A PRACTICAL EXAMINATION OF THE USE OF EVIDENCE BEFORE MAGISTRATES OF THE PRELIMINARY CHAMBER

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ABSTRACT: *The Romanian Constitutional Court ruled through two decisions, nr.641 of 11 November 2014 and nr.802 of 5 December 2017, accepting the hypothesis in which any means of evidence is acceptable during the phase of the preliminary chamber hearing, and, we would add, not only to verify the legality of administrating evidence during the criminal indictment. It is our opinion that the preliminary chamber must constitute a bastion of verifying the necessary evidence for establishing the truth in a trial.*

KEYWORDS: *preliminary chamber; preliminary judgment; preliminary hearing; evidence; proof; discovery; Constitutional Court; legality*
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1. INTRODUCTION

Although the Romanian Constitutional Court ruled through two decisions, nr.641 of 11 November 2014[1] and nr.802 of 5 December 2017[2], that the „objective of this procedure (preliminary chamber) is to establish if the criminal complaint and the prosecution are able to lead to a criminal trial, or require redoing"[3], the magistrates of the preliminary chamber behave quite timidly or even reluctantly, generally refusing to admit that this procedure should involve "any means of evidence", however this could lead to „clarifying the facts, which can have a consequence on the rule of law" (§19 from Decision nr.802/2017).

Generally speaking, the prosecutor and the judge have been inflexible in accepting that "any means of evidence" practically meant that the institution of the magistrates' independence consisted precisely of the freedom to act of dispensing justice, through an „examination of the legality of the discovery and the materials of the prosecution."

By eliminating any judicial formality, one reaches the conclusion that the independence of the magistrates of the preliminary chamber will enable them to administer as evidence, outside „any written evidence", any means of evidence without any distinction, directly and against all the parties involved.

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[1] Published in the Official Gazette of Romania nr.887 of 5 December 2014
[2] Published in the Official Gazette of Romania nr. 116 of 6 February 2018
[3] See Decision of the Romanian Constitutional Court nr. 802/2018 §15

Proving the legality and foundation of the object of such a request becomes a practical case.

According to art. 344 alin.2 of the Romanian Code of criminal procedure, it is possible to form in the first hearing *requests* and *exceptions* regarding the *legality* of bringing the case before court[1]/ the *legality* of administering evidence[2]/ the *legality* of acts of criminal pursuit[3]/ (in truth, this is the exact *object* of the preliminary chamber, according to art. 342 of the Romanian Code of criminal procedure).

In the case examined, through the *prosecution's indictment of 08.11.2017*, the defendant went on trial for the crime of *criminally negligent homicide*, defined in art. 192 alin.1, 2 and 3 of the Criminal code. Through the *Conclusions of 1 March 2018*, the court rejected the requests and exceptions formulated and ruled in favour of beginning the trial.

The challenge submitted requested to the superior control court according to art. 425/1 alin.7 pct.2 lit.a of the Code of criminal procedure that, based on the reasons invoked in the first hearing during the preliminary chamber: *the challenge should be admitted; the appealed decision should be revoked, and the solutioning of the case should mandate the correction of the irregularities occurred through the use of requested evidence and should therefore rule according to the conclusions of the evidence submitted: -either send the case back to the prosecution's office if the irregularity makes it impossible to establish the object or limits of judgment (art.346 alin.3 lit.a Code of criminal procedure); -or the beginning of trial if the irregularities were covered through the means of evidence submitted (art. 346 alin.4 Code of criminal procedure);*

Motivation of the challenge: it was shown according to *art. 342 Code of criminal procedure, that the object of the procedure of the preliminary chamber* is verifying: the competence, the legality of bringing the case to court, the legality of administering evidence and acts of the prosecution. "The competence of the preliminary chamber proceedings belongs to the preliminary chamber judge, who is a self-standing magistrate, distinctive from the Court (art. 30 lit. d Code of criminal procedure), who verifies the legality of the procedural documents" (§25 Decision 802 of 5 December 2017).

2. REGARDING THE LEGALITY OF BRINGING THE CAUSE TO COURT

According to *art. 321 alin.1 Code of criminal procedure*, as soon as the criminal investigation is completed, the case and report of completion of the criminal investigation (RTUP) are forwarded to the prosecutor, who proceeds, according to art. 322 alin.1, to verifying the prosecution's case.

According to legal provisions, if the prosecutor notes that *the criminal investigation is not complete*, or that *legal provisions were not respected* during the proceedings, the file will be *returned* to the authorities who made the criminal investigation to *complete or redo* it (art.323 alin.1 Code of criminal procedure). Moreover, the prosecutor can indicate the means of evidence that will be used (art. 323 alin.3 Code of criminal procedure).

We believe that the lack of the aforementioned elements in the legal texts (only one mention would have been sufficient) makes that this case was unlawfully brought to court. The lack of a single evidentiary material, if it is an essential one, is sufficient for the referral to become illegal. Obviously, in this case, it was not verified if a cause of non-liability existed or not, in order for the guilt to be „beyond the shadow of a doubt", and to

constitute basis for an indictment. Under these circumstances, the act of bringing the case to court is illegal because, according to legal texts, on the one hand the criminal investigation is incomplete, and on the other hand legal provisions were not respected.

As a result, the indictment obligates the prosecutor according to t art. 327 alin.1 Code of criminal procedure to note if: *a)* legal provisions guaranteeing the discovery of truth were respected; *b)* the criminal investigation is complete; **c)** there are necessary and legally used means of evidence;

From the indictment examined in this case, it follows that the legal provisions of the Code of criminal procedure guaranteeing the discovery of truth were not respected (art. 99 and following, art. 5), that the indictment is *not complete* (there is no forensic examination) and that *there is not sufficient evidence* leading to establishing the facts and the rule of law in this case.

Moreover, according to art. 327 alin.1 lit.a of the Code of criminal procedure, *indictment* goes through if: *a)* from the criminal investigation it results that *the act exists*; *b)* from the criminal investigation it results that *the act was committed by the defendant c)* from the criminal investigation it results that *the defendant is criminally liable*;

From the evidentiary material in its entirety, it results that the *indictment was illegal*, as it does not allow for truth to be discovered, since the *criminal investigation is not complete***,** and it is not certain that the defendant is *criminally liable*.

On 9 May 2017, through a request to the prosecutor, a forensic expert report was called for, regarding the following question: *"in the moments preceding the traffic accident of 07.08.2016, was it possible that a syncope affected Mr. Aron Vasile, causing him to lose consciousness for a few moments, and therefore causing the accident?"*

A series of medical documents dated 16 August 2016 and 27 March 2017 were also forwarded, along with other medical documents from medical centers in Cluj Napoca and Tîrgu Mureș, highlighting the diagnosis of sleep apnea syndrome of obstructive type, severe form, micro cerebral angiopathy, HTA stage II, obesity grade II etc.

On 30 October 2017 the authorities conducting the criminal investigation emitted an ordinance rejecting the request of probation (it should be mentioned that on the 17 October 2017 there was another request for this procedure).

On 8 November 2017 the defendant was informed about the ordinance rejecting his request.

More details from the criminal investigation file:

On 28 June 2017 the prosecutor's office begun the process of criminal indictment.

On 17 October 2017 the suspect was notified of his new status as a defendant through official record, at which moment he requested again for a forensic expert investigation to be made.

On 03 November 2017 the case was registered at the prosecutor's office along with the report of completion of the criminal investigation.

On 06 November 2017 the defendant requested that the evidentiary process be supplemented.

On 08 November 2017 the prosecutor filed the indictment and registered it with the Mureș County Court.

On 08 November 2017, on the same day when the indictment was made, the defendant received the rejection of his evidentiary request concerning a forensic expert investigation. It should be noted that due to the new Code of criminal procedure coming into effect (1

February 2014), the prosecutor had the obligation, when finalizing the criminal investigation, to inform the defendant about the contents of the investigation, at which stage it was also possible to request and administer new evidence.

The refusal on behalf of the authorities conducting the criminal investigation as well as the prosecutor to administer this evidence distorted the act of referral before the court, making that the judge of the preliminary chamber was "*unable to clarify the facts, circumstance which can implicitly have consequences over the rule of law*." (§19 Decision 802/2017 of 5 December 2017 of the Constitutional Court of Romania).

The final investigation of the legality of the act of referral as evaluated through the limits set by the legal texts, constricts not only the magistrate's independence, but constitutes a breach of the parties' right to defense and the right to a fair trial.

However, *administering evidence* including the forensic expert investigation during the procedure of preliminary chamber *would have led to a predictable and fair judgment* of the case, to a fair trial.

"The objective of this procedure of the preliminary chamber is to establish if the criminal investigation and indictment are able to lead to the trial phase or need redoing" (§15 Decision nr.802/2017 a CCR; Bucur și Toma vs. România – Decision of 8 January 2013 CEDO).

Paragraphs 60 and 61 of the Decision nr.641 of 11 November 2014 of the Constitutional Court of Romania admitted that *"in order to establish the illegal character of the procedure of administering evidence by the authorities conducting the criminal investigation, in this phase of the criminal process any means of evidence can be used. In this sense, it was noted that due to the aforementioned decision, the judge of the preliminary chamber would be able to allow the administration of evidence concerning the legality or fairness of the criminal investigation and administration of evidence.*" (§20 Decision nr.802/2017 of the Constitutional Court of Romania).

Concerning the legal obligation and fairness of administering evidence, we also note *art. 100 alin.1 Code of criminal procedure* which states that during the criminal investigation, the authorities must gather and administer evidence both for and against the defendant, by default or upon request. If the guarantee of discovery of the truth regarding the facts and circumstances of the cause relies on evidence (art.5 Code of criminal procedure), it is obvious that the prosecutor's neutrality is proved by the respect towards the legality of the administration of evidence – the obligation to gather evidence both for and against the defendant (art. 5 Code of criminal procedure).

It is our opinion that in the analyzed case, the legality of the referral to court was compromised.

-According to *art. 329 alin. 1 Code of criminal procedure*, the indictment constitutes the act of referral of the court.

-According to *art. 328 alin. 1 Code of criminal procedure*, the indictment must contain accordingly, information concerning the act the defendant is accused of, as well as its legal definition, evidence and means of proof that guarantee the discovery of truth.

The question that follows, due to the legal provisions of art. 327 alin.1 Code of criminal procedure, is whether this indictment respected the legal provisions that guarantee the discovery of truth, whether the criminal investigation was complete, whether the necessary evidence for establishing the facts and for a correct legal definition

were present and legally administered. *Per a contrario, the court was not referred to legally.*

Moreover, the strict lawmaker requires that *the indictment* be made if the *criminal investigation reveals the criminal liability of the defendant. (this must be a certainty, not an assumption).*

We believe that from the *file* and *indictment* it results, firmly and certainly, that:

- *the criminal investigation is not complete;*
- *in this phase of the criminal trial, it is unknown whether the defendant is criminally liable;*

The reasons are as follows:

While lacking a forensic expert investigation of a psychiatric nature, there is valid doubt regarding a *cause of non-liability* (art. 31 - unforeseeable circumstances transpose the theory of hardship from civil law into criminal law). The requested evidence (a forensic expert investigation of a psychiatric nature) was relevant (substantial) for establishing the truth. the prosecution's refusal "weakened" the act of referral towards the court, making that the judge of the preliminary chamber, while lacking this forensic investigation, could not conclude to a legal referral, regardless of whether the defendant was criminally liable or not.

This means that the indictment was *illegally made***,** and the referral was also illegal.

On the other hand, according to *art. 15 Code of criminal procedure, the essential traits of crime are as follows:* the act should be foreseen by law; the act should be done with guilt; the act should be unjustified (justification reasons) or imputable (causes of non-liability).

In this specific situation, the defendant could not have foreseen the result of his deed.

According to *art. 23 Code of criminal procedure*, the act foreseen by the criminal law done within the circumstances of non-liability conditions (unforeseeable acts) *is not a crime.*

The indictment holds as *cause of the accident* the fact that the defendant *did not respect the legal provisions* of *art. 101 alin. 3 lit. d from OUG nr. 195/2002* "in a curb, on the right-hand side, he went onto the opposite lane, going on a collision course". It is the prosecution's opinion that the cause of the car crash is that the defendant drove on the opposite lane. However, in reality, the cause of the car crash is a change occurring in the defendant's psychological and physical state right before the event.

The act is subjected to the guilt-free hypothesis – meaning that the prosecution only analyzed the *objective* side (the material element and the dangerous consequence) but left out the *subjective* side (guilt).

Thus, the prosecution did not even seek to clarify if there was a non-liability circumstance as per art. 31 Criminal Code (unforeseeable circumstance) although art. 5 Code of criminal procedure states the prosecution should gather evidence both for and against the defendant and even moreso since the defendant requested certain evidentiary means.

The unforeseeable case, as defined by Romanian criminal law, is a cause eliminating guilt, due to the objective impossibility to foresee it. "Certain states of illness that a person may be affected by, are in some cases the cause of unforeseen circumstances"[4] It does not

[4] For instance, epilepsy, fainting, seizure, etc.); See (Dongoroz, et al., 1969);

matter then if the illegal activity or situation that the defendant found himself in was a breach of law.

3. CONCERNING THE LEGALITY OF EVIDENCE ADMINISTRATION

It is more than obvious that, previous to the definition given by the Code of criminal procedure enforced since 01.02.2014, the judge of the preliminary chamber was not able to administer new evidence that would have direct and implicit relevance to clarifying the factual situation, which would then have consequences for the rule of law. (*Decision of the Constitutional Court nr. 641/11 November 2014, §61*).

According to art. 98 Code of criminal procedure the definition of an *evidentiary object consists of: a) the existence of the crime* and its perpetration by the defendant; *b)* the facts and *factual situation* that the rule of law depends on; c) *any circumstance necessary* for a *fair* solutioning of the case.

According to art. 99 alin. 1, 3 Code of criminal procedure, during the criminal trial, the parties have the right to request from judicial authorities the administration of evidence.

This is the expression of a *fair and equitable trial* (art. 6 §3 lit. d CEDO) as per the principle of equality of arms. In this sense, see also the legal provisions of the *EU Directive 2016/343* of the European Parliament and Council regarding the presumption of innocence.

It is undeniable that the burden of proof belongs to the prosecution and the defendant benefits from any doubt *(CEDO, Decision Lavents vs. Letonia, 28 November 2002).* "The requirements of equality, according to art. 6 of the European Convention, create the obligation for the authorities responsible for the criminal investigation to present to the defense all means of evidence for or against the defendant, and disrespecting this procedure are cause for mistrial" *(CEDO, Decision Edwards vs. UK, 16 December 1992).*

In a cause with a similar topic, based on a forensic expert investigation, the prosecution decided to close the case as a cause of non-liability was noted.

In this case, it is important to note that the evidence administered is formal, as can be easily seen: the police report from the scene of the accident, the official reports from blood samples testing, the results of the toxicologic analysis, the declarations of the defendant.

All this evidence gathered by the prosecution do not clarify the cause of the accident, the material action or the subjective action.

The criticism brought to the administration of evidence is as follows:

- in the file there are notes concerning a *Slovakian citizen* who was an eye witness but was not heard officially.

- *the police report from the scene of the accident* is formal – when, where the assistant witness signed, what he saw, did he have knowledge of what was written? The legality of the report is to be contested because the defendant was in the hospital and could not give a statement; the drivers did not sign despite giving statements for the official police records.

- the file includes *documents from other cases*;

On *6.11.2017* there were requests for additional evidence that were left unanswered. The rejection of these requests required a reasoned order according to art. 100 alin.3 Code of criminal procedure (there should be a reasoning for accepting or rejecting this request).

It should be noted that the illegality of the procedure of administrating the evidence "deprived the defendant ab initio and definitively of a fair, equitable trial" (Decision Teixeria vs. Portugal of 9 June 1998 CEDO).

4. CONCERNING THE LEGALITY OF THE CRIMINAL INDICTMENT

See the documents of indictment (processual and procedural):

a) The ordinance of rejecting the request of a forensic expert investigation is illegal.

On 09.05.2017 there was a request to have a forensic expert investigation of a psychiatric nature. *On 30.10.2017* the authorities of criminal investigation rejected this request through an ordinance. This ordinance is *not motivated* and therefore the rejection is illegal.

It is mentioned that the request was not relevant (although there was a cause of non-liability according to art.100 alin.4 lit.a Code of criminal procedure) with regard to the topic of the evidentiary proceedings. It was further stated that there were no medical documents previous to the accident that would confirm the existence of an illness.

The ordinance was motivated on 30 October 2017 and the communication towards the defendant occurred on 8 November 2017. The report of completion of the criminal investigation (RTUP) and the case file were forwarded to the prosecutor's office on 3 November 2017, and the indictment was made on 8 November 2017. It follows that the defendant was not given the possibility to appeal the ordinance of rejection of the evidence request.

b) The illegality of the official police report from the scene of the accident:

The official police report is a means of evidence despite not being signed by the defendant; it simply mentions that the defendant agreed with the report but a signature is not present.

5. CONCLUSIONS

- unforeseeable circumstances are not equivalent to lack of discernment;
- since the judicial organs do not have medical training, logically, rationally, professionally, and legally, the defendant's medical issues were to be examined by a psychiatric specialist and a forensic medical expert;
- the demand for a forensic expertise was in good faith, since the defendant could not have known if the conclusions would be in his favour or against him;
- the correct solutioning of the case depended on having a forensic expertise;

Considering all the above, the judge of the preliminary chamber must appreciate after observing all the documents in the indictment and means of evidence, that:

- there is no essential evidence that would lead to the judges establishing the liability or lack thereof, having as consequence the acquittal of the defendant (the just solution)
- if guilty, the defendant can resort to the simplified procedure during judgment, once the first arraignment is over, based on evidence administered during the criminal investigation.
- to use this procedure, the court also requires access to the forensic expertise concerning the defendant's psychiatric condition.

- without the aforementioned forensic expertise, the judge cannot know whether he is facing judicial error and whether the defendant is tried on the basis of "evidence" or simple "presumptions".

- the judge can sentence the defendant without knowing whether the latter is criminally liable or not.

Following Decision nr. 802 of 5 December 2017 of the Constitutional Court of Romania (§ 15) we consider that regardless of being in the phase of first judgment or during the appeal, the magistrate of the preliminary chamber is obligated to examine through any means of evidence the proof that establishes whether the defendant is criminally liable or not.

"The Court noted that, concerning establishing guilt for the acts defined by the criminal law and implicitly, for overruling the presumption of innocence, the criminal trial goes through several stages that have different levels of probation, from the reasonable doubt to establishing guilt beyond any reasonable doubt".[5]

Otherwise, we could just as well state for the criminal process as we do for the civil ones, that we are facing a "denial of justice.

REFERENCES

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[5] See the decision of the Constitutional Court nr.22 of 18 January 2018, published in the Official Gazette of Romania on 26 February 2018;