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PROBLEMS OF EVIDENCE IN THE COURT OF APPEAL IN CRIMINAL PROCEEDINGS

Солдатенко О., Юнацький О. ПРОБЛЕМИ ДОКАЗУВАННЯ В СУДІ АПЕЛЯЦІЙНОЇ ІНСТАНЦІЇ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ. Проблеми реалізації чинного кримінального процесуального закону, численні законопроектні пропозиції вказують на недостатню ефективність судової системи та контролю в кримінальному судочинстві, формалізацію процесу прийняття відповідних процесуальних рішень. Це також може свідчити про те, що процес реформування інституту судового контролю триває, відбувається пошук шляхів його вдосконалення, створення доступної та ефективної системи судочинства, що відповідає європейським цінностям та стандартам захисту прав людини.

Однією з гарантій забезпечення захисту прав та свобод громадян України в кримінальному судочинства виступає можливість апеляційного оскарження рішень судів першої інстанції, що не набрали законної сили та розгляд цієї скарги апеляційними судами.

З огляду на це, контрольна функція суду апеляційної інстанції вимагає глибокого вивчення та якісно нового осмислення, що мають на меті удосконалення та підвищення ефективності апеляційного провадження.

Слід зазначити, що судове рішення визнається таким, що відповідає фактичним обставинам кримінального провадження у випадку, якщо в його основу покладено висновки, що ґрунтуються на достовірних доказах, досліджених безпосередньо під час судового розгляду. За будь-яких умов судове рішення не може бути визнано таким, що відповідає фактичним обставинам кримінального провадження, якщо судом не перевірені та не спростовані доводи на захист обвинуваченого та не усунуті сумніви в його винуватості, які могли вплинути на правильність застосування закону України про кримінальну відповідальність, на визначення виду покарання або на застосування примусових заходів виховного чи медичного характеру.

Визначення належності, допустимості та достовірності доказів дозволяє апеляційній інстанції оцінити їх достатність для ухвалення судом першої інстанції, слідчим суддею правосудного рішення. Питання про достатність належних, допустимих і достовірних доказів є надзвичайно важливим у їх оцінці, оскільки дозволяє суду апеляційної інстанції встановити неповноту, неточність та суперечності в доказовому матеріалі.

Запроваджена у законодавстві модель апеляційного провадження потребує вдосконалення. Серед проблем оцінки доказів судом апеляційної інстанції слід відзначити відсутність чіткого алгоритму дій, що негативно впливає на однозначність формування внутрішнього переконання суддів апеляційної інстанції та не дозволяє остаточно дати відповідь на запитання про правосудність (неправосудність) оскарженого судового рішення.

Ключові слова: *суд апеляційної інстанції, апеляційне провадження, доказування, дослідження доказів, оцінка доказів.*

Formulation of the problem. The problems of the implementation of the current criminal procedural law, numerous legislative proposals point to the ineffectiveness of the judicial system and control in criminal proceedings, and the formalization of the process of adopting relevant procedural decisions. This may also indicate that the process of reforming the judicial control institute is ongoing, seeking ways to improve it, and creating an accessible and efficient justice system that is consistent with European values and human rights standards.

One of the guarantees of the protection of the rights and freedoms of Ukrainian citizens in criminal proceedings is the possibility of appeals against appeals against decisions of first

instance courts that have not come to legal effect and consideration of this complaint by appellate courts.

In view of this, the control function of the appellate court requires a thorough examination and a qualitatively new understanding aimed at improving and improving the effectiveness of the appeal proceedings.

Analysis of publications that initiated the solution to this problem. The theoretical basis for studying the issues of appeal proceedings is the research on the problems of proving in the stages of reviewing court decisions, which are executed on the basis of the past legislation (V.B. Alekseyev, V.G. Goncharenko, M.M. Grodzinsky, O.M. Kopyeva, M.P. Kuznetsov, P. A. Lupinska, M. M. Mikheyenko, N. M. Peretyatko, M. M. Polyansky and others). There are very few special studies on this subject. There are only separate scientific works, which pay attention to the specifics of evidence in the court of appeal (N.B. Bobechko, NV Kitsen, SO Kovalchuk, VI Marinov, VI Slipchenko, etc.). .

The purpose of this article is to establish the problems of studying evidence in the court of appellate court in criminal proceedings.

Presenting main material. Appeal proceedings are the stage of criminal proceedings, in which the court of higher instance, on appeal complaints of participants in criminal proceedings in accordance with the law, reconsiders court decisions of the court of first instance that have not acquired legal effect. The purpose of the appeal proceedings is to provide a correction by the higher court of errors and violations of the requirements of the law, which were adopted during the pre-trial investigation and proceedings in the court of first instance, guaranteeing the rights and interests protected by the law of the participants in criminal proceedings, the establishment of legality and justice in criminal proceedings [1, p. 338].

In accordance with Part 4 of Art. 31 CPC, a criminal proceeding in an appeal procedure is carried out collectively by a court of not less than three professional judges and is conducted in accordance with the rules of trial in the court of first instance (Articles 342-345 of the CPC), taking into account the features envisaged by Chapter 31 of the CPC of Ukraine [2].

As a rule, the appellate court reviews the court decisions of the court of first instance within the scope of the appeal. The Court of Appeal has the right to go beyond the limits of appeals requirements in the following cases:

1) if the situation of the accused does not deteriorate;

2) if the situation of the person concerning which the issue of the application of compulsory measures of medical or educational nature was resolved does not deteriorate;

3) if there are grounds for making a decision in favor of persons who have not lodged an appeal. In this case, the court of appeals is obliged to make a decision in favor of these persons.

In the presence of an appropriate petition of the participants in the criminal proceedings, the court of appeal is obliged:

- re-examine the circumstances established during the criminal proceedings, provided that they are not investigated by the court of first instance in full or in breach of procedure;
- to examine evidence which was not investigated by a court of first instance, only if, during the trial of the first instance court, there was a request for the examination of such evidence;
- to examine evidence which became known after the decision of the court of first instance. It should be borne in mind that such evidence may be filed by participants in court proceedings or demanded by a court in the presence of a petition of the participant in criminal proceedings in preparation for an appeal.

As a result of appeal proceedings following a complaint to a verdict or a court of first instance, the court of appeal has the right: to leave the sentence or a decision unchanged; change judgment or ruling; cancel the sentence in whole or in part and adopt a new verdict; cancel the decision in whole or in part and adopt a new ruling; to revoke a sentence or order and to close a criminal proceeding; cancel the verdict or the decision and appoint a new trial in the court of first instance.

According to Art. 409 of the CPC, the grounds for canceling or changing the court decision are: incompleteness of the trial; inconsistency of the court's findings in the court decision with the actual circumstances of the criminal proceedings; substantial violation of the requirements of the criminal procedural law; incorrect application of the law of Ukraine on criminal liability.

It should also be noted that a court decision is deemed to correspond to the actual circumstances of the criminal proceedings if it is based on conclusions based on reliable evidence,

investigated directly during the trial. In any circumstances, a judicial decision can not be recognized as being in accordance with the actual circumstances of the criminal proceedings, if the court has not verified and refuted the arguments in defense of the accused and the doubts in his guilt that could affect the correct application of the law of Ukraine on criminal liability , on the definition of the type of punishment or on the use of compulsory measures of an educational or medical nature.

In addition, in Part 1 of Art. 411 of the CPC provides the grounds, in the presence of which a verdict, a ruling can be canceled or changed from the grounds of non-compliance of the court decision with the actual circumstances of the criminal proceedings:

1) the findings of the court are not supported by evidence, investigated during the trial;

2) the court did not take into consideration the evidence that could significantly affect its conclusions;

3) there are contradictory evidence which is essential for the court's findings, the court decision does not indicate why the court took into consideration some evidence and rejected others;

4) the court's conclusions, set forth in the court decision, contain significant contradictions [3].

Thus, the issue of the study of evidence and its assessment in the appellate court is the most important when making the right decision.

In examining these issues, one should also draw attention to the fact that the CPC does not have an independent article devoted to the peculiarities of studying evidence by the appellate instance. Court of Appeal conducts research of evidence according to the rules established by Art. 84-94 CCP, taking into account the features envisaged by Chapter 31 of the CPC of Ukraine.

Verification of the compliance of the court decision with the actual circumstances of the criminal proceedings may be carried out in the process of proof, which, according to Part 2 of Art. 91 CCP is conducted by collecting, verifying and evaluating evidence.

In addition, taking into account the provision that the appellate review is based on the rules of trial in the court of first instance, it can be concluded that the means of studying the evidence will be identical. However, litigation in an appellate court should not duplicate evidence-based research conducted in the court of first instance. It should be carried out to the extent that is sufficient and necessary to verify the legality and validity of sentences or decisions, taking into account the arguments and requirements set forth in the appeal complaint [4, p. 244].

Also note that u. p. 18 of the Resolution of the Supreme Court of Ukraine of 21 January 2016 in the case No. 5-249x15, the court notes that the immediacy of the examination of evidence means the request to a court of law to investigate all the evidence gathered in a particular criminal investigation by questioning the accused, victims, witnesses, expert , reviewing material evidence, announcing documents, playing back audio and video, and so on. This ambiguity of criminal proceedings is important for the complete clarification of the circumstances of the criminal proceedings and its objective resolution. The directness of the perception of evidence enables the court to properly investigate and test them (as each individual evidence, and in conjunction with other evidence), to evaluate them according to the criteria set forth in Part 1 of Art. 94 CPC, and to form a complete and objective view of the actual circumstances of a specific criminal proceedings [5].

It should be borne in mind that the legislator uses the term "research evidence" during a criminal proceeding in an appeal procedure without disclosing its contents. Therefore, it can be assumed that in accordance with Article 23 and Part 2 of Article 91 of the CPC, the study of evidence is carried out through their verification and evaluation.

However, such a widespread interpretation of the study as a combination of verification and evaluation can not be completely correct, since, based on the general provisions of evidence, the assessment of evidence follows after their verification and expressed in the final procedural documents of the Court of Appeal. Moreover, the identification of research evidence with their re-faith is also not entirely legitimate.

This position is confirmed by the fact that in the doctrine of the criminal process, under the study of evidence, it is understood that the activity carried out by the subjects in the prescribed procedural form of the law is carried out in relation to the analysis of their content in view of the full presentation, the logical sequence, the absence of contradictions, inaccuracies, gaps, comparison with other available evidence in the criminal proceedings, the clarification of

their coherence, the establishment of sources of evidence, and the conduct of procedural actions aimed at their verification. Hence it follows that the study of evidence takes place both through the thinking (logical) and practical - [6, p. 237]. To operate evidence, to use in the proof, they must be studied, therefore, the study of evidence is a necessary element of proof [7, p. 40].

It should be noted in particular that the study of evidence in the stage of appeal proceedings has a number of peculiarities that are determined by the nature of this stage, as well as its general provisions, such as the subject of appeal, the scope of appeal review and the inadmissibility of turning to the worst.

Unlike a study, verification of evidence is an activity aimed at confirming (negating) the information contained in them. Checking evidence means gathering data on which to draw a conclusion on its authenticity and admissibility.

It should be noted that certain features of verification of evidence are typical for the court of appeals. Firstly, depending on the grounds of appeal, it is conducted optionally. In other words, in cases where the parties are not challenging the actual facts and circumstances themselves when appealing to a court of first instance, proof is not required.

Secondly, in the appellate instance, the verification of evidence is not complete (truncated). Unlike the proceedings before the court of first instance, not every evidence is subject to verification in an appeal, but only one that is in any way related to the appeal filed.

Thirdly, the action of Art. 349 CCP does not apply to appeal proceedings, so evidence in the appellate instance may consist of direct investigation of evidence, and be limited to the study of evidence based on the proceedings.

With regard to the assessment of judicial evidence, it is the most important component of prostitution in the court of appellate instance. The assessment of evidence is, first of all, a logical (mental) process for the study of such properties as belonging, admissibility, authenticity and sufficiency and forming a conclusion about them. She, like any other act in the criminal process, has a target orientation and is designed to solve many problems.

Even when verification of evidence in an appellate instance is not in demand, the assessment of evidence is carried out at each appellate investigation. However, it has its own special features compared with the assessment of evidence by the court of first instance.

1. The assessment and reassessment of evidence should be distinguished. Estimates are subject to all new evidence in the proceedings or received in the court of appeal. All evidence available in the proceeding is subject to re-evaluation by the court of appellate instance or its re-evaluation.

2. The assessment of evidence is always carried out by the court of appellate instance. It can be conducted not only in their direct research, but also in their study only on the materials of criminal proceedings. It depends on whether the court of appellate instance carries out the proof or substantiation of its own conclusion.

3. The assessment of the evidence in the appellate instance is not complete (truncated) in character in the light of the assessment of evidence in the court of first instance. This applies both to the volume of evaluated evidence and to the evaluation of specific properties of evidence. The peculiarity of the assessment of the appellate instance is also manifested in the scope of work with certain properties of evidence. Thus, the court of first instance evaluates the affiliation, admissibility, authenticity of the second proof and the sufficiency of their aggregate in order to make a decision in the case. In an appeal, however, it is not always the court to investigate all the properties of evidence, they can be investigated separately, in combination, or not at all examined.

In addition, the amount of evidence to be assessed by the court of appellate instance may not coincide with the scope of the assessment of the first instance. It can be extended in comparison with the evidence that was evaluated in the court of first instance, by providing them with parties or by gathering new evidence by the court of appeal.

4. The lack of immediacy in the study of most of the evidence is another distinctive feature. As was noted, the assessment of evidence by the court of appellate instance is carried out at each appellate review. However, the scope and ways of knowing the actual circumstances (direct or research on criminal proceedings) depend on what grounds for appeal decisions are made and from the fact that the court of appellate instance provides evidence or substantiation of its own conclusion.

According to judicial practice, it is precisely during the assessment and reassessment of evidence in the appellate court that there are many unresolved issues. The explanations of the

higher judicial authorities do not solve them, and even more confusing, leading to delays in the consideration of cases or even intentional violations.

As we have noted, Ukraine's Supreme Court expressed its legal position on this issue in the case No. 5-249x15 dated January 21, 2016. It has been generally observed by the High Specialized Court for Civil and Criminal Cases. In accordance with the provisions of Article 23 and part 4 of Article 95 of the CCP, based on the principle of direct evidence of an investigation, the Court of Appeal has no right to give them a different assessment than that given by the court of first instance, if these evidences was not investigated in the appeal review of the verdict.

That is, if the Court of Appeal merely refers to the testimony of witnesses, which he did not interrogate, and at the same time give another assessment of this evidence as evidence, then such a decision can not be regarded as lawful and well-founded, and therefore it is subject to cancellation with the prize-giving of a new consideration in the court of appeal authorities

Given the absolute majority of judges of the appellate instance, this legal position of the Armed Forces is not sufficiently substantiated, moreover, it is contradictory and non-consecutive [8].

Conclusions. Thus, determining the membership, admissibility and authenticity of evidence allows the appellate instance to assess their sufficiency for the approval of the court of first instance, the investigator judge of the justice decision. The question of the sufficiency of appropriate, admissible and reliable evidence is extremely important in their assessment, since it allows the court of appellate authority to establish incompleteness, inaccuracy and contradiction in the evidence [9].

The model of appeal proceedings introduced in the legislation needs to be upgraded. Among the issues of appraisal of evidence by the court of appellate instance, it should be noted that there is no clear algorithm of actions that adversely affects the unambiguousness of the formation of the internal convictions of the judges of the appellate instance and does not allow to finally answer the question about the justice (unrighteousness) of the challenged judicial decision.

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Summary

The article deals with the peculiarities of the investigation of evidence in the court of appeal in the criminal proceedings. The essence, rules, and also the problematic moments of the research of evidence at the stage of appeal production, namely, their verification and evaluation, are determined.

Keywords: *Court of Appeal, appellate procedure, proving, study of evidence, examination of evidence.*