or discovered after the decision' the College notes that these key points must be clarified: firstly, whether the evidence sought is evidence in the sense of criminal procedural law; secondly, whether such evidence emerged or was discovered after the judgment was rendered; thirdly, whether such new evidence, alone or in conjunction with what was once assessed, shows that the judgment rendered is wrong.⁴

Also, since referring to paragraph 3 of Article 427 itself the court can mainly order the repetition of the judicial review in this context, the right to obtain new evidence may be exercised by the judge in any case he deems necessary to establish his internal conviction when the evidence provided by the parties has been insufficient to create such a thing. Only if after receiving this new evidence taken to trial in the Court of Appeal, or regaining the same permissible evidence, the court creates an internal conviction that the defendant has committed the criminal offense can he plead guilty, but he cannot plead guilty only on the same evidence taken to trial in the court of first instance, making a different assessment of them.

3. Repetition of judicial review in cases where the shortened trial has been applied

At the moment when the court decides to repeat the judicial review, it has the duty to check the quality of the criminal proceeding acts and concludes that the court of first instance has rightly proceeded with a shortened trial, the analysis of the evidence and the criminal fact should be related to the analysis that the court of first instance has made to the evidence and facts in view of the indictment filed, the criminal liability and the criminal fact.

The obligation set forth in Article 427, paragraph 4, as amended by the Law nr.35/2017 dated 30.3.2017, to repeat the judicial review, even when the proceeding with a shortened trial was fair, does not imply the violation of the purpose of this particular trial rite, but the fulfillment of the obligation for a fair trial that in case of aggravation of the position of the person goes towards the normal rite consisting in obtaining and hearing directly the evidence from the court of appeal. Based on the above unification, the idea is that the court of appeal will be in front of two alternatives, either to consider the shortened trial as lawful and consequently to be unable to proceed with the repetition of the judicial review, or to overturn the decision of that court for the shortened trial, to pave the way for the possibility to repeat the judicial review. Consequently, in the violation of the guarantee obtained by the defendant to benefit from the reduction of the sentence, although his request was based and the development of the shortened trial was rightly appreciated.⁵

As well as the Constitutional Court in its decision no. 6, dated 15.01.2021 has also pointed out on such a request for cost control of this norm that: *"from the way Article 427 of the CPC is formulated, the appellate court is not obliged to repeat the judicial review in each case. This is a matter at its discretion and it is not obliged to change the decision of the*

⁴Unifying Decision nr.6/2002 of the United Chambers of the Supreme Court.

⁵Unifying Decision No.191 dated 30.06.2023.

*court of first instance or the guilty plea of the defendant even if it decides to accept the request to repeat the judicial review, since the court of appeal, at the end of the trial, has the obligation to apply one of the cases of Article 428 of the CPC regarding the type of decision-making. As for the allegations related to the shortened trial, the meeting of judges has assessed that the referring court has failed to argue that the defendant's rights guaranteed in the criminal process, including the principle of non-compliance with his position, as well as the guarantees provided by the shortened trial, are denied or violated by the application of the challenged provision"*⁶

4. The principle of reformation in peius "The principle of not deteriorating the position of the defendant "

The provision itself provides that when the defendant has pleaded not guilty, the appellate court cannot find him guilty, solely on the basis of a different assessment of the evidence obtained in the first instance trial.

Evidence pricing is a complex mental operation process for the realization of which, in addition to the knowledge of the legality of logical thinking, it is also necessary to know the judicial psychology, which deals with the study of legalities about the formation and manifestation of the awareness of procedural participants. Internal belief is the result and product of the legal, intellectual and technical-scientific activity of the judge and prosecutor obtained from the thorough analysis of the circumstances and facts presented during the judicial review (Sahiti, Murati and Elshani, 2014).

While the process of free evaluation of evidence is presented as a result of the evaluation of the free conviction of the court, a conviction which it was created on the occasion of the implementation of the process of obtaining evidence, inner persuasion can be both objective and subjective. The objective side lies in the fact, that it is created on the basis of data that are collected according to the sources provided by law and that constitute facts and circumstances that have occurred objectively. As for the subjective side, it lies in the fact, that it is the personal conviction of the person who deals with the proceeding and is created on the basis of evidence. Internal obedience must adhere to certain principles, the observance of which leads the court to a correct resolution of the case and ultimately to the guilt or no guilt of the defendant.

When the Court of Appeal deems that the verdict of innocence is not correct, it may repeat the judicial review by obtaining evidence, debating them, giving the defendant the opportunity to discuss them, obtaining new evidence and in particular those with witnesses. If the defendant does not present new evidence and the repeated judicial review closes with the same evidence for which he has requested and is the procedure with a shortened trial, the defendant has the right to receive a reduction of 1/3 of the sentence in case of a guilty verdict by the Court of Appeal.⁷

According to the jurisprudence of the ECHR, in the case *Scoppola v. Italy*⁸ Appeal No. 10249/03, the decision of the Grand Chamber of 17 September 2009 provision for the shortened trial is a substantive provision applying the principle that the favourable

⁶ Decision No. 6 dated 15.01.2021 of the Constitutional Court.

⁷ Decision No. 119 of the Albanian Supreme Court dated 30.06.2023.

⁸ The decision of the ECJ in the case of *Scoppola against Italy*.

criminal law has retroactive effect. In analogical interpretation, the right to benefit from the shortened trial in cases of review on appeal and aggravation of the position of the defendant is in the conditions of repetition of the judicial review should be recognized, but the repetition of the judicial review should be made complete, with the taking of evidence directly, with debate and not formally by not guaranteeing the defendant the right to hear and oppose the accusation, which in this case implies another legal qualification that aggravates his position.

So, such a situation, "*reformatio in pejus*" by the higher court, is necessarily related to the existence of two circumstances: first, with the prosecutor's request for a wrong assessment of the evidence and second, this wrong assessment would refer not to any kind of evidence (such as material evidence or documents), but to declaratory evidence (testimony, statements of the defendant, confrontations) and not to all such evidence with this nature but to those considered crucial or essential. According to ECHR jurisprudence, assessing or assessing the reliability of a witness is a complex task that generally cannot be accomplished through a simple reading of written words.

The ECHR, in its judgment of 10 February 1995⁹, *Allent de Ribemont v. France*, *inter alia* reasoned: *The presumption of innocence provided for in paragraph 2 of Article 6 is one of the elements of a fair criminal process as required by paragraph 1 (see in particular the DeWeer v. Belgium decision of 2 February 1980). This principle is violated if a court decision concerning a person accused of committing a criminal offence reflects a prior opinion that he is guilty when his guilt has not yet been proved by law. Even if there is not yet a formal finding, there is a violation and when during the reasoning it turns out that the judge considers the defendant guilty.*

In the case "*Dan v. Republic of Macedonia*",¹⁰ the ECtHR found a violation of Article 6 of the ECHR, since the sentence received as a result of the trial on appeal was imposed without recovering the declarative evidence declared essential. The purely cardinal assessment of this evidence was called by this court as absolutely invalid to guarantee a fair legal process, considering the complexity and subtlety of the judgment on the merits of this evidence, made possible by the guarantee of orality, that characterizes the criminal prosecution process. Such a position was also taken by the Italian jurisprudence, according to which, the finding of violation of Article 6 of the ECHR in the case of "*reformatio in peius*" of the acquittal decision by the highest court, should have referred to the fact whether the assertion of the defendant's criminal responsibility was carried out or not exclusively on the basis of a different assessment on the reliability of the witness statements, without first proceeding with the interrogation of the latter. According to this jurisprudence, it is not necessary to repeat the judicial review in cases where there is no discussion on the content of the evidence, its evidentiary power, including declarative ones, but there are claims about the manner of synthesis of the analysis of evidence, or the application of substantive law.

⁹ Decision of the Court of Justice of 10 February 1995 in the case *Allent de Ribemont v France*

¹⁰ ECJ decision on the case and against Macedonia.

5. Conclusion

The institute of repetition of judicial review before the amendments to Law 35/2017 was applied in cases where a party requested the retrieval of evidence collected in the first instance judicial review or the receipt of new evidence, and only if the court deemed it necessary to decide to repeat the judicial review in whole or in part. The Court also decided to repeat the judicial review when it is established that the defendant did not participate in the first instance, because he did not receive information or could not appear for legal reasons.

Therefore, the lawmaker had closely linked the repetition of the judicial review to the case of the trial in absentia or the failure to appear without justified reasons, where the defendant is not aware that a trial is being held against him, and therefore does not appear in the process. Being unaware of this trial in the first instance, he was not able to present the evidence and was subjected to judicial debate.

While after the amendments to the Law, the lawmaker has determined that this request should be made together with the appeal act and this request is defined in the appeal act, unlike the provision before the changes that this request was made at any time during the trial on appeal.

Unlike the unchanged provision which related to the making of the request in cases where the defendant was tried in absentia, the new provision does not have this provision. But it has determined that this request must be made in conjunction with the act of appeal if the party has requests to recover the permitted evidence or to obtain new evidence.

Also, in both the provisions before and after the amendments, discretion is left to the court itself, which if it considers that it cannot judge on the situation that the acts are, has the right to make a full or partial repetition of the judicial review.

The important change that this provision has undergone is that: When the defendant has pleaded not guilty, the appellate court cannot find him guilty solely on the basis of different evaluation of the evidence obtained in the first instance trial. In this case, the appeals court repeats the judicial review. So, the Court of Appeal is limited to the right to different evaluation of the evidence, and on the basis of which it cannot plead guilty to the defendant. Only if she receives new evidence then on the basis of this new evidence if she establishes a conviction on the guilt of the defendant can she plead guilty, but not on the evidence obtained by the Court of First Instance by making them a different assessment.

In practice, we have encountered problems with the implementation of this provision because despite this provision, the Courts of Appeal have again found the defendant guilty on the same evidence obtained by the court of first instance by making a different assessment to them.

There is also room for discussion of the procedural moment when this request can be made, as the provision stipulates that this request must be defined in the act of appeal. We consider that this request should be made at any time at trial in the court of appeal as new evidence may emerge during this trial and the party cannot be denied the right to request a repeat of the judicial review only because he did not do

it with the act of appeal.

Also, what is being discussed is the fact that if the trial in the first instance is conducted with the rules of the shortened trial, the prosecutor, when requesting a repeat of the judicial review in the appeal act, must definitely make an appeal together with the final appeal against the court decision to accept the defendant's request for the shortened trial.

I think that the Albanian Supreme Court should issue a unifying decision through which to make a clear and accurate interpretation of Article 427/4, also Article 427 /1 by giving the right parties to request the repetition of judicial review at any stage in the trial on appeal and not only in the appeal act, because if they have not done so in the appeal act this right falls into decadence.

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