



Research Article

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Exclusion from criminal liability of possession of narcotics in small doses -Issues of judicial practice

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Abstract

Albania's law excludes from criminal liability persons in cases of possession for personal use of small doses of narcotic and psychotropic substances. This matter has also been addressed by the Albanian Supreme Court in its unifying criminal decisions. Being aware of this exclusion, persons who possess narcotics and psychotropic substances pay attention to keeping with them only such small doses. This way they try to escape the criminal prosecution, since in most cases they are users of narcotics and psychotropic substances themselves. In this regard, there have often been difficulties and misinterpretations to hold these persons liable for this criminal offense. In this paper, these situations are analyzed from the legal and judicial practice point of view, reaching the relevant conclusions.

Keywords: narcotics substances, criminal liability, small dose, expert.

1. Introduction

Article 283 of the Criminal Code provides the criminal offense "Production and sale of narcotics". In the first paragraph of this provision is provided the criminal liability of persons who sell, offer for sale, give or receive in any form, distribute, trade, transport, send, deliver and keep narcotic and psychotropic substances, as well as seeds of narcotic plants, in violation of the law or in excess of their content, except in cases of personal use in small doses. In other words, those persons who possess narcotic and psychotropic substances or seeds of narcotic plants in small quantities for personal use are excluded from criminal liability.

The unifying criminal decision no. 1, dated 27.03.2008 of the Supreme Court has unified the judicial practice by determining that the user of narcotics, who does not keep

it for personal use, even if it is in small doses, when he is its distributor in one of the forms provided for in article 283, first paragraph, of the Criminal Code, has criminal liability according to this provision. This decision also instructs that the determination of the small dose of narcotic and psychotropic substance, in order to implement the article 283 of the Criminal Code, shall be done with the help of this field specialists (toxicologists, etc.) called experts and case by case, that is not only according to the type of the narcotic and psychotropic substance, but also to the physical-biological qualities and the degree of drug addiction of the specific person possessing the narcotic and psychotropic substance.

As for the above, at no time should the dose of narcotic substance kept, be considered as a small dose for personal use without any basis and *a priori*. All the evidence collected during the criminal investigation must be evaluated by the proceeding authority, including the fact whether the person under investigation or the defendant turned out to be a user of this narcotic substance. In this sense, in the practice of Albania's proceeding authorities there have been difficulties due to various forms of camouflage of the distribution activity and trading of narcotics, through the division and possession in very small doses. These cases require a careful handling of all the collected evidence and especially a critical assessment of the experts opinion.

2. Legal criteria for exclusion of users from criminal liability

The crime of production and sale of narcotic substances, which is provided for in article 283 of the Criminal Code (first paragraph), is committed through keeping, selling, offering for sale, receiving in any form, distributing, trading, transporting, sending and delivering narcotic substances and psychotropics, as well as the seeds of narcotic plants, in violation of the law or in excess of their content. The commission of this offence in complicity or more than once is provided for in the second paragraph, while the organization, direction or financing of this activity is provided for in the third paragraph of this article.

The law that this provision refers to is Law no. 7975, dated 26.7.1995 "On narcotic drugs and psychotropic substances". In this law, all plants and substances classified as narcotic drugs or as psychotropic substances by international conventions or other acts in implementation of these conventions, their preparations, as well as all plants and other substances dangerous to public health, due to the harmful effects resulting from their misuse, are included in three tables. Their classification is based on the degree of health risk that their misuse can cause and whether they have a medical use. Table I contains plants and substances of high risk that are not used in medicine. Table II contains plants and substances of high risk used in medicine. Table III contains plants and dangerous substances used in medicine. Tables II and III are divided into two groups A and B according to the control measures that apply to them. According to this law, in the territory of the Republic of Albania, any type of activity related to the plants, substances and preparations included in table I is prohibited (production, fabrication, wholesale and retail trade, distribution, transportation, stor-

age, supply, for sale or for free, purchase, use, import, export, transit), whereas the activities related to the substances included in tables II and III and their preparations are not prohibited, but regulated. They are subject to the provisions applicable to all substances and preparations intended for medical and veterinary use, as defined in the "On Drugs" law, to the extent that the latter are in accordance with this law.

The aforementioned criminal provision, only in the case of possession of narcotic and psychotropic substances, provides for the possibility of exclusion from criminal liability when two criteria are met simultaneously: firstly, narcotic and psychotropic substances, as well as the seeds of narcotic plants, are kept for personal use and, secondly, in terms of quantity, they should be in small doses (Miha, E. Pekmazi, 2024). The absence of either one of these two criteria leads to the impossibility of applying the clause of exclusion from criminal liability because the possession of a quantity of narcotics when it is not for personal use, but in small doses, or even when it is for personal use, but not in small doses, would bring criminal liability for the person who commits the criminal offense.

In the absence of a legal definition of the term "small doses" used by the legislation, there can be many judicial interpretations. As the above-mentioned unifying decision of the Supreme Court also argues, in terms of quantity, narcotic or psychotropic substances must be to the extent that they are considered really small for personal use by a specific individual and not in general. It should not exceed the physical-biological abilities of the individual user and should be within the limits of the tolerance of his organism for the specific type of narcotic or psychotropic substance, at the time and conditions of use of this substance, in order not to create such effects on the person that would cause harm to his health. Based on these arguments, the Supreme Court has reached the generalizing and at the same time binding conclusion for all courts that a small dose, in its legal sense, is not considered the physical division into several such, but the amount of narcotic and psychotropic substance that it contains as a whole and which according to experts is considered a small dose.

The concrete mass of the small dose is determined by the procedural act of its weighing and furthermore by chemical and quantitative chemical expertise.

In order for narcotic and psychotropic substances to be for personal use, this must result from a toxicological expertise. Through this examination, it is determined whether the specific person is their user, which is realized by analyzing the biological samples taken from him (blood, urine) and discovering whether there are traces of narcotic and psychotropic substances in them. In our judicial practice, the expertise that aims to detect the presence of narcotic metabolism products in the human body is usually encountered, which is performed through the analysis of the person's urine, the sample of which must be taken immediately after the person is caught with the narcotic or psychotropic substance. The sample must be stored in appropriate conditions and sent without delay for examination to the experts of the Institute of Forensic Medicine.

The proceeding authority (prosecutor or judge, depending on the phase of the criminal proceedings) cannot determine by themselves whether the seized amount of narcot-

ic or psychotropic substance is a small dose (Peppo, 2023). The evaluation of whether it is a small dose for personal use must be carried out by toxicologists through forensic-clinical expertise, as it depends on the type of narcotic or psychotropic substance and the person who is its user (his physical qualities, health condition, the degree of addiction to the narcotic substance, the ability to absorb the narcotic substance without immediate damage to health). Until now there is no legal definition of what is allowed to be a small dose of a narcotic or psychotropic substance for personal use, and this seems difficult to be done in the future precisely because, despite the fact that the amount must be small, it does however vary from one type of narcotic substance to another and from one user to another.

It should be noted that the exclusion from criminal liability refers only to the act of possession of narcotic and psychotropic substances, as well as the seeds of narcotic narcotic plants, and not to other actions. Although the person might keep the narcotic substance in small doses that are within the amount for personal use, he is not excluded from criminal liability if he keeps it with the intention of selling, trading, distributing, transporting, etc. This way, the exclusionary clause that is provided for in this criminal provision does not protect the dealers and distributors of narcotic and psychotropic substances, who carry out this activity under the guise of being their user.

3. Problems of judicial practice

In practice, many sellers and distributors of narcotic and psychotropic substances are also their users and keep the substances to sell or distribute in small doses which in themselves are within the amount allowed for personal use. For these reasons, during the criminal proceedings, proving whether or not the quantity of the narcotic substance is a small dose within the tolerance for personal use and whether the subject kept it only to use it for himself and not to sell, distribute, show, etc., is a matter of verifiability of facts. Often the reference elements to make this distinction are the concrete circumstances, such as the place of capture, the place where the narcotic or psychotropic substance is kept, the way of packaging, the amount of monetary values that the person carries with himself, etc. All these elements help to distinguish between the keeper for the purpose of sale, who is also the subject of the criminal offense "Production and sale of narcotics" provided for in article 283 of the Criminal Code, and the user as a victim of the drug phenomenon.

In practice, it has been observed that certain individuals keep narcotic and psychotropic substances in very small doses which, in any case, altogether do not exceed the amount of a small dose for personal use and at the same time they are users of these substances (Miha, 2024). In these cases, in the absence of evidence that they are exercising the activity of selling, trading or distributing them, or that they keep them for this purpose, they are excluded from criminal liability. In the criminal proceeding, any doubts regarding the charge shall be evaluated in favor of the defendant, therefore they cannot be held liable without having convincing evidence that they sell,

trade, distribute, transport, etc. the narcotic or psychotropic substance kept.

On the other hand, there have been cases where the quantity of the narcotic substance was small within the limits of personal use, but the toxicological expertise showed that the subject who carried it was not a user of narcotic substances and in these conditions, regardless of the small amount of narcotics and despite the fact that there was no evidence that the person was exercising the activity of selling, trading or distributing it, he is not excluded from criminal liability for the criminal offense provided for in article 283, first paragraph, of the Criminal Code.

However, there have also been cases when the amount of narcotic substance carried by the person was very small, completely negligible, and from toxicological expertise the subject himself turned out to be a user of that narcotic substance and as a result it was deemed unnecessary to carry out the clinical forensic expertise to determine the small dose (previous expertises in similar cases where the maximum limits of the small dose for the same type of narcotic substance were about 5-10 times higher than the amount kept in the specific case were taken into account as well).

In other cases, the possession of narcotic and psychotropic substances in small doses that can be consumed by the specific individual within one day (24 hours) has been encountered, situations in which the prosecutor or the court have often concluded that they should be excluded from criminal liability because the amount seized is considered a small dose for personal use. These approaches are based on the opinions of experts, who, among other things, to reach their conclusions, have used the criterion of "consumption throughout a day" of the narcotic substance. This includes both cases when the different doses contain the same narcotic or psychotropic substance, as well as when they contain different substances and the specific individual has turned out to be a user of all types of substances he was carrying.

For illustration, we quote the opinion of an expert in one of these issues. In the expert report drawn up by him, he stated that the amount of cannabis sativa narcotic substance that citizen A.B. can use during a single intake is about 100 milligrams of THC, while the amount of 4.3 grams of the narcotic cannabis sativa that was seized, which has a THC value of 430 milligrams, although it is above the amount that this person can consume in a single intake, it is considered a small dose for personal use because it can be consumed in two to three consecutive intakes during a day without causing damage to the health of person A.B. under investigation.

The determination of the small dose of a narcotic or psychotropic substance based on the amount that a person can consume in a day without suffering health damage, at first sight seems to be supported by criminal decision no. 63, dated 29.02.2012 of the Supreme Court, which stated that, in the absence of a determination by a legal act, the determination of the amount for personal use by the toxicological expert should be carried out on the basis of an assessment based on a general study of the drug addiction phenomenon of a user, where the maximum dose limits for exclusively personal use for any narcotic or psychotropic substance are determined. According to this decision, in any case the expert must determine for each type of narcotic substance (a) the single average dose considered as the amount of active substance for each single

intake, capable of producing a psychotropic effect in a dependent user, (b) the average daily frequency of intake, (c) the amount of active substance taken on a daily basis and (d) the power to cause behavioral changes and decline in psychomotor skills. According to this reasoning, in determining the small dose, among others, the daily frequency of intake and the amount of narcotic or psychotropic substance that is taken on a daily basis should be taken into consideration. This decision is wrongly perceived as suggesting that the small dose for personal use is the amount that a particular individual can take in a 24-hour period without causing health damage.

The above referred decisions and some of the opinions given by experts in different cases bring us to the discussion whether the small dose for personal use should be considered the amount that can be consumed in a single intake without harming the health of the user or the amount that can be consumed within 24 hours without harming the user's health.

The time criterion of "consumption over the course of a day", often referred to by experts, is not provided for in article 283 of the Criminal Code and is not even considered in the above-mentioned unifying interpretation of the Supreme Court as a criterion for determining the small dose, in order for the individual user to be excluded from criminal liability. Even the acts of forensic expertise that give conclusions based on the amount that can be consumed in a day do not refer to this time criterion "consumption throughout a day" as being a scientific criterion for determining the small dose.

In conditions where the legislation has not determined, by special law or sub-legal acts, the cases of the use of narcotic and psychotropic substances in accordance with the law and not in violation, if we were to accept the interpretation that a certain amount of narcotic or psychotropic substances consumed during a certain time, when it does not cause damage to health, would fulfill the requirements of article 283, first paragraph, of the Criminal Code to exclude the person from criminal liability, then the path would be left open for unjust interpretations of this criminal provision. For example, referring to the case cited above from the case law, even double the amount of 4.3 grams of cannabis sativa when consumed for two days could be considered a small dose that does not cause damage to health, three times that when consumed for three days, and so on, which is against the law.

In the criminal case presented as an example above, the court reasoned that the criteria provided for in article 283, first paragraph, of the Criminal Code regarding the objective side of this crime in the form of possession of narcotics, were met, because although it was proven that the person A.B. under investigation was a narcotic user and there was no evidence that he possessed it for purposes other than personal use, the quantity possessed by him was not a small dose. Under these conditions, the court, based on article 329, paragraph 3/c, and on article 329/b, paragraph 3, of the Criminal Code, returned the case to the prosecutor and ordered him to formulate against A.B. the charge for the criminal offense "Production and sale of narcotics" provided for in article 283, first paragraph, of the Criminal Code and to submit a request to send the case to trial.

Despite the fact that the determination of the small dose is made by experts, the proceeding authority can take a position different from the opinion given by the expert. In the criminal proceedings, no evidence has a predetermined value, but is subject to its assessment, being evaluated in harmony with other evidence. Expertise, which is one of the types of evidence, is no exception here. However, the court must justify its position as to why it does not take as a basis the opinion given by the expert or why it takes it partially.

Nevertheless, in these situations it is best to request the expert's opinion again, ordering the completion of the forensic-clinical expertise by the same expert or conducting a new expertise with other experts. The expert should be asked to determine whether the seized amount of narcotic or psychotropic substance is considered a small dose if it were all consumed in a single intake (if small doses of different substances were kept, for example a dose of cannabis sativa and a dose of cocaine, the expert should be asked in the same way to determine whether it is considered a small dose when all doses with different substances are used jointly and simultaneously). The answer to this question would not leave a path for the incorrect application of the clause excluding from criminal liability the keepers of narcotics for personal use, provided for in article 283, first paragraph, of the Criminal Code.

4. Conclusion

Albania's criminal legislation excludes users of narcotic and psychotropic substances from criminal liability for keeping them in small doses for personal use, because they are victims of the drug phenomenon. Sellers and distributors of narcotics, often being users of narcotics themselves, try to use this legal space in order to avoid criminal prosecutions. Although they themselves are victims of the drug phenomenon, they are not excluded from criminal liability as they are the authors of this crime with other persons as victims and with their actions they contribute to the continuation and further spread of this criminal activity. The proceeding authorities must be very attentive to each specific case, evaluating all the circumstances of the possession of these substances by these subjects. In particular, they must critically evaluate the opinions of experts regarding the determination of the small dose of the narcotic or psychotropic substance. Regardless of the modes of action (forms of possession) used by the different subjects, the criterion for determining the small dose should not be the amount of narcotic or psychotropic substance that can be consumed by the specific individual over a period of 24 hours without causing damage to his health, but rather the amount that this individual can consume in a single intake without harming his health. In this way only can it be ensured that those who carry out the criminal activity of sale, trading, distribution of narcotic and psychotropic substances be held criminally liable and the real victims be protected.

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