

Abbreviated Trial

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Abstract

The actual criminal procedure in Albania adopted by Law no. 7905, date 21.3.1995 establishes the procedure relationships between the subjects in all phases of criminal process. In its focus this code also guarantees respecting of law and protecting defendant's rights in criminal process. It must be underlined that the criminal procedure code beyond the ordinary trial also provides other types of trials like the abbreviated trial which implies the avoidance from ordinary way of judgment. In this paperwork will be analyzed the features of abbreviated trial, the terms of application and the consequences for defendant in a criminal process through applying the abbreviated trial. A special emphasis in this paperwork will go to analysis of taking court's decision on acceptance or not of a request for an abbreviated trial, considered in relation to invalidity of a procedure act. This paperwork will also deal with issues of changing the legal classification of criminal offense to be judged in the abbreviated trial which will be illustrated with Constitutional Court's practice of Albania.

Keywords: abbreviated trial, criminal proceeding, defendant, court, decision, new charges

1. General Considerations about Abbreviated Trial

The abbreviated trial is a new institute in Albanian procedure law. The previous procedure codes did not provide the abbreviated trial as someone's right to be judged by abbreviated trial with procedure of acts just as they are. In this way the defendant has the right to be judged with an accelerated procedure of trial without including the detailed examination of facts evidenced during the preliminary investigations.

A significant requirement to hold an abbreviated trial is the request for an abbreviated trial submitted by the defendant or by his lawyer in court, before the judicial hearing examination is declared open. By the procedure of abbreviated trial it becomes evident the necessity of judicial economy, because such type of trial simplifies the procedures, increases the velocity and efficiency of trial with its consequence the profit of defendant by reducing 1/3 of conviction and not application of life imprisonment sentence (*Unifying Decision no.2 date 29.01.2003, of United Colleges of Supreme Court, Tirana*).

In cases when the condition of procedure acts brought for adjudication is not objected by the defendant either in form or in content, the issue to proceed with simplified trial does not present any difficulties. The defendant accepts the condition of procedure acts and on their basis the court announces the final decision reducing 1/3 of sentence if the defendant is claimed guilty for the felony he has been charged of.

The problem gets complicated when after submission of request for an abbreviated trial by the defendant the court refuses to proceed with an abbreviated trial. In this case the refusal of request for an abbreviated trial happens for reasons not related with behavior of defendant but mainly because of shortcomings ascertained from court in preliminary investigations.

In this special situation, the jurisprudence of Supreme Court and that of Constitutional Court has determined the nature of abbreviated trial, the cases of abbreviated objection, implying also the principles that must lead the court in function of guaranteeing the due process, without threatening fundamental rights of participating defendant in trial.

2. Abbreviated Trial in Albania and Limitations of Its Enforcement

In second section of Seventh Title of Criminal Procedure Code are the criminal procedure provisions which regulate the Abbreviated Trial. Actually this institute is provided in articles 403-406 of Criminal Procedure Code.

As it was above underlined, the abbreviated trial by request of defendant which must be advanced before the judicial examination is declared open. When the preliminary investigations are closed, the prosecutor deposits in court the request for judging the charge or charges raised on defendant.

In the code of criminal procedure in Albania, the judge of preliminary hearing is not provided as an intermediate step. First, this subject in presence of prosecutor and defendant with his lawyer in hearing controls if the investigations

performed by the prosecutor are complete and there is no need to perform any other additional investigating actions. This subject also estimates if the charge proposed by the prosecution is harmonized with criminal fact for which the defendant is brought in trial. In last case if the raised charge is not harmonized with the criminal evidence, the preliminary hearing judge can intervene to determine the right charge on which basis the defendant will be judged in judicial hearing.

In actual code of criminal procedure the prosecutor enjoys the discretionary power on formulating the charge, notification of charge to the defendant and the submission of charge in court against the defendant. In formulating the charge the prosecutor does not have to first take the declarations of defendant about charge he is notified about. On the other side the defendant during the preliminary investigations does not have any procedure possibility to object the charge notified by prosecution.

The defendant can oppose the charge raised in court during the examination of criminal case. The rejection of charge in effect of this writing refers only to the objection related to the right legal qualification that must be made to the criminal fact attributed to the defendant.

The request of defendant for an abbreviated trial is examined by the judging panel as a preliminary request, then if this panel evaluates that this criminal case can be resolved with procedure acts where they are, as submitted by prosecution then it takes the decision and proceeds with abbreviated trial. If the court evaluates that the criminal case cannot be resolved with actual condition of procedure acts, it refuses the request for an abbreviated trial and continues the trial with an ordinary judgment.

In an hypothetical case if the criminal case is brought for trial in Court of Serious Crimes, the 5 judges panel exercising its functioning competence examines the request for an abbreviated trial if it has been submitted by the defendant and in case the court accepts it, it proceeds with the abbreviated trial procedure. Otherwise if the request for an abbreviated trial is not accepted, then the case proceeds with the ordinary one.

The abbreviated trial hearing is held with participation of prosecutor, of defendant and his defense lawyer. In judicial hearing of abbreviated trial the prosecutor sets forth the results of investigation in a summarized way and in the end of judicial process he asks for defendant to be claimed guilty for the criminal act qualified by him in abbreviated trial. The defendant does not have any rights to submit new evidences about criminal fact to alleviate his position during the abbreviated trial, because he has agreed with all the acts brought in trial by the prosecutor.

After the court has listened to the defendant and to his defense lawyer about their viewpoints they have for the fact presented in trial and the respective charge, in the end of judicial process the court closes the judicial examination and gives its verdict regarding the criminal case.

When the court gives a conviction sentence, it reduces its imprisonment or fine by one third. Against the court decision it can be made a claim by the side of defendant and/or prosecutor in Court of Appeal.

3. The Abbreviated Trial and the Invalidity of Procedure Act

As above mentioned, the abbreviated trial is held only if the defendant uses this right recognized by law submitting a request before the judging panel of his case and before the judicial examination is declared open.

The submission of request by defendant for an abbreviated trial is a *conditio sine qua non* in absence of which the court cannot proceed *ex-officio* with abbreviated trial.

Nevertheless, not in all cases the request of defendant to have an abbreviated trial is accepted without any reasonable restriction from court. Basing on article 404 of the Criminal Procedure Code the court can refuse the petition for abbreviated trial, when it estimates that the condition of acts does not help to judge the case on charge of defendant this way and as a result the procedure acts have to pass through a judgment according to the ordinary way (*Article 404 of the Code of Criminal Procedure*)¹.

The criminal procedure law provides the condition of procedure acts brought by prosecution as requirement to admit the request for an abbreviated trial. In order that the interpretation of expression *condition of procedure acts* could not be enforced by the courts for similar cases in various ways, the Supreme Court in its Unifying Decision No.2, date 29.01.2003 has established the cases when the condition of procedure acts impedes the ordinary court to refuse the abbreviated trial.

According to this unifying decision with expression *condition of procedure acts* should be meant the fact that the court holds the obligation that before taking decision on accepting the request, it ought to examine the acts in details and in case it preliminarily ascertains their invalidity when it finds the court impossible to give a grounded decision, the court

¹ When the court evaluates that the case can be resolved in condition of acts, it decides pro the abbreviated trial. Otherwise it refuses the request.

should not accept the request for an abbreviated trial since at the beginning.

The invalidity of procedure acts should mean the cases of absolute invalidity of procedure acts which in principal may be ascertained by the court with no need that the defendant or the prosecutor makes a request about ascertaining the invalidity of procedure acts compiled during the preliminary investigation phase.

The article 128 of the Criminal Procedure Code provides the cases when the procedure acts are absolutely invalid. According to such provision the absolute invalidity is related to such acts which since when they have been compiled they have not respected the provisions regarding the terms to be such case's judge, and the number of judges who are indispensable to form the certain colleges as by this code, the right of prosecutor to practice the criminal prosecution and his participation to the process, the summons of defendant or the presence of lawyer when it is obligatory. An act legally qualified as absolutely invalid cannot become valid (*Article 128 of the Code of Criminal Procedure*).

Basing on the unifying decision mentioned above, the absolute invalidity of acts ascertained by the court before it gives the verdict on defendant's request for an abbreviated trial, constitute a legal ground that the court refuses the request for an abbreviated trial. The situation when the condition of acts is such as it does not allow the abbreviated trial, is the case when the procedure act is absolutely invalid basing on ascertainment made always by the court but before giving the verdict on request for an abbreviated trial.

The refusal of request for an abbreviated trial is related with content of procedure acts. For instance we can bring the case when the procedure acts have no shortcomings regarding their invalidity, but they do have incongruities of a procedure sort which is with consequences for the criminal proceeding itself and has a direct influence to the defendant's procedural position.

4. The Abbreviated Trial in Relation to the Change of the Offense Legal Qualification

The Albanian judicial practice has had cases when the charge formulated by the prosecutor has not been correct, because it did not totally complied with the criminal fact committed by the defendant. The criminal fact really responds to a criminal act provided as such by the criminal code, while the prosecution notifies the defendant incorrectly a charge which does not respond to a criminal fact but this charge is provided for another criminal act different from the one doubted for the defendant to have committed.

In this case despite the fact that the defendant can submit in court a request for an abbreviated trial, the court can refuse the request because the criminal case cannot be resolved in the condition of acts. In this case first the court ascertains an evident inconsistency between the procedure acts which reflect the criminal fact in relationship to the charge formulated for such fact by prosecutor. When the inconsistency of criminal fact with the charge formulated by the prosecutor aggravates the defendant's position, then the court is put before the legal obligation not to accept the request for an abbreviated trial.

The jurisprudence of Constitutional Court of Albania evokes the case of violation of defense right in examination of criminal case in jurisdiction of ordinary courts, which after having accepted the request of defendant for an abbreviated trial, in the conviction sentence had changed the legal qualification of criminal offense aggravating the defendant's position. The aggravation of defendant's position by the court in the type of abbreviated trial was provided by defense and as a result the ordinary courts by aggravating the defendant's position had violated the constitutional standard of defendant defense's right.

Actually in this case, the defendant L.L. has been charged of the criminal act of "Failure to report a crime" provided by paragraph 1 of the Criminal Code where it is provided the conviction by a fine or up to three years of imprisonment.

According to the request submitted by the applicant and his lawyer, the court has proceeded with abbreviated trial. The Court of First Instance for Serious Crimes, basing on article 375 of the Criminal Procedure Code has decided to change the legal qualification of criminal act and through its decision among others it has decided to declare the applicant guilty for the criminal act of "Trafficking narcotics", committed in collaboration, remained in temptation, provided by articles 283/a/2 and 22 and 23 of the Criminal Code punishing him by 9 years of imprisonment. In application of article 406 of the Criminal Procedure Code the court has finally convicted the applicant by 6 years of imprisonment.

Against this sentence the applicant and his defense lawyer has submitted complain. The Appeal Court for Serious Crimes by its sentence has decided to leave in force the decision of First Instance Court for Serious Crimes.

The Criminal College of Supreme Court in Counseling Chamber has decided to reject the recourse submitted by the applicant, as it does not contain any reasons from those provided by article 432 of the Criminal Procedure Code (*Constitutional Court no. 4 date 10.02.2012, Tirana*).

According to the evaluation made by the Constitutional Court in the above mentioned example, the First Instance Court for Serious Crimes by changing the legal qualification of criminal act, after it has accepted the request of defendant

to be proceeded with an abbreviated trial, has not respected the requirements defined by Albanian jurisprudence regarding this institute. So, the First Instance Court for Serious Crimes has not given to the applicant the possibility to exercise the right of defense towards a new criminal act (what's more a heavier one).

The Constitutional Court after defining the constitutional aspect and the institute of changing the legal qualification of criminal act by the court it underlines its attitude that, during the ordinary trial, it is an exclusive competence of courts of ordinary jurisdiction to make the change of legal qualification of criminal acts. Whereas in special trials, as the abbreviated trial is considered as well, this right must be exercised in conformity with the features of such trial and especially with the fact that to proceed with such type of trial, beyond the request of defendant, it is also required indispensably the decision or approval of the judge.

Before accepting the request for an abbreviated trial according to the instruction of Constitutional Court, the court must first take into consideration by evaluating even the legal qualification of criminal act determined by the prosecutor. Consequently, if the court doubts on such qualification, this element is sufficient for court to put down the request of defendant to proceed with an abbreviated trial and to continue the trial with an ordinary procedure respecting this way all the principles of a due legal process, like the cross examination, the right of defense etc.

Through the example of constitutional practice mentioned above, the doubt of the court when it has been submitted the request for an abbreviated trial regarding the legal qualification of the criminal act determined by the prosecutor is sufficient that the court refuses the petition for an abbreviated trial.

So even in this case the problems that may exist with procedural acts which are raised not for reasons related to the fault of defendant can influence directly to the defendant in rejection of his request for an abbreviated trial.

As a result we can say that in some cases the petition of defendant for an abbreviated trial referring to the provisions of criminal procedure code may result as an inefficient request.

The defendant not by his fault or not because of his behavior may be refused for his request for an abbreviated trial because of absolute invalidity of acts brought in trial by the prosecutor or because of an incorrect legal qualification of the criminal act made by the prosecutor during the preliminary investigation phase.

5. The Right to Refer to the Court

In both above mentioned cases, the responsibility to refuse the request for an abbreviated trial falls on prosecution. So, it would not be fair by the court to refuse to the defendant his application for an abbreviated trial because of "mistakes" made by the prosecutor in preliminary phase considering this regarding the incorrect compilation of procedural acts, or referring to incorrect formulation of charge towards the defendant.

In this case the defendant might be found in an unsecure situation because on one side the law recognizes him the right to ask for abbreviated trial resigning from some of constitutional rights as taking evidences, the cross examination in function of obtaining the reduction of conviction and on the other side, his request might be rejected for reasons related to "defects" of investigation made by the prosecutor (*Decision no. 14 date 26.03.2012 of Constitutional Court, Tirana*).

In this way the right that the defendant owns to ask for an abbreviated trial in above circumstances is transformed to an inefficient tool. Referring to the jurisprudence of Supreme Court and to that of Constitutional Court, the article 404 of the Criminal Procedure Code regulates the decision taking of the court for abbreviated trial with the condition of procedural acts brought in trial. This provision in above mentioned cases constitutes in itself a restriction for the effective practicing of defendant's right to ask for an abbreviated trial.

Taking account the effects that the abbreviated trial brings, regarding the judicial economy particularly the extent of punishment, it is estimated the indispensability of avoiding restrictions provided by article 404 of Criminal Procedure Code to the right of being judged by abbreviated trial removing the legal impediments which refuse such type of trial not for the defendant's fault. The choice of abbreviated trial as a procedural right influences directly to the determination of conviction, which is reduced by 1/3 if proceeded with an abbreviated trial.

In this case we have to do with an aspect of material law which is enforced through the right of procedural law on advancing the request for an abbreviated trial. In the above mentioned cases considering that the judgment in the first instance can be held by the ordinary rite of judging because of "imperfect condition" of acts brought by prosecutor, the defendant (not for his fault) does not profits from the reduction of conviction by one third.

So the article 404 of the Criminal Procedure Code for the above mentioned cases referring to the condition of acts negating to the defendant the profit of 1/3 of conviction, practically has negated to him the right to address to the court.

The right to address to the court (access in court) is a fundamental right for a due legal process provided by article 6 of the European Convention for Human Rights and Freedoms and as a constitutional right provided by article 42 of the Constitution of Republic of Albania.

6. Conclusions

The lack of some additional elements in article 404 of Criminal Procedure Code in some circumstances mentioned above can transform the request of defendant for an abbreviated trial to a non effective request causing this way impendance of defendant's right to refer to the court.

In this aspect it is evaluated that the institute of abbreviated trial provided in the code of criminal Procedure of Albania requires the presence of preliminary hearing judge who actually is a subject not included in code. Referring to the nature and functions that the preliminary hearing judge has, taking as model even the other criminal procedure systems which have included in their content the preliminary hearing judge, when it comes for the institution of abbreviated trial, his presence is necessary.

The main role of preliminary hearing judge is to control and examine the preliminary investigations made by the prosecutor before the investigated case is judged in merits by the court. If the preliminary investigations are not complete or the procedure acts are not clear, such hypothetical situations are sufficient for the judge of preliminary hearing to return through a decision, the criminal case once more to investigation on goal to confirm all the facts which will be necessary to judge the criminal case.

At the same time the judge of preliminary hearing provided by law with the right to control the investigating acts compiled by the prosecutor in preliminary investigations during the debate at preliminary session may give to the prosecutor the due legal space to modify the charge making so the compliance of the new charge with the criminal fact for which the defendant has been investigated.

Consequently, the control by the judge of preliminary hearing of investigations done by the prosecutor is an additional guarantee to improve the criminal proceeding in complex.

A criminal proceeding corrected in the right way offers to the defendant real possibilities and transforms the request of defendant for an abbreviated trial to an effective request. By including the preliminary hearing judge to the criminal procedure code, it can be removed the existing impediment of defendant to have the right of access in court by request for an abbreviated trial.

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