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Driving a Vehicle by Holding a Licence Not Appropriate to the Category to which the Vehicle Belongs by a Person with a Suspended Driving Licence. Legal Classification. Appeal Within Time Limit.

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Abstract: *The purpose of this paper is to highlight the interpretation and application of the law by the courts in a case that has raised both substantive criminal law and criminal procedure issues. Thus, it is of interest to know the legal classification that must be assigned to the act of a person who commits several forms of the same offence, provided for in the same criminal law. In the present case, the discussion refers to S. 335 (12) of the Criminal Code: Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which was issued for a different category or subcategory than the one in which the vehicle is included, or whose license has been suspended, withdrawn or rescinded or who is not entitled to drive vehicles in Romania shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine. From a procedural point of view, it is also of interest to analyse the time from which the appeal period starts to run and the defendant's compliance with this period in the context of the fact that the appeal was lodged after the enforcement of the first instance judgment.*

Keywords: *driving a vehicle, withdrawn driving license, legal classification, appeal.*

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Trial at first instance

By the indictment drawn up by the Public Prosecutor's Office attached to Huşi District Court on 25.08.2020, in case no. 2387/P/2019, the accused SE was taken to court, in a state of freedom, for committing the offences of driving a motor vehicle on public roads by holding a licence not appropriate to the category of the vehicle in question, as provided for by S. 335 (2) sentence 1 of the Criminal Code and driving a vehicle on public roads with a suspended right to drive provided for in S.335 (2) sentence 3 of the Criminal Code, both with the application of S. 38 (2) of the Criminal Code.

In fact, in the indictment, it was held that on 03.10.2019, at 01,00, the defendant was stopped by the police while driving on the DN 28, in the area of Drânceni locality, at the wheel of the vehicle ensemble consisting of the Mercedes Sprinter minibus and the Wiola trailer. At the time of the check, the accused presented his Moldovan driving licence, valid for categories B and C. From the study of the documents presented at the control, it resulted that the maximum authorized mass of the vehicle ensemble driven by the defendant is 6200 kg, and for driving this ensemble it was necessary for the above-mentioned person to have a category BE licence. Following the checks carried out by the Contact Center Galaţi, it resulted that the defendant has asuspended license, since 12.06.2018, for a period of 36 months, the suspension being ordered by the authorities of the Republic of Moldova. Having been heard during the criminal proceedings, the defendant admitted to committing the crime, stating that he knew that his driving licence was suspended following a traffic accident committed on the territory of the Republic of Moldova.

The case was registered om the dockets of Huşi District Court on 07.09.2020 under no. 2130/244/2020.

By the minutes of the proceedings of the Council Chamber of 11.11.2020, which became final by uncontested decision, the Pre-Trial Chamber Judge found the legality of the referral to the court, of the administration of evidence and of the carrying out of the acts of criminal prosecution and ordered the start of the trial.

The defendant, legally summoned, did not appear in court. The defendant has dual Romanian and Moldovan nationality, and during the criminal proceedings he gave an address in Romania (where he is legally domiciled), an address in the Republic of Moldova (where he lives) and

requested that procedural documents be sent to him via a mobile phone application.

By criminal sentence no. 155 of June 7, 2021 delivered by the Huși District Court in case no. 2130/244/2020 the court ordered, under S. 396 (1) and (2) of the Code of Criminal Procedure, the sentencing of the defendant to two penalties:

- one year imprisonment for driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which was issued for a different category or subcategory than the one in which the vehicle is included, as provided for by S. 335 (2) of the Criminal Code with the application of S. 396 (10) of the Code of Criminal Procedure.
- 9 months imprisonment for driving, on public roads, a vehicle for which a driving license is required by law, by an individual whose license has been suspended, as provided for by S. 335 (2) of the Criminal Code with the application of S. 396 (10) of the Code of Criminal Procedure.

Under the provisions of S.38 (2) and S. 39 (1)(b) of the Criminal Code, the defendant was sentenced to the heaviest penalty, to which an increase of one third of the total of the other penalties was added, and he was sentenced to 1 year and 3 months of imprisonment.

The defendant filed an appeal against the conviction. By his grounds of appeal, the defendant appellant SE, acting through his chosen solicitor, requested to be ascertained that the appeal was declared on time, since he was not actually served with the minutes or the judgment and was not summoned to the preliminary chamber proceedings or to appear before the court in the manner indicated by him, i.e. by mobile phone application. For those reasons, it considers that the appeal lodged after the expiry of the time-limit laid down by law may be regarded as having been lodged within the time-limit because the delay was caused by a well-founded ground of impediment (the defendant was not summoned by the method indicated and was not lawfully served with the judgment of conviction) and the request for appeal was lodged no later than 10 days after learning of the existence of the judgment of conviction.

In his grounds of appeal, the defendant requested that the judgment of the court of first instance be dissolved on the grounds that the entire trial phase was conducted without his having been legally summoned, in breach of his rights of defence. The defendant claimed that his rights under S. 374 of the Code of Criminal Procedure had not been respected, that he had not

been able to avail himself of the trial procedure in the admission of guilt and that he had not been able to express his agreement to perform unpaid community service. In the alternative, he requested that his agreement to perform unpaid community service be recorded in a statement by the defendant with a view to the application of the provisions of S. 83 et seq. Criminal Code, i.e. in order to be able to order the postponement of the application of the sentence.

Judgment on appeal

At the trial date of September 29, 2021, the court of appeal questioned the lateness of the appeal, i.e. the request of the defendant appellant that the appeal be found to have been lodged within the appeal period, and by the minutes of September 30, 2021, it rejected, as unfounded, the exception of lateness of the appeal and found that the appeal lodged by the defendant against the criminal sentence no. 155/2021 of 07.06.2021 delivered by the Huşi District Court was lodged within the period provided for by S. 410 of the Code of Criminal Procedure. The appeal court found that during the trial at first instance the defendant was summoned to the first two trial hearings at the address in the Republic of Moldova, address identified by district, locality, street and number, and subsequently also at the address in Romania. The judgement delivered by the Huşi District Court in case no. 2130/244/2020 was communicated to the defendant at his address in the Republic of Moldova, but the documents were returned on 10.08.2021, with the mention unclaimed.

The Court found that, unlike the previous communications, the documents relating to the communication of the decision and judgment delivered in case no. 2130/244/2020 did not contain all the data necessary to identify the defendant's domicile in the Republic of Moldova. Thus, the notification and proof of receipt refer to the district and locality, without indicating the name of the street and the number of the property where the defendant lives. The judgment was also served on the address in Romania and, by posting, on the court's door, but, as the case file shows, the defendant does not actually live at the address in Romania.

In the light of the above, the Court held that the communication of the criminal sentence no. 155/07.06.2021 of the Huşi District Court in the Republic of Moldova to an incomplete address or the communication to the address chosen in Iaşi, but at which the defendant does not live, does not allow the court to establish unequivocally that the defendant has actually received the information on the decision rendered in the case nor, possibly,

the precise time of this receipt. Since it is not possible to draw a precise conclusion from the evidence submitted as to whether the defendant was aware of the decision delivered in case no. 2130/244/2020 of the Huşi District Court, the time-limit for lodging the appeal began to run from the moment when the warrant for the enforcement of the prison sentence was enforced, which is why the Court decided that the defendant's appeal had been lodged within the legal time-limit and granted a time-limit for debating the appeal.

At the hearing on November 17, 2021, the Court, of its own motion, discussed the change of the legal classification of the offence from two offences to a single offence, and on February 16, 2022, after hearing the conclusions of the defendant and of the prosecutor, the Court decided to change the legal classification to a single offence provided for in S.335 (2) of the Criminal Code, given that it is an offence with alternative content, the realisation of several variants of the material element does not lead to the conclusion of multiple offences, the unity of the offences being maintained.

Analysing the appeal, in the light of the pleas raised, but also from all aspects of fact and law, in accordance with S.417 (1) and (2) of the Code of Criminal Procedure, the Court found that the appeal is well founded.

The Court held that the first instance, by analysing and corroborating the evidence adduced in the case, both during the prosecution stage and during the judicial inquiry, established a correct factual situation and correctly concluded that the guilt of the defendant was proven by the evidence adduced.

The defendant's request to refer the case for retrial was considered by the Court of Appeal to be unfounded, given that the defendant was aware of the trial, was summoned to appear at the hearings from 11.01.2021 and 08.03.2021 in the Republic of Moldova, where the defendant received the summonses personally, and subsequently at the address indicated during the criminal proceedings asd well, in order to be served with the procedural documents in Iaşi City.

With regard to the legal classification of the offences held against the defendant, by the minutes of 16.02.2022, the Court ordered its change from two offences provided for in S. 335 (2) of the Criminal Code, into a single offence provided for in this article. According to the doctrine, in the case of offences with alternative content, such as the one provided for in S. 335(2) of the Criminal Code, the different modalities provided for by the incriminating provision are equivalent in terms of criminal significance, so that the fulfilment of more than one of them does not affect the unity of the offence.

As such, in the Court's opinion, the driving by the defendant on 03.10.2019 on public roads of the ensemble of vehicles, with a driving license inappropriate to the category to which it belonged, as well as the right to drive with a suspended licence, meets the constitutive elements of the offence provided for in S. 335 (2) of the Criminal Code.

With regard to the applicable sanction, the Court held that the achievement of the dual preventive and educational purpose of the penalty is essentially conditional on its appropriateness, the court having the objective duty to ensure a real balance between the seriousness of the offence and the social dangerousness of the offender, on the one hand, and the duration of the penalty and its nature (custodial or non-custodial), on the other. Referring to the legal provisions of S. 74 of the Criminal Code, with reference to the actual circumstances of the offence and the personal circumstances of the defendant, having regard to the limits of the penalty prescribed by law, and all the other data particularising both the offence committed - in two normative forms - and the person of the defendant, who is a first-time offender, the Court held that a penalty of one year's imprisonment is sufficient to re-educate the defendant and make him aware of the need to respect the social values protected by law. As regards the method of enforcement of the sentence, in view of the data which favourably characterise the defendant's person, it was held that the purpose of the sentence could also be achieved under the conditions of a suspended sentence under supervision.

For these reasons, by Decision no. 769 of 14.10.2022, the Iasi Court of Appeal admitted the appeal filed by the defendant SE, against the criminal sentence no. 155 of 07.06.2021 delivered by the Huşi District Court in case no. 2130/244/2020, which it partially annulled. In the retrial of the case, the court removed from the sentence appealed the provisions sentencing the defendant to the two penalties, found that the minutes of 16.02.2022 of the Iaşi Court of Appeal ordered a change in the legal classification of the offences against the defendant, from two offences provided for in S. 335 (2) of the Criminal Code with application of S. 38(2) Criminal Code, into a single offence provided for by S. 335 (2) Criminal Code and, on the basis of S. 335 (2) Criminal Code, with application of S. 396(10) Code of Criminal Procedure, sentenced the defendant SE to 1 year imprisonment for the offence of driving a vehicle without a driving licence. Pursuant to S. 91 of the Criminal Code, the enforcement of the one-year prison sentence imposed on the defendant SE was suspended under supervision, and a term of supervision of two years was set, pursuant to S. 92 of the Criminal Code.

Comments on the interpretation and application of the law

As can be seen from the court judgments presented, the courts took different views on the legal classification of the offence committed by the defendant. In fact, both courts held the same factual situation, namely that the defendant drove on the public road an ensemble of vehicles consisting of a minibus and a trailer, the driving of which required a driving licence for category BE, but the defendant had a driving licence only for categories B and C, and his right to drive was suspended when he was detected in traffic.

The prosecutor of the Public Prosecutor's Office attached to the Huşi District Court considered that the defendant's act meets the constituent elements of two offences, both provided for by S.335 (2) of the Criminal Code, as formal multiple offences, and the Huşi District Court accepted this legal classification and ordered the defendant to be sentenced for two offences, to two penalties, applying the rules of multiple offences. In the grounds for the judgment of conviction, the court merely held that, objectively speaking, the material element of the offence is the act of driving in unlawful conditions, having a driving licence which is not appropriate for the category of vehicle in question and having the right to drive suspended, the immediate consequence being a state of danger to road safety.

It should also be noted that, although they filed an appeal, neither the defendant nor his defence counsel criticised the legal classification of the offence.

In the course of the appeal, the Court of Appeal discussed with the defendant and the prosecutor on the change in the legal classification of the offence committed by the defendant from two offences to a single offence and subsequently ordered that the offence be classified as a single offence. In its reasoning for the change of legal classification, the Court noted that the offence provided for in S. 335 of the Criminal Code is an offence with alternative content, so that the occurrence of several variants of the material element does not lead to the conclusion of multiple offences, the unity of offences being maintained.

The appeal court's solution is the correct one, as there is only one offence in this case. The offence provided for in S.335 of the Criminal Code is an offence with alternative content, that is to say, an offence for which the law provides for alternative variants of the material element of the objective side, equivalent in terms of their criminal significance, namely:

- Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which

was issued for a different category or subcategory than the one in which the vehicle is included,
- Driving, on public roads, a vehicle for which a driving license is required by law, by an individual whose license has been withdrawn or rescinded
- Driving, on public roads, a vehicle for which a driving license is required by law, by an individual whose license has been suspended.
- Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who is not entitled to drive vehicles in Romania.

The commission of any of these different offences, as provided for in the criminal law, does not affect the unity of the offence and, consequently, does not give rise to multiple offences, since all the ways of committing the offence have a common material element and the purpose of their criminalisation is also common.

The same arguments were used with reference to the offence of tax evasion by the High Court of Cassation and Justice at the time of its ruling of Decision no. 25/HP/03.10.2017 which established that the actions and inactions listed in S. 9 (1) (b) and (c) of Law no. 241/2005 on preventing and combating tax evasion, which refer to the same company, are alternative variants of the commission of the offence, constituting a single offence of tax evasion provided for by S. 9 (1) (b) and (c) of Law no. 241/2005 on preventing and combating tax evasion. The Supreme Court took into account the fact that tax evasion is an offence with an alternative content, since all the factual methods of committing it have the same purpose.

The judgments handed down in the case also highlight some interesting procedural aspects as regards the manner of service of the judgment delivered. Thus, the grounds of appeal submitted by the defendant and his defence counsel allege that the first court did not use the telephone application indicated by the defendant to summon him and communicate the judgment to him, for which reason it was requested that the appeal be reinstated and that the case be sent back to the first court for retrial. However, the requests of the defendant were not accepted by the Court of Appeal, which found that the defendant had been summoned in accordance with the legal provisions, to the address in the Republic of Moldova, where he actually resides, and to the address in Romania where he is legally domiciled. Moreover, the defendant received two summonses in person, but chose not to attend the trial. The Code of Criminal Procedure does not

regulate summoning by means of mobile phone applications, but provides in S. 259 of the Code of Criminal Procedure that the suspect, the accused and the other parties to the proceedings shall be summoned at the address where they live and, if this is not known, at the address of their place of work. If neither the defendant's home address nor of his place of work is known, a notice containing the particulars of the summons shall be posted at the office of the judicial body. As a result, the Court of Appeal correctly held that there was no breach of the legal provisions on summons and re-judged the appeal without ordering that the case be referred back for judgment.

As regards the serving of the judgment, this was not done in compliance with the legal provisions, since the address to which it was communicated was incomplete, as the name of the street and the number of the property where the defendant lives were not indicated. That fact, together with the finding that the defendant had never lived at the address in Romania, having only been accepted as a lodger in order to obtain Romanian nationality, led the Court to conclude that the defendant had not been lawfully notified of the judgment of conviction. In view of the fact that, according to S.410(1) of the Code of Criminal Procedure, related to S. 406 (1) and S. 396 of the Code of Criminal Procedure, the time-limit for appeal runs from the date of communication of the judgment, and communication did not take place, the time-limit for appeal in the case began to run from the moment when the defendant actually became aware of the judgment, that is to say from the moment when the warrant for the serving of the prison sentence was enforced.

If the first court had served the judgment delivered on the address in the Republic of Moldova used for the summons, the appeal period would have started to run from the moment of service, so the appeal would have been untimely. Only in such a situation could the institution of reinstatement of the appeal and the merits of the case to prevent the defendant from filing an appeal in time could be called into questions.

Another aspect to be mentioned in the factual analysis concerns the applicability of the provisions of S.396(10) of the Code of Criminal Procedure concerning the reduction of the sentence limits in the case of guilty plea. It is clear that in the present case, given that the defendant did not appear at the trial at first instance, he cannot avail himself of the simplified procedure applicable in the case of a guilty plea, since the first instance wrongly held that those provisions applied. The Court of Appeal, hearing only the defendant's appeal, although it noted the error of the first instance, was unable to correct it and was obliged to uphold the same provisions, since otherwise it would have infringed the *non reformatio in prejus* principle provided for in S. 418 of the Code of Criminal Procedure.

References

Criminal Code

Code of Criminal Procedure

Minute of the Meeting of the Presidents of the Criminal Chambers of the High Court of Cassation and Justice and of the Courts of Appeal, Bucharest, 27-28 February 2023