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THE APPEAL AGAINST THE FIRST INSTANCE COURT VERDICT

“The procedural institute of the appeal was first born within the inquisition procedure. It was based on the right of the Emperor to interfere in the actions of its subordinates. The appeal made to the Emperor to interfere in the actions of his subordinates was called appellatio, therefore the appeal meant the right of the procedural subject to attack the decision of a lower instance judge in front of higher instance judges. Further on, every higher court had the right the review the case by giving a new decision, the procedural actions in two instances was based not on the subordination relation between a lower instance judge towards a higher instance judge, because judges are dependent by and from the law, but towards rendering as better as possible verdicts”.³⁷

The appeal towards the first instance court verdict and the procedure foreseen for its rendering is regulated by the Code of Criminal Procedure of Kosovo, precisely, from Article 398 to Article 429.

In Article 13 of the European Convention for Human Rights, is also foreseen the right to an effective appeal, where anyone whose rights and liberties, recognized by this Convention, are violated has the right to an effective appeal in front of an institution of his /her own country and also when the violation is committed by persons that act within exercise of their official duties³⁸.

³⁷ Criminal Proceedings Law, Ejup Sahiti 2005

³⁸ ECHR Article 13

In spite of the procedural guarantees foreseen in the procedure that aim finding the truth, in spite of the fact that through the verdict the verifying of the factual situation is aimed, in concordance with how the situation was developed when the criminal offence was committed, there are possibilities that the first instance court verdict, due to different reasons, could be unjust or could have violated certain legal provisions.

1. AUTHORIZED PERSONS FOR SUBMITTING AN APPEAL

Authorized persons only can submit an appeal within the limit of 15 days from the day of received of the verdict. The appeal submit within the time limitation can suspend the execution of the verdict, precisely the suspension character of the appeal.

Based on Article 399 an appeal can be resented by the parties, the defence attorney of the defendant, the authorized legal representative of the accused and the injured party, though only for the decision of the court related to penal sanctions for criminal offences against life and body, against sexual integrity, public traffic safety and for procedural expenses of criminal proceedings³⁹.

The right to fully submit an appeal has the public prosecutor, this due to the fact, that he/she can submit an appeal against the first instance court verdict be it against the interests or in favour of the interests of the defendant, because the prosecutor defends the general public interest thus aiming to have the criminal matter be tried in a just manner ad not have the sentencing of the defendant in each and every case.

The public prosecutor can submit an appeal in favour of the defendant even against his will because he works independently and protects genera; interests.

The defendant as a party in the proceedings has the right to submit an appeal in accordance with every appeal basis under the conditions as foreseen by the Criminal Proceedings Code.

³⁹ Criminal Proceedings Code of Kosovo.

The Criminal Proceedings Code does not have any special provisions on the possibility for the defendant to submit an appeal against an acquitting verdict, such an appeal is not expressly forbidden by law, but this depends from the juridical interest of the defendant when submitting such an appeal. The right of the defendant to appeal an affirmative verdict does not have to mean that he/she will appeal to jeopardize himself/herself but there are cases when the juridical interest requires that one be released based on the factual situation and not based upon the juridical basis.

The injured party based on Article 399 par. 3 can submit an appeal against the verdict only in relation with the penal sanction in cases of criminal offences against life and body, sexual integrity and public traffic safety , but only if in that matter the injured party was in the position of a subsidiary plaintiff, the injured party can submit an appeal based on grounds for attacking an appeal.

The injured party can not file an appeal because of legal violations, be it procedural or material, and not because of erroneous and incomplete evaluation of the factual situation.

The defense attorney has an independent right of submitting an appeal, as compared to the defendant, the defense attorney can also submit an appeal which means that one appeal does not exclude the other one, however, and the defense attorney cannot submit an appeal that damages the defendant.

Based on Article 399 par 5 of the Criminal Proceedings Code, the defense attorney can submit an appeal even without a special authorization of the defendant, but not against his will, in such a case there is an exception and that is only cases when the defendant is sentenced with long imprisonment, as well as, the criminal proceedings against juveniles as per Article 77 par 2 of the Juvenile Criminal Code⁴⁰.

The right to submit an appeal also have the person's the wealth of which is confiscated or persons from whom the profit, ill gained through a criminal offence, is confiscated , also the right to submit an appeal have juridical persons the wealth of whom is confiscated.

40 The Juvenile Justice Code Article 77 paragraph 2

All of the persons which based on the law are entitled to submit an appeal are obligated to announce the submitting of an appeal at least 8 (eight) days after the announcement of the verdict.

When no one from the persons that have the right to submit an appeal does not announce an appeal within the legal time limits it is then considered that they have waived their right for this and in these cases it is not necessary to have it in the written verdict, the reasoning part, or the audio recording of the trial sessions. An exception to this represents the case when the defendant is sentenced with effective imprisonment.

2. THE CONTENT OF THE APPEAL

The content of the appeal is set forth as per Article 104; according to this provision an appeal should contain the following:

- Data on the verdict which is appealed ,
- Reasons why is the verdict objected,
- Reasoning of the appeal,
- The proposal for an entire or partial annulment or for changing it and the
- Signature of the appeal

If the appeal submitted does not contain the data given above, and it is submitted by the defendant, the injured party, the subsidiary plaintiff or the private plaintiff that do not have an authorized representative, then the first instance court requests from the appealing person that in a certain time period to amend the appeal through a submission or orally which must be mentioned in the court session minutes.

When the appeal does not contain data on the verdict towards which the appeal is submitted, in the first place, the court shall refute the appeal only when the court cannot determine to which verdict the appeal refers to. When the appeal does not contain data as foreseen by Article 401 par 1 subparagraphs 2, 3 and 5 of the Criminal Proceedings Code the court shall refute the appeal.

When the appeal is submitted by the injured party the subsidiary plaintiff or the private plaintiff that have an authorized legal representative, or if the submitter of the appeal is the public prosecutor and the appeal does not fulfil the requirements as per Article 401 par 1 subparagraph 2, 3 and 5 or when the appeal does not contain the data as per paragraph 1 subparagraph 1 of this article and cannot be determined as to which verdict the verdict refers to then the court shall refute such an appeal.

In the appeal it is allowed to present new evidence that have not been elaborated in the proceedings developed in front of the first instance court , but in these cases the appellant is obliged to give reasons as to why did he/she not present these evidence before.

When the appellant bases upon new evidence through which these facts can be proven, and when it refers to new evidence , then one is obliged to present arguments through which aims to prove them.

3. THE REASONS FOR SUBMITTING AN APPEAL TO THE FIRST INSTANCE COURT VERDICT

The appeal against the verdict can be submitted due to objective (real) or juridical flaws which were made because of mistakes and flaws of procedural subjects that were made by the court.

Based on Article 402 paragraph 1 of the Criminal Proceedings Code the appeal against the verdict can be exercised for the following reasons:

When the appellant considers that the court has violated the law error in iure , in this case the appellant should ground his appeal in one of the essential violations of the procedural provisions or because of the violation of the criminal law , whereas, when the appellant considers that the court has made an error based on the factual situation error in factis then the appellant shall use the erroneous conclusion or the incomplete conclusion of the factual situation as a basis for submitting the appeal⁴¹.

41 Criminal Proceedings Law Prof Ejup Sahiti 2005

Essential violations can be separated in absolute violations and in relative violations.

Essential absolute violations of the provisions of the criminal procedure shall be considered when:

- The composition of the court was not in accordance with the law, or when rendering the verdict a lay judge has taken part that was not present in the main trial session or when through a decision he was expelled from the trial sessions;
- In the trial session has participated a judge that should have been expelled;
- The trial session was held without the presence of persons the presence of which is demanded by law, or when the defendants, the defense attorneys, the subsidiary plaintiffs, or the private plaintiffs, independently from their requests, were denied to use their language in the trial session and denied the implementation of following the trial session in their own language;
- The public is expelled from the trial session against the law;
- The court has violated the provisions of criminal procedure in relation to the issue whether there is an accusation from the authorized representative – plaintiff, the proposal if the injured party or the permission of the competent public institution;
- The verdict was rendered by the court that did not have the material competence to try the case or the court has refused the indictment due to material incompetence;
- Through the rendered verdict, the court has not tried in entirety the object of the indictment;
- The verdict is grounded on inadmissible evidence;
- The summoned defendant to give a statement on the guilty plea did not plead guilty for the entire indictment of some parts of it and was interrogated before being presented the evidence;
- The verdict has exceeded the indictment (Article 386 paragraph 1 of this Code);

- The provisions of Article 417 of this Code have been violated through the verdict, such is the case when the appeal is presented in favour of the defendant, whereas, as far as the juridical evaluation of the criminal offence and the penal sanction the verdict as such cannot be changed on the defendants' disfavour therefore in such situation the principle of reformation in peius – non aggravation of the position of the defendant, comes into force.
- The enacting clause of the verdict is not understandable, it is in contrariety with its content or the reasons of the verdict , when the reasons of the verdict are very unclear or in contrariety in a considerable measure , when for the decisive facts there are considerable contradictions between what is presented in the reasons of the verdict with the content of the case files or of the trial minutes for the statements given in the proceedings and between the case files and the proceedings' minutes.

The essential relative violations are the following:

The violations which are foreseen in Article 403 paragraph 2 of the Criminal Code of Kosovo , are essential relative violations , which the court during the time of the preparation for the trial session, including the pre trial proceedings, the court, the public prosecutor and the police officer if;

- A certain provision of the Criminal Code of Kosovo is not applied or it is applied wrong
- The rights to defense have been violated and this has influenced or could have influenced in the rendering of a free and regular verdict.

4. THE VIOLATIONS OF THE CRIMINAL LAW

The second group of grounds for appeal is composed of criminal law violations, or of any other criminal provision, that have to do with the non application or the erroneous application of a certain provision in relation to

the existence of a criminal offence, the criminal liability or the criminal sanction.

Based on Article 404 of the Criminal Code, the violations of the criminal law exist when the criminal law is violated in the following matters:

- If the offence for which the defendant is being prosecuted is a criminal offence
- If there are conditions that exclude criminal responsibility
- If there are circumstances that exclude the criminal prosecution, and especially if the criminal prosecution has undergone statutory limitation or is excluded because of amnesty or pardon or if before it was already tried and a legally binding verdict is rendered.
- If in relation on the tried criminal offence a law that cannot be applied has been applied
- If in the rendering the decision for sentencing , alternative punishment, judicial warning or taking the decision for the measure of obligatory treatment or rehabilitation or confiscation of wealth gained through the criminal offence, when the court has surely exceeded its competencies or
- If the provisions in calculation of the pre-trial detention into the served sentenced have been violated

5. THE ERRONEOUS AND INCOMPLETE ESTABLISHMENT OF THE FACTUAL SITUATION

The erroneous or incomplete evaluation of the factual situation has to do with the flaws of the verdict in relation to the factual situation – error in factis.

Based on Article 405 paragraph 2 of the Criminal Proceedings Code , the erroneous evaluation of the factual situation exists when the court has erroneously evaluated an important factor when the content of the document, the minutes on the evidence elaborated or the technical recording do question the exactness and the veracity of certifying of important facts

The erroneous evaluation of the factual situation exists then when the court based on the facts and certain evidence has established what the factual situation is, but when evaluating the evidence and when making the final conclusion on their truthfulness has made a mistake, therefore, the incomplete establishment exists then when the court has missed the establish all relevant facts and necessary evidence for rendering the necessary decision.

In the appeal presented due to the erroneous evaluation or the incomplete evaluation of the factual situation new evidence can be presented – *Beneficium novorum* , but based on Article 401 paragraph 4 of the Criminal Proceedings Code , if the appellant in the appeal presents facts and new evidence then he is obliged to justify as to why did he /she not present them before , when the appellant refers to new evidence he/she is obliged to present evidence through which these facts can be proven and when he refers to new evidence he is obliged to present facts through which he intended to provide justification for.

In Article 406 of the Criminal Proceedings Code another group of reasons for submitting an appeal if foreseen, therefore, in paragraph 1 of his Article the appeal can be submitted in relation to the decision on the rendering of the sentence or of the juridical remark when the court, taking into consideration the circumstances that influence in the judicial remark or in the height of the sentence , in spite of not exceeding the legal competencies, has not rightfully determined the sentence or the juridical remark , so in one word the court has not weighed the sentence appropriately.

In paragraph 2 of Article 406 of the Criminal Proceedings Code is also foreseen the possibility of submitting and appeal towards the decision on the measure of mandatory rehabilitation treatment for persons dependent on drugs or alcohol or for the confiscation of wealth gained through a criminal offence , in spite of the fact that the court has not violated of Article 404 subparagraph 5 of the Criminal Code , yet has taken an unjust decision or has not rendered the measure of mandatory rehabilitation treatment for persons dependant from drugs or alcohol or for the measure of confiscation of wealth gained through a criminal offence , in spite of that fact that legal basis for such had existed.

An appeal can be filed against the decision on the procedural expenses when the court, for such expenses, has decided in an unjust manner in contradiction with the provisions of the Criminal Proceedings Code.

Also, an appeal can be filed against the decision for the juridical material compensation request and also against the decision to make the verdict public via print media, radio or television when the court for such cases has taken a decision in contradiction with the provisions of the Criminal Proceedings Code

6. PROCEDURE RELATED TO THE FIRST INSTANCE COURT APPEAL

The procedure related to the first instance court appeal is developed in two parts, at the first instance court and at the second instance court.

6.1 The proceedings related to the appeal of the First Instance Court

In Article 407 and 408 of the Criminal Proceedings Code, the foreseen procedure is developed at the first instance court in relation to the submitted appeal.

The appeal is submitted to the first instance court which has rendered the verdict for the second instance court in a sufficient amount of copies for the court, the opposite party and for the defense attorney in order to give a response to the appeal.

At the first instance court the appeal is accepted by the presiding judge that has rendered the verdict, he/she checks the appeal is it on time, is it submitted by an authorized person and does it contain the elements according to which it can be decided in relation to it.

The appeal presented out of the legally foreseen time limits, or the impermissible appeal shall be refused through a decision by the presiding judge of the first instance court, against this decision the appeal to the second instance court is allowed.

An appeal submitted on time and in its fully correct content is then sent to the opposing party, by the presiding judge, which in a period of 8 (eight) days have the right to submit a response to the appeal. The first instance

court sends the appeal to the second instance court together with the response to the appeal if there is such and all of the other case files.

6.2 The proceedings in relation to the appeal to the second instance court

When the second instance court receives the cases with an appeal it hands it over to the reporting judge appointed as per the schedule of the court, the reporting judge has the duty of studying the case files especially the submission of the appellant in the appeal.

When in case of a criminal offences that are prosecuted as per official duty the reporting judge sends the case to the competent public prosecutor that elaborates the appeal and with no delay returns it to the court, in this case he/she can present a proposal or to declare that he will present the proposal in the collegiums session, after the prosecutor returns the case, afterwards, the presiding judge schedules the collegiums session.

The public prosecutor shall be informed for the collegiums session, as well as, his defendant, the non appearance of the parties summoned in a regular manner shall not hamper the holding of the session of the collegiums.

The collegiums session starts with the reporting of the reporting judge on these facts. The second instance court in collegiums session decides whether it will hold the session, the session will be held only when it is necessary, due to the erroneous evaluation of the factual situation or of the incomplete evaluation of the situation, and in order to take new evidence or the repeat the already taken evidence, as well as, when there exist well founded reasons to have the case not returned to the first instance court for a re trial.

If the second instance court decides to hold a session, then the session starts with the reporting of the reporting judge that presents the factual situation but with giving his opinion for the founding of the appeal.

The part of the indictment towards which the appeal is presented, and as needed, the minutes of the main trial session are read with the proposal of parties or as per official duty, afterwards the appellant is summoned to

justify the appeal, then the opposing party is invited to respond, the parties and the defense attorney during the session can present evidence and new facts, whereas, the defendant his defense attorney have the last word.

Based on the results of the elaboration the plaintiff can withdraw entirely or partially from the indictment or to change it in favour of the accused, when the prosecutor withdraws from the indictment in entirety the injured party has the rights as foreseen by Article 63 of Criminal Proceedings Code.

6.3 The boundaries of the elaboration of an appeal

After presentation of the appeal the second instance court shall elaborate the appeal in the parts for which the appeal is filed for, however, as per official duty every time elaborates on the following :

- If there are essential violations of the criminal provisions from Article 403 paragraph 1 subparagraph 1,2,6 and 8 until 12 of the Criminal Proceedings Code⁴²;
- If the trial session was held in absence of the defendant and in contrariety with the provisions of the Criminal Proceedings Code
- If in the obligatory defense case the trial session was held without the presence of the defense attorney and
- If the criminal law was violated aggravating the situation of defendant.

If the appeal was presented only in favour of the accused, in relation to the juridical evaluation of the criminal offence and of the penal sanction cannot be changed as to aggravate him.

7. The decisions of the second instance court related to the appeal

Acting as per the appeal against the verdict of the first instance, the criminal collegiums of the second instance court in the collegiums session of the main session can do the following:

42 Article 403 Criminal Proceedings Code

- To refute the appeal as such that has passed the limitations or as inadmissible
- To refuse the appeal as unfounded and to ascertain the verdict of the first instance court
- To annul the verdict and to return the case to the first instance court for a retrial and another decision or
- To change the verdict of the first instance court

The second instance court through a decision shall refute the appeal as one that has passed the statutory limitations when it concludes that it is presented after having passed the legally foreseen time limits, also through a decision refutes the appeal as an impermissible one when it concludes that it is submitted by a person that does not have the right to do so or by the person that has waived his/her right to appeal or when the appeal was withdrawn.

The second instance court through a verdict refuses the appeal as an unfounded one and ascertains the first instance court verdict when it concludes that there are no causes for which the appeal was submitted in the first place against the verdict, and that there is not violation of the law as per Article 415 paragraph 1 of the Criminal Proceedings Code, whereas through a decision annuls the verdict of the first instance court and returns the case to a retrial when it concludes that there are essential violations of the provisions of the criminal proceedings.

Acting as per the appeal or as per the official duty the second instance court changes the verdict of the first instance court through a verdict, when it ascertains that the decision making facts in the verdict of the first instance court are righteously ascertained, but however, taking into consideration the established factual situation as per the proper implementation of law another verdict was necessary to be taken.

Conclusion

In this piece of paper the object of study was the appeal presented against the first instance court verdict, the authorized persons for submitting the appeal, the content of the appeal, the reasons and the grounds for appeal, the procedure developed in front of the first instance court and the one of

the second instance concerning to the appeal presented and for the types of decision that the second instance court renders based on the appeal submitted.

LITERATURE:

- The Criminal Proceedings Code of Kosovo;
- The Criminal Code of Kosovo;
- The Juvenile Justice Code ;
- The Criminal Proceedings Code - Ejup Sahiti Prishtina 2005
- The European Convention for Human Rights