TO THE CLASSIFICATION OF THE POWERS OF THE APPELLATE COURT ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE

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Abstract

The paper examines the essence of the appellate court as a controlling judicial instance and clarifies the basic principle according to which the appellate court works and issues judicial acts. Based on this, a check was made to match the nature of the appellate court proceedings with the nature of the classification of his powers as proposed in Article 334 of the Criminal Procedure Code. At the end of the paper, a new classification of his powers, compatible with the nature of appellate judicial review, was developed.

Keywords: *court, review, trial, sentence, accused party, prosecutor, judicial powers.*

1. Introduction

This report is related to the clarification of the meaning and application of significant norms of the Criminal Procedure Code of Republic of Bulgaria. The word is about important texts that outline the type and arrangement of the powers of the appellate court, as well as the cases in which they should be exercised. The aim is to ensure without problem understanding and application of Art. 334, Art. 335, Art. 336 and Art. 337 of the Criminal Procedure Code. This is of essential importance both for the rights of citizens and for the full adaptation of the intended legal norms to the spirit of the control judicial proceedings themselves. Here, normative resolutions of problems are proposed in accordance with the philosophy of second-instance judicial proceedings and with the need to preserve "by all means" the role of the appellate court as a full-fledged guarantee against procedural error in criminal proceedings. It necessarily follows that the report recommends and insists on the principled compatibility of the appellate proceedings, both with Chapter Two of the Code and with the tasks of criminal proceedings. Only with such compatibility a fair trial can be ensured and citizens' confidence can be strengthened in the judiciary in the Republic of Bulgaria.

2. Contents

Before considering the powers of the appellate court, it is appropriate to point out that the appellate proceedings are an important guarantee of both the public and the private interest in the criminal process, since both interests require the correct decision of the criminal case. The appellate proceedings provide precisely this opportunity, as it is controlling in its legal nature and is aimed at eliminating vicious judicial acts from the legal world. The verification of the correctness of an act issued by the first judicial instance before a higher instance, and more precisely before

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the next judicial instance, is also denoted by the word combination - appellate review.

Before the court of second instance are attacked, i.e. appeal and protest not entered into force judicial acts of the court of first instance. More specifically, the appellate court verifies the correctness of the judgments issued by the court of first instance in criminal cases of a general and private nature - Art. 313 of the CPC[1]. Validation is performed in three directions.

Firstly, the contested judgment is examined for legality. The appellate court verifies whether the sentence rendered complies with the material and procedural law applicable to the case, and also whether the criminal proceedings themselves were conducted in accordance with the requirements of the law.

Secondly, the assailed judgment is examined for reasonableness. This means that the appellate court checks whether the facts accepted as established by the verdict correspond to the evidence and means of proof in the case. The appellate court answers the question of whether there is an overlap between the factual conclusions of the judge and the evidentiary material from which they are drawn.

Thirdly, it is checked whether the sentence passed is fair. The appellate court reviews the penalty imposed by the verdict. The review concerns the individualization of punishment, i.e. the control includes the manner in which the court of first instance has determined the type and amount of punishment according to the degree of public danger of the act and of the perpetrator in the specific criminal proceedings.

It is important to note that, according to the Bulgarian law, the appellate court makes a comprehensive review of the contested sentence, regardless of the grounds on which it was appealed. What's more, the intermediate appellate review instance shall also revoke or modify the sentence in the section that has not been appealed, as well as with respect to the persons who have not filed an appeal, if there are grounds therefore. Proceedings before the intermediate appellate review instance shall be instituted by protest of the prosecutor or by appeal of the parties (the accused party, the victim and their defenders). Appeals and protests shall be filed within 15 days after the announcement of the sentence. Appeals and protests shall be filed through the court which has pronounced the sentence – Art. 319 CPC.

The control proceedings commented here are most significant for the rights of citizens in view of the so-called the revision for correct on the non-enforced first-instance verdicts according to the operation of the appellate principle. According to this principle, the verdicts are checked for the presence of defects, the removal of which is imperative to reach a lawful and fair administration of justice in the country. Georgi Mitov successfully notes that the Bulgarian: "appellate review of the sentence has a complex nature. It combines within itself judicial control over the activity of the court of first instance and the rendered judicial act with a specific form of examination and decision of the case on its merits. In other words, the appeal is a manifestation of judicial control over the sentence and the administration of justice"[2] In this sense, our appellate proceedings constitute a "second - first instance"[3] on the merits of the criminal case. The appellate court can therefore rule anew and in a

[1] Abbreviation of Criminal Procedure Code.
[2] G. Mitov, *Vazivno proizvodstvo po nakazatelni dela*, Sibi, Sofia, 2016, p. 41.
[3] *Ibidem*, p. 42.

different sense on the questions of guilt and criminal responsibility of the defendant. He can re-decide the case by convicting an acquitted or acquitting a convicted.

Another distinctive feature of the Bulgarian appellate proceedings, as it became clear above, is the effect of the prohibition on worsening the situation of the accused party (reformatio inpejus). This prohibition, as generally noted in the theory, provides the defendant with peace of mind on appeal and prohibits the court from aggravating his situation unless there is an accompanying protest by the prosecutor or an accompanying complaint by the private complainant or private prosecutor.[4] When aggravation of the defendant's position is sought by the appellate court, the protest and appeal must be relevant, i.e. to contain an express request for that - Art. 335, paragraph 4 and Art. 336, Art. 337, paragraph 2 of the Criminal Procedure Code.

In case of need, the appellate court can make a factual determination in the case (Art. 332 in conjunction with Art. 315 of the Criminal Procedure Code), this follows from the principle that it can decide the criminal case on its merits. For this purpose, the appellate court is unrestricted in its review, it fully checks the correctness of the verdict, regardless of the reasons given by the parties. The main view that I seek to share with the report is precisely that the powers of the appellate court and their arrangement in law should be marked by the operation of the appellate principle. In other words, from the position of the appellate court of “second-first instance.” Has this been achieved at the normative level?

When analyzing the provisions of chapter Twenty-one of the code, it is inevitable not to undergo a teleological and systematic interpretation of Art. 334 of the CPC. The purpose of the law is an attribute of the law itself.[5] Law as an organized system has a certain direction conditioned by the achievement of significant social results. It can even be assumed that "law is a means of achieving certain social goals by legal means"[6] As for the ratio legis inserted in the appellate proceedings, it should be specified that it must be discovered and deduced through interpretation by the interpreter, because it is nowhere specifically indicated by the legislator. In this sense, jointly interpreting the provisions of section one of chapter Twenty-one of the CPC, the purpose of the appellate procedure is to serve as a tool to ensure that in the social community, criminal law cases will be resolved, solely and only with the help of effective correct criminal convictions. Therefore, the legislator proceeds from the understanding that the work of the first instance court includes the possibility of making a procedural error and, in view of this, it is necessary to provide control judicial proceedings for its possible establishment and elimination. The results of social practice show, not only that a mistake can be made in the decision of the case by the first court instance, but that a mistake is too often made. This is what G. Mitov also observed: "the appeal aims at legal peace so that an incorrect and illegal judicial act does not remain. We cannot accept that the purpose of the appeal is to set aside or modify the first instance judgment. Unfortunately, in practice, this is often the case - in a significant number of appealed cases, the result is exactly this - the attacked act is amended or canceled"[7]. The appellate court

[4] *Ibidem*, p. 46.
[5] R. Tashev, *Teoriya na talkuvaneto*, Sibi, Sofia, 2000, p. 234.
[6] *Ibidem*, p. 235.
[7] G. Mitov, *Vazivno proizvodstvo po nakazatelni dela*, Sibi, Sofia, 2016, p. 182.

is the "guardian" of the correct decision of the case. It is designed as a "second-first" instance in essence and last instance on the facts of the case, namely, in order to be able to really and effectively reach the undesirable but often admitted procedural error by the court of first instance. It is not argued here that mistakes are made in all first-instance cases in the country, or that the error of the first instance must necessarily be expected by litigants and citizens, but that such mistakes are often made, and that the powers of the appellate court must be adapted to this circumstance. Is it so de lege lata?

This question should be answered in negative. The arrangement of the powers of the appellate court is not in line with either the purpose of the appellate proceedings or the results of social practice.

According to Art. 334 of the CPC: "the intermediate appellate review court may:

1. revoke the sentence and return the case for another examination by the first-instance court;

2. revoke the first-instance court sentence and issue a new sentence;

3. modify the first-instance sentence;

4. rescind the sentence and terminate criminal proceedings in cases under Article 24, Paragraph (1), Items 2 to 8a and 10 and Paragraph (5);

5. suspend criminal proceedings in cases under Article 25;

6. confirm the first-instance sentence. "

From the gradation of the powers of the appellate court two things immediately make an impression:

firstly, the legislator places as the most important (begins with) a power that is not distinctive for appellate proceedings. Revoke of the sentence and return of the case for a new trial is a typical control-revocation power and is characteristic of the cassation proceedings. It is reasonable from the point of view of the purpose of the law to impose as leading the powers to set aside the first-instance judgment and decide the case on the merits, as well as that of amending the first-instance judgment;

secondly, the legislator unjustifiably puts the suspension and termination of the criminal proceedings before the confirmation of the first-instance sentence, as if they were more frequently advocated hypotheses in social practice. Thus, it is hardly indicated to the law enforcers that the confirmation of the first-instance judgment is the most distant, the rarest, the most unacceptable and the most extreme procedural possibility. The appellate court affirms only if there is nothing else to do in the case - it is baseless!

According to the above arguments, it is imperative that the powers of the appellate court should be preserved, but rearranged in order of importance. Their rearrangement should also be guided by the results of the systematic interpretation of all provisions of the appellate procedure. This means that the new enumeration of the appellate court's powers should be guided by the fact that the appellate court is an instance that can conduct fact-finding and decide the case on its merits.

I propose the following de lege ferenda amendment to Art. 334 of the Criminal Procedure Code. The intermediate appellate review court may:

1. revoke the first-instance court sentence and issue a new sentence;

2. modify the first-instance sentence;

3. confirm the first-instance sentence;

4. revoke the sentence and return the case for another examination by the first-instance court;

5. rescind the sentence and terminate criminal proceedings in cases under Article 24, Paragraph (1), Items 2 to 8a and 10 and Paragraph (5) of the CPC;

6. suspend criminal proceedings in cases under Article 25 of the CPC.

The proposed new arrangement of the powers of the appellate court is already in line with the purpose of the proceedings itself and ultimately with the spirit of Art. 338 of the CPC, according to which the appellate court confirms the sentence only when it finds that there are no grounds for its cancellation or amendment.

A proposal to amend the law must also be made in accordance with Art. 335 of the CPC. As a starting point for this undertaking Art. 335, paragraph 3 of the Code will be used.

According to Art. 335, paragraph 3 of the Criminal Procedure Code: "in cases under Article 348, paragraph 3 the appellate court shall revoke the sentence and remit the case to the first instance, unless it can itself eliminate the violations allowed or these might not be avoided in a new examination of the case". This refers to the cases where an appellate review is reached a second time in the same case. Then, in order to achieve procedural economy and speed, the legislator prescribes an obligation for the appellate court to decide the case on its merits, i.e. the appellate court decides the case instead of returning it a second time to the trial court for decision. In Art. 335, paragraph 3 CPC, an internal reference is made to paragraph 2, and no such reference is made to paragraph 1 of the same article. Should such a reference be made?

From the strict interpretation of paragraph 3 of Art. 335 of the Code comes to the conclusion that the cases referred to in paragraph 1 of Article 335 of the Criminal Procedure Code do not fall within its scope. Therefore, when the conditions of paragraph 1 are present again, the appellate court can return the case instead of deciding it on its merits. In Art. 335, paragraph 1 of the CPC indicates a case where the appellate court revoke the sentence and sends the case to the prosecutor. From Art. 335, paragraph 3 of the Criminal Procedure Code, the appellate court has no obligation to decide the case on its merits if it comes to the conclusion a second time that the case should be returned to the prosecutor. Such an obligation exists only if the case has to be returned a second time to the court of first instance. The problem is not in the dual application of the authority to cancel and return the case for a new trial, but in the fact that Art. 335, paragraph 2 of the Criminal Procedure Code demanded the cancellation of the sentence and the return of the case for a new trial to the court of first instance due to significant violations of the procedural rules. The revoke of the sentence and the return of the case in the sense of Art. 335, paragraph 1 of the Criminal Procedure Code is because of the finding of the appellate court that the crime for which the proceedings were initiated on the complaint of the private complainant is of a public nature. The return of the case to the prosecutor is due to mistakes made in the qualification of the crime, and not due to significant violations of the procedural rules. Probably for this reason, paragraph 1 of Art. 335 of the CPC is excluded from the scope of Art. 335, paragraph 3 of the Code. Whether this is an accidental act of the legislator or his well-thought-out action remains a mystery, because he has nowhere indicated that the ground for cancellation of the sentence is the violation of the substantive law contained in it (wrong legal qualification of the act), as well as themselves the duties of the prosecutor after receiving the returned case. Any mandatory instruction of the court to the prosecutor regarding the legal qualification applicable to the case is a form of interference in the prosecutorial function. Thus, from the analysis of Art. 335, paragraph 3 of the Code, it is concluded that it is correct, paragraph 1 of Art. 335 of the CPC to be dropped, instead of being

included in the content of Art. 335, paragraph 3 of the CPC. Georgi Mitov is of a similar opinion: "... there are no grounds for the appellate court to cancel the contested judicial act and return the case for a new examination. Establishing a different nature of the crime is related to the application and interpretation of the substantive law. In the specific case, the finding by the appellate court of the fact that the crime, subject of consideration in the proceedings, which is based on the victim's complaint, is of a general nature, goes beyond the application and interpretation of the substantive law and has significant procedural consequences with a change in the nature of the order of examination of the criminal case... the possibility of the court to return the case to the prosecutor upon establishing a change in the nature of the crime subject of the proceedings, de lege ferenda should be an independent power, which is specified in a separate text".[8]

In view of the frequency of application in practice and discussion in theory of Art. 336, paragraph 1, item 1 of the CPC, and for its qualitative distinction from Art. 337, paragraph 1, item 2 of the CPC, it is important to provide for an explicit legislative distinction between these two cases of deterioration of the situation of the defendant by the appellate court. This can happen satisfactorily with the development of a definite legal norm in which to define the concept of "the law for a more heavily punishable crime" and to list, for example, its most typical manifestations. This will bring clarity to the exercise of individual powers by the appellate court, as well as the possibility of relating by analogy other similar factual cases under the hypothesis of Art. 336, paragraph 1, item 1 of the Criminal Procedure Code, which will significantly ease the work of the parties in the case! The general beneficial result would be to limit the possibility of making a procedural error in the case! Nowadays it is minimized through theory. It is there that the concept of " more heavily punishable crime " is associated with a mistake made in the qualification of the crime, while "increasing the amount of punishment" is associated with a mistake made in the individualization of criminal responsibility. In the first case, the appellate court corrects the error by applying a law with a more severe legal qualification, if there was an accusation of this in the first court instance. In the second case, the appellate court corrects the error by maintaining the qualification given in the case and increasing the criminal liability of the defendant.

Moreover, the adoption of a definitive legal norm to describe and distinguish the content of the concepts: "a law providing for equally or for same crime" will also have a positive impact on legal practice - Art. 337, para. 1, item 2 of the Criminal Procedure Code. Currently, the distinction between the cited terms in practice is achieved by using the most general standards developed for this purpose in theory. For example, the "same punishable crime" is present when, in the case, the appellate court has to classify the crime under another component of the same crime or under the same component of the crime, but with an insignificant change of the facts of the accusation. The term "equally punishable crime law" refers to the cases when the appellate court misrepresents the facts relevant to the case under a new crime category (qualification), different from the previous one, as the punishment for both categories is the same.[9]

[8] *Ibidem*, p. 246-247.
[9] *Ibidem*, p. 203.

3. Conclusions

In conclusion, with the problems outlined above in the formulation and application of Art. 334, Art. 336 and Art. 337, paragraph 1, item 2 of the Criminal Procedure Code sought to confirm the view that the appellate court should function as a "second-first" court with clear and logically distributed procedural authority. With the permissions and recommendations proposed in the report, the provisions of the appellate proceedings become more precise and more applicable, both for the competent state authorities and for the citizens of the Republic of Bulgaria.

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