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USE OF SPECIAL KNOWLEDGE IN THE PROCEDURE OF CRIMINAL CASES

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In the process of examining the case at the trial stage, the judge, in some cases, requests that methodical research be carried out with the application of special knowledge in order to clarify circumstances that are important for the fair settlement of the case. The disposition and performance of the judicial expertise in the trial phase takes place under the conditions of observing the principle of orality, directness, publicity and adversariality. These principles, which underlie the trial of the case, differentiate the procedure for disposing of judicial expertise in the trial phase from the procedure for disposing of expertise in the criminal investigation phase. In essence, the judicial function consists in administering the evidence, the evaluation of the evidence administered in order to pronounce a decision on the merits of the criminal accusation made by the prosecutor against the defendant, as well as the pronouncing of a court decision resolving the criminal law conflict being guaranteed. to the parties and to the procedural subjects the fullness of the rights provided by art. 6 European Convention on Human Rights. In the process of examining the case in the trial phase, the judge in some cases at the request of the parties requests a methodical investigation with the application of special knowledge in order to clarify some circumstances that are important for the fair settlement of the case.

Keywords: *judicial expertise, judicial expert, disposition, conclusion, request of the parties, judicial investigation, court.*

UTILIZAREA CUNOȘTINȚELOR SPECIALE ÎN PROCESUL DE JUDECARE A CAUZELOR PENALE

Probatoriul penal reprezintă totalitatea acțiunilor întreprinse de organele competente ale statului în vederea stabilirii circumstanțelor cauzei. În procesul examinării cauzei în faza de judecată, judecătorul, în unele cazuri, solicită efectuarea unor cercetări metodice cu aplicarea cunoștințelor speciale în scopul clarificării unor circumstanțe care au importanță pentru soluționarea justă a cauzei. Dispunerea și efectuarea expertizei judiciare în faza de judecată are loc în condițiile respectării principiului oralității, nemijlocirii, publicității și contradictorialității. Aceste principii care stau la baza judecării cauzei, diferențiază procedura de dispunere expertizei judiciare în faza de judecată de procedura dispunerii expertizei în faza de urmărire penală. În esenţă, funcţia de judecată constă în administrarea probatoriului, evaluarea probatoriului administrat în vederea pronunţării unei hotărâri cu privire la temeinicia acuzaţiei penale formulate de procuror împotriva inculpatului, precum şi pronunţarea unei hotărâri judecătoreşti prin care să fie rezolvat conflictul de drept penal dedus judecăţii fiind garantate părţilor şi subiecţilor procesuali plenitudinea drepturilor prevăzute de art. 6 a Convenţiei europene a Drepturilor Omului.

Cuvinte-cheie*: expertiză judiciară, expert judiciar, dispunere, încheiere, cererea părților, cercetare judecătorească, instanță de judecată.*

UTILISATION DE CONNAISSANCES SPÉCIALES DANS LA PROCÉDURE DES AFFAIRES PÉNALES

Dans le processus d'examen de l'affaire au stade du procès, le juge demande, dans certains cas, que des recherches méthodiques soient effectuées avec l'application de connaissances spéciales afin de clarifier les circonstances importantes pour le règlement équitable de l'affaire. La disposition et l'exécution de l'expertise judiciaire en phase de jugement s'effectuent dans les conditions du respect du principe d'oralité, de franchise, de publicité et de contradictoire. Ces principes, qui sous-tendent le jugement de l'affaire, différencient la procédure de disposition d'expertise judiciaire en phase de jugement de la procédure de disposition d'expertise en phase d'instruction pénale. En substance, la fonction judiciaire consiste à administrer les preuves, à évaluer les preuves administrées en vue de prononcer une décision sur le bien-fondé de l'accusation pénale portée par le procureur contre le prévenu, ainsi que le prononcé d'une décision de justice résolvant le conflit de droit pénal étant garanti aux parties et aux sujets de procédure la plénitude des droits prévus par l'art. 6 Convention européenne des droits de l'homme. Lors de l'examen de l'affaire au stade du procès, le juge dans certains cas, à la demande des parties, demande une enquête méthodique avec l'application de connaissances spéciales afin de clarifier certaines circonstances importantes pour le règlement équitable de l'affaire.

Mots-clés: *expertise judiciaire, expert judiciaire, décision, conclusion, demande des parties, instruction judiciaire, tribunal.*

ИСПОЛЬЗОВАНИЕ СПЕЦИАЛЬНЫХ ЗНАНИЙ ПРИ РАССМОТРЕНИИ УГОЛОВНЫХ ДЕЛ

Доказательства представляют собой совокупность действий, предпринятых компетентными государственными органами для установления обстоятельств уголовного дела. В процессе рассмотрения дела на стадии судебного разбирательства, судья в некоторых случаях просит провести методическое исследование с применением специальных знаний для выяснения обстоятельств, важных для справедливого и объективного разрешения дела. Размещение и проведение судебной экспертизы на этапе судебного разбирательства происходит при соблюдении принципа устности, прямоты, гласности и состязательности. Эти принципы, лежащие в основе судебного разбирательства по делу, отличают процедуру предоставления судебной экспертизы на этапе судебного разбирательства от процедуры предоставления экспертной информации на этапе уголовного расследования. По сути, функции судебных инстанций заключаются в использовании доказательств, оценке представленных доказательств для вынесения решения по существу уголовного обвинения, выдвинутого прокурором против подсудимого, а также в вынесении судебного решения, разрешающего Уголовно-правовой конфликт, гарантируя сторонам и процессуальным субъектам полноту прав, предусмотренных ст. 6 Европейской Конвенции о Правах Человека.

Ключевые слова*: судебная экспертиза, судебный эксперт, диспозиция, заключение, ходатайство сторон, судебное следствие, суд.*

Introduction

Solving certain circumstances is not possible without the application of special knowledge in various fields, which can be obtained and applied through special training and professional experience, being used for the purpose of researching facts, circumstances, objects, phenomena, etc., which can serve as evidence. in criminal proceedings.

The criminal evidence represents the totality of the actions undertaken by the competent state bodies in order to establish the circumstances of the case. Judicial expertise, within the criminal evidence, is an evidentiary procedure in which the forensic expert conducts research and formulates conclusions regarding certain circumstances, facts, objects, etc. The results of this activity are materialized by the forensic expert in a forensic report, which is a means of proof in criminal proceedings.

Materials and methods applied

A number of research methods have been applied in this paper, including: the logical method (based on inductive and deductive analysis, interpretation of legal norms governing forensic activity, etc.), the comparative method, the systemic method (applicable for the purpose of investigating documents national and international legal rules containing regulations on the institution of judicial expertise in criminal proceedings), the empirical method (in the process of drafting the paper by the author was examined the practice of the ECtHR, the Constitutional Court, the Criminal College of the CSJ and criminal cases were consulted).

Main research ideas

The special importance of the trial phase in the conduct of the criminal trial was noted by several specialized authors who, unequivocally, acknowledged to the court the central role it plays in the conduct of criminal justice. This does not undermine the importance of criminal prosecution, but emphasizes that resolving the conflict of criminal law arising from the commission of a criminal act, establishing the guilt or innocence of the person brought to justice remains the exclusive prerogative of the court [8, p. 641].

During the trial, the court verifies the legality and validity of the criminal accusation formulated by the prosecutor, as well as of the civil claim formulated by the civil party, adopting a decision by which the criminal and civil side of the case is solved; the court's decision may be subject to judicial review by the public prosecutor, the injured party or the parties [18, p. 236].

The disposition and performance of the judicial expertise in the trial phase takes place under the conditions of respecting the principle of orality, directness, publicity and adversariality. These principles, which underlie the trial of the case, differentiate the procedure for disposing of judicial expertise in the trial phase from the procedure for disposing of expertise in the criminal investigation phase.

Matters concerning the disposition of the forensic examination or the hearing of the forensic expert are examined and resolved in order to ensure an objective examination of the circumstances of the case, the complete and detailed investigation of the forensic report, the observance of the legal provisions, as well as the correct and objective assessment of the forensic report in conjunction with the other means of proof.

The purpose of this evidentiary procedure in the trial phase is to resolve by the expert some ambiguities found by the judge, the solution of which requires the application of special knowledge in various fields of science, art, technology or craft, which arose in the examination of the criminal case.

The legislator gives the parties the opportunity to submit requests for the hearing of the judicial expert or the ordering of judicial expertise, at the preliminary hearing, but from a tactical point of view we consider it appropriate to submit requests for the hearing of the judicial expert or the ordering of judicial expertise in the course of the judicial investigation.

On the one hand, non-giving of decisions to administer evidence could potentially affect the fairness of the process, and on the other hand the arbitrary admission of such requests could affect the reasonable timeframe of the process. This balance must be ensured not only in the case of first instance but also in the case of the appellate court.

The Constitutional Court notes that the appellate court, although not obliged to order the readministration of evidence or the administration of new ones, is nevertheless obliged to give a reasoned opinion on such requests. Therefore, the refusal to administer new evi-

dence requested by the parties must be sufficiently substantiated [15].

The CSJ agreed with the position of the lower hierarchical courts when it rejected the request for an additional hearing of an expert, which had previously already been heard in the same process. *The additional hearing of the expert Cozlovschi Gh., was also rejected by the appeal and ordinary appeal court, since he was heard in the appeal court following the order of the Supreme Court to rejudge the case, it confirmed the conclusions set out in the self-technical expert report carried out on a case-by-case basis* [6].

The CSJ criticized the decision of the Court of Appeal because, ... *it did not resolve in anyway the appeal on the conclusion of the court of first instance of December 21, 2016 (f.d. 98 v. 6), which ruled: "the request of Donos T. is rejected regarding the disposition of a complex psychiatric-psychological-medical expertise regarding the injured party Rusu V., as being unfounded", challenged by the defense in the declared appeals (points 3. - 4. of the decision)* [9].

In some cases, the experts heard deviate significantly from the opinion expressed in the expert report, although their hearing is done in order to elucidate the unclear aspects of the expert report. In such cases, the prosecuting authority or the courts must verify the reasons which led to discrepancies between those indicated in the expert report and the statements of the expert heard [13]. In order to admit or reject the request of the parties for the disposition of judicial expertise, it is necessary for the court to examine all admissible evidence, but in the preliminary hearing, the court cannot rule on the admissibility of certain evidence, the Constitutional Court notes that the examination of evidence in contradictory conditions is reserved for the stage of judicial investigation. At this stage, the parties may request, *inter alia*, the examination of the criminal bodies of the documents and the minutes of the proceedings. In this regard, if at the preliminary hearing stage, the court decides which of the evidence presented to the court to resolve the case is relevant, at the stage of the judicial investigation the judge must examine in substance each piece of evidence that he/she considered relevant [11].

Therefore, based on the decision of the Constitutional Court, the evidence presented by the parties is examined in the judicial investigation, and following the investigation which establishes the factual basis for the disposition of the judicial expertise, following which a request for the disposition of the judicial expertise is submitted, in the same way the court is able to examine the requests submitted by the parties regarding the disposition of the judicial expertise only after the examination of some evidence presented by the parties.

The legislator obliges the parties to the trial to provide the list of evidence which it intends to investigate in the course of the trial, including those which have not been examined in the context of criminal proceedings. The parties will thus indicate the list of evidence they intend to examine in the course of the judicial investigation: minutes of the hearing of the judicial expert, report of the judicial expertise, etc.

Failure to present the list of evidence will make it impossible to investigate the evidence in the judicial examination. However, if the party who invokes the fact of the discovery after the stage of filing the criminal case, there will be no impediment to examine the evidence given [12].

In the preparatory part of the hearing, the chairman of the hearing establishes the identity and competence of the judicial expert, explains his/her rights and obligations, and warns the judicial expert of the criminal liability he/she bears for intentionally making false statements. In accordance with article 363

Criminal Procedure Code, the president of the court hearing establishes only the identity and competence of the judicial expert, but in the preparatory part of the court hearing the president of the court hearing will explain the right of recusal of the judicial expert, but to exercise this right it is necessary to be informed other information regarding the activity of the expert.

In this regard, we support the position of the author A.I. Paliasvili who states that it is not enough for the parties to be informed only of the identity and competence of the forensic expert, but also the information about his/her work (*the case of Sara Lind Eggertsdottir v. Iceland* [2]), his/her function, special degree, scientific title, studies, etc. [19, p. 73].

In the case of Mirilashvili vs. The Russian Federation, the European Court of Human Rights found that during the criminal investigation phase it was ordered to carry out the forensic examination in the phonoscope commission. The group, consisting of three forensic experts, was provided with samples of the applicant's voice in Russian. The experts searched the audio recordings, in which discussions were recorded in Georgian. Two of the three experts included in the committee who did not speak Georgian found that the applicant's voice belonged to the applicant, and the Georgian-speaking forensic expert included in the committee of experts concluded that the voice did not belong to the applicant.

In order to contradict the conclusions of the forensic report indicating that the voice belonged to the applicant, the defense requested the court to summon the citizens Rosinskaia E. R. and Galeasina E. I as specialists, on January 29, 2003, these persons were heard and stated that the methods by which it had been established that the applicant's voice belonged to the applicant were uncertain and that their conclusions were uncertain. Rosinskaia E. R. and Galeasina E. I., presented their conclusions to the court [1], the presented conclusions contributed to the disposition of a repeated expertise on this case.

We contend that the court was required to inform the parties that two of the three judicial experts included in the panel of experts did not know the language in which the person was identified.

Likewise, we maintain the opinion that when explaining to the expert his/her rights and obligations, the reason for the summons must be explained to him/her as well as at the initiative of which the judicial expert was summoned.

The local legislator did not regulate the procedure for removing or releasing the judicial expert from the courtroom, but, from a practical point of view, a legal regulation of releasing or removing the expert from the courtroom would contribute to a good conduct of the trial.

On this question the authors M.A. Celitov and N.V. Celitova, according to which in the preparatory part of the court hearing, the president of the court hearing will solve the question regarding the removal of the judicial expert from the courtroom until he/she is heard [20, p. 207].

Therefore, we support the view that the judicial expert may be released from the courtroom at the request of the parties or on his/her own initiative. In both cases, the court will examine the arguments of the participants in the trial and will make a reasoned decision as to when the judicial expert will be released or removed from the courtroom.

The effectiveness of the judicial expertise ordered in the trial phase is directly proportional to the ability of the president of the court hearing to perceive not only the purpose of this evidentiary procedure, but also to understand the specificity of this means of proof, compared to other means of evidence examined in the investigation courts.

In the course of the investigation, the court will investigate all the evidence presented by the parties to the trial. However, due to its passive role, the court is not ex officio entitled to order the performance of the forensic examination, or to comment in advance on the admissibility of the forensic report carried out in the criminal investigation phase.

In this regard, we will refer to the conclusion issued by the Chisinau Court, based in Buiucani district, regarding the request for recusal of the judge who, after withdrawing to the deliberation chamber in order to pronounce the sentence, resumed the judicial investigation, exposing himself to the violation of the disposition procedure of the judicial expertise, which was ordered and carried out until the beginning of the criminal investigation. In this case, the judge questioned ex officio the opportunity to perform the repeated expertise on the grounds of procedural defects that affected the primary expertise report, commenting in advance on the admissibility of this evidence, calling it devoid of probative value [14].

In the course of the judicial investigation, each party to the proceedings is entitled to submit the request to require the performance of the forensic examination. Such a request shall be made in writing, indicating the facts and circumstances subject to the finding and the objects, materials to be investigated by the expert [4].

Requests will be substantiated, and if new evidence is requested, the facts and circumstances to be proved will be indicated, the means by which such evidence may be administered, the location of such evidence, and the identity of the experts will be indicated and their address if the party cannot ensure their presence in court [4].

Requests shall be resolved by the court after hearing the views of the other parties to the proceedings on the application.

In *the Mantovanelli judgment against France (Hot.18.03.1997)* CtEDO reiterated that respect for the right to a fair trial presupposes the right of the parties to be able to express their views before the expert report was drawn up, since the mere possibility granted to discuss the conclusions of the expert study was not sufficient to meet the requirements of Article 6 ECHR [3]. In the trial phase, no procedural act can be performed except with the approval and control of the court. This provision is applicable to any means of proof whose administration has been previously admitted by the instant [8, p. 686].

The author Igor Dolea reiterates that when examining the case on the merits or on appeal, the court may order the performance of the expertise, if, following a request or application of the parties, it will be found that certain circumstances have not been established in criminal proceedings and without finding them, it is impossible to solve the case in a fair manner [12, p. 1015].

Therefore, if there are any circumstances in the trial of the case, the settlement of which requires the application of special knowledge, each party to the trial, both the prosecution and the defense will file a request for the disposition of the forensic examination. The request for the performance of the forensic examination shall be made in writing, indicating the facts and circumstances subject to the finding and the objects, materials to be investigated by the expert [4].

Following the submission of the request for the disposition of the judicial expertise, the judge listens to the opinion of the parties regarding the need to carry out the judicial expertise. The opposing party shall be required to be aware of the request for the ordering and conduct of the forensic examination, and shall state its merits.

When ordering the forensic examination, it is important to pay attention to how the expert

will answer the questions. One of the main causes of reaching erroneous or scientifically unfounded conclusions is the superficiality in setting the objectives of the expertise, not to mention the situations in which these objectives are left to the discretion of the expert [17, p. 116].

In order to resolve any requests submitted by the parties in the trial, the judge or, as the case may be, the full court shall deliberate on the spot, without withdrawing to the deliberation chamber. However, following the consultation of the parties, regarding the request for the disposition and performance of the judicial expertise, the judge, as the case may be, the full court, as the case may be, will withdraw for deliberation.

The need to withdraw to the deliberation chamber results from the need to establish the factual grounds for disposing of the forensic examination as well as to exclude the intention of the party requesting the forensic examination to delay the trial.

Our legislator has provided for these procedural documents to be issued as separate documents, issued only after the formation of the Court has been withdrawn in the Chamber of the council and attached to the minutes of the hearing. Based on the provisions of Article 144 (1) CPP RM (on the disposition of expert opinions by the court), we understand that the express and exhaustive termination provided for in Article 342 (2) the Code of Criminal Procedure of the Republic of Moldova must be justified, and a statement of the factual and legal reasons for the suitability of specialist knowledge in the proper resolution of the case without deliberation is practically difficult.

Beyond the difference established by the legislator between the separate conclusions and the conclusions that are included in the minutes of the hearing, the Court notes that Article 20 of the Constitution establishes a basic requirement for respecting the guarantees of the right to a fair trial - that of justifying any judicial act resolving the issues that arose during the trial of the case [7].

The author Mihail Udroiu, mentions that the deliberation is the activity carried out by the court panel in order to establish the solution to be pronounced in the criminal case; a deliberative activity also takes place when the court rules on various requests made by the prosecutor, the injured person or the parties (for example, the deliberation on the evidence requested to be administered in the judicial investigation) [18, p. 278].

Professor Igor Dolea reiterates that during the deliberation the probative material and other procedural material are verified and evaluated in order to assess it and determine the next solution. The deliberation procedure is not public, as is natural, in order to ensure the independence of judges in the materialization of their own conviction on the examined case [12, p. 944].

The deliberation must take place in the council chamber, where access to other persons is prohibited. In the event that the criminal case has been tried by a panel, the deliberation takes place under the chairmanship of the president of the court hearing [12, p. 944].

Following the deliberation, the court will comment on the requests submitted by the parties by a decision.

The author Igor Dolea classifies the conclusions issued by the courts into two categories: the conclusions issued as a separate document and the conclusions included in the minutes of the court hearing [12, p. 946].

Following the deliberation, the judge or the president of the panel will announce if the request is admitted or rejected. Regardless of whether it was admitted or rejected, the judge will argue the decision. In case of admitting the request, the judge, after informing the parties, will send the conclusion of the disposition of the expertise and the objects to be sub-

mitted to the investigation to the institution of expertise.

The Constitutional Court of the Republic of Moldova commented on the reasoning of the court decisions. The Constitutional Court noted in paragraph 15 that beyond the difference established by the legislature between the separate conclusions and the conclusions included in the minutes of the hearing, the Court notes that Article 20 of the Constitution [5] establishes a basic requirement for compliance, guarantees of the right to a fair trial - the one regarding the motivation of any judicial act by which the issues arising during the trial of the case are resolved [10]. Therefore, the provisions of Article 20 of the Constitution do not release them from the obligation to present sufficient reasons in case of rejection of the request for conducting the forensic examination.

The time and place when the forensic report will be made public and in what order it will be read in conjunction with the other means of proof is determined by the court. The forensic report shall be made public to the parties, which may be read in whole or in part.

As a rule, the court reads only the conclusions of the expert report, but the parties to the trial may request the court to acquaint the other parties with the expert report.

In this context, we mention that the European Convention on Human Rights in art. 6 par. 3 let. b, provides for the possibility of a person having sufficient time to become acquainted with evidence in order to ensure his/her defense.

Therefore, the request of the parties to provide the necessary time to get acquainted with the report of judicial expertise is a binding one for the court. Regarding the right to get acquainted with the materials of the case, the author M. Poalelungi, I. Dolea, C. Gurschi, T. Vizdoaga and others were exposed, who reiterated that this right of the accused is presented as a counterbalance regarding the prerogatives of the investigative bodies empowered in organizing the investigation and conducting criminal proceedings. The right to dispose of the time and facilities necessary for the defense is aimed at gathering the multitude of evidence, which would allow the organization of a defense, as far as possible in the circumstances of the case, effective and efficient in order to challenge the accusation.

The provisions of art. 142 (2) The Code of Criminal Procedure of The Republic of Moldova grants the right of the parties, on their own initiative and on their own account, are entitled, through the criminal investigation body, the prosecutor or the court, to submit to the public institution of judicial expertise / office of judicial expertise conducting forensic examination to ascertain the circumstances which, in their opinion, may be used in the defense of their interests.

These regulations are most often interpreted arbitrarily in judicial practice, or the national courts reject the requests based on law based on art. 142 (2) CCP, and the requests of the party do not reach the institution of judicial expertise. A solution that also requires the intervention of the legislature, would be to submit the application directly to the institution of expertise or to an independent expert, with the information of the court.

Conclusions

The disposition of the judicial expertise in the trial phase can take place only on the basis of the request of the parties. The court, in turn, examining the application and hearing the opinion of the other parties will issue a decision admitting or rejecting the application. Based on ECtHR practice, the conclusion is to be reasoned, even if the request of one of the parties has been rejected. The overall observance of the legal requirements regarding the disposition of the judicial expertise, will contribute essentially to the observance of the procedural guarantees of the parties to the trial.

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13. În Cauza Ghimp şi alţii c. Republicii Moldova (Hot. CtEDO 30.10. 2012) *CtEDO menţionează că medicul-legist I.C. a făcut parte din prima comisie de experţi medici-legişti, care după ce au examinat cadavrul victimei, au ajuns la o concluzie cu privire la posibila oră la care i-a fost cauzată leziunea fatală. Cu doi ani mai târziu, din motive bine – cunoscute doar pentru el, medicul-legist I.C. s-a înfăţişat la Curtea de Apel şi a exprimat o opinie care a atras după sine o un alt efect asupra acuzării celor trei colaboratori de poliţie. Noua sa opinie a fost acceptată de Curtea de Apel fără a fi înaintate întrebări despre motivele care l-au determinat pe medicul I.C. să-şi schimbe părerea după o perioadă atât de îndelungată. Mai mult, judecătorii care au admis noua opinie a lui I.C. nu au considerat necesar să explice de ce ei au preferat această nouă viziune, şi nu raportul de autopsie şi concluzia comisiei experţilor medici-legişti care au avut sarcina de a examina cadavrul victimei* (paragr.50). Disponibilă: http://hudoc.echr.coe.int/eng?i=001-124597 (accesat la 25.11.2021)

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15. Mai mult, eventualul refuz al instanței de apel poate fi contestat odată cu fondul cauzei. Toate acestea au ca scop, pe de o parte, asigurarea dreptului la un proces echitabil, iar, pe de altă parte, soluționarea cu celeritate a cauzei, întrucât, în caz contrar, s-ar permite prelungirea nejustificată a soluționării acesteia printr-o cerere de readministrare/administrare a probelor, cu toate că dispunerea lor nu este pertinentă cauzei. Pct.50 Decizia Curții Constituționale a Republicii Moldova nr. 74 din 02.07.2020 de inadmisibilitate a sesizării nr. 1g/2020 privind excepția de neconstituționalitate a unor prevederi din articolele 251 alin. (2) ș alin. (4), 325 alin. (2), 413 alin. (3) ș 414 alin. (2) din Codul de procedură penală.

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