JOINT INTERNATIONAL CONFERENCES
10TH EDITION EUROPEAN INTEGRATION REALITIES AND PERSPECTIVES
5TH EDITION THE GLOBAL ADVANCEMENT OF UNIVERSITIES AND COLLEGES

The Main Principles of the Criminal Trial in the New Procedural Regulation and their Importance in Practice

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Abstract: The fundamental principles of the criminal trial, like those specific to a particular phase or institution of the criminal trial, represent the basic "pillars" of the activities performed by the judicial organisms for the acknowledgment of the crimes and the prosecution of the guilty. A fair trial finalized in due time with the respect of the procedural warranties cannot happen outside this support frame and guideline. The New Code of Criminal Procedure opted for the express regulation of these principles asserting that it is the safest way to implement them in the practical activity. The new principles, together with the classical principles, whose validity has been confirmed by a prolonged experience, enhance the professionalism of the judicial organs to reduce the duration of the trials, consolidating the respect and trust in the act of justice.

Keywords: criminal trial; fundamental principles; practical importance of the principles

1. Introduction

The most general rules based on which the structure ad performance of the criminal trial are regulated represent the fundamental principles of the criminal trial. They ensure the fulfilment of the criminal trial purpose so that it is righteous and the solving of the cases is made in due time. Some leading rules of the criminal trial can refer only to one institution of the criminal trial (for example: the principle of free interpretation of the evidence) or to a phase of the trial (for example: the publicity of the judicial debates- refers only to the trial phase), others direct all the institutions and stages of the criminal trial and are considered thus fundamental principles. *The fundamental principles of the criminal trial* have been defined as being those *guidelines rules that determine all the institutions of the criminal trial in all its stages.* (Theodoru, p. 68). Some authors consider that the fundamental principles of the criminal trial aim directly at the *purpose of the trial* and establish the ground rules of its development (Dongoroz, 1975, p. 29). In the presentation of the motives in Law no. 135/2010 on the Criminal Procedure Code[2] the fundamental principles of the criminal trial are identified with *the general rules present in the legislations of the European Union member states, which are the base of the modern criminal trial, rules whose validity and efficiency have been verified by the judicial practice and jurisprudence of the European Court Of Human Rights.* They represent *the pillars* of those dispositions that oblige the judicial organs to perform independent and impartial justice, meant to ensure the confidence in the act of justice.

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[2] Published on the web site of the Chamber of Deputies – http//www.cdep.ro/proiecte/2009/400/10/2/em412.pdf.

2. The System of the Criminal Trial Principles

In theory, the study of the fundamental principles and general rules that determine the structure and the course of the criminal trial led to the necessity of arranging them in a logical order, determined by their power and contribution for the fulfilment of the purpose of the criminal trial, especially because the Romanian codes did not contain such a system. The Codes prior to the one in 1968 (Criminal Procedure Codes in 1864 and 1936) did not contain dispositions related to the principles or basic rules of the criminal trial. The code of criminal procedure in 1968 contained in Title I of the General Part, titled *The ground rules and actions in the criminal trial"* Chapter I *Purpose and ground rules of the criminal trial* which, in article 2-8 provisioned these rules with value of fundamental principles (legality and official character, finding the truth, guarantee of freedom, respect for human dignity, innocence presumption etc.). Some authors have expressed the idea of eliminating, from a future code of criminal procedure, the ground rules or the principles of the criminal trial, arguing that a code does not have to contain concepts, definitions, principles but only norms that regulate the procedural activity of the criminal trial (Theodoru, 2007, p. 69).

The new code of criminal procedure, in force since February 1st 2014, contains these principles in Title I of the General Part entitled *"The principles and limitations of the application of the criminal procedural law".* The exposure of the motivations justifies the express regulation of the fundamental principles of the criminal code by the fact that a fair criminal trial in due time cannot be guaranteed without being based on the pillars of new principles which, together with the classical ones, oblige the judicial organs to perform a criminal independent and impartial law, capable to institute in the public opinion the respect and trust in the judicial acts.

Although the fundamental principles of the criminal trial are included in the texts of the Criminal Procedure Code, the doctrine assumes the role of organising, explaining and clarifying them so that their application is made accordingly.

The French doctrine for example has organised the principles of the criminal trial by dividing them in three categories: principles of framing comprising the legality, judicial authority, guarantee of the citizen liberties, principle of proportionality; references to the human rights and fundamental liberties, which comprises the benefit of the doubt, right to defence, equality of the parties, respect of human dignity; weapon equality, celerity and access of the victims to criminal justice represent a third category with reference to the course of the trial.

The Romanian doctrine was shaped according to the opinion according to which the fundamental principles of the criminal trial aim at three important sides of the process:

a) *the structural- institutional side* referring to the judicial authorities involved in the criminal trial and their attributions;

b) *the development side*- the principles in this category aim at the fulfilment of the purpose of the criminal trial;

c) *the guarantee of the respect of the human rights and fundamental liberties within the criminal trial.*

In the category of the principles that aim *at the structural- institutional side* can be included principles such as:

- exclusive attribution of the judicial authorities to apply punishments and other measures provisioned in the criminal law for control exertion over their legality and substantiality;

- separation of the procedural- criminal functions

- free access to justice in the criminal trial.

In the category of principles that act upon the course of the criminal trial are comprised:

- the legality of the criminal trial;
- the official character of the criminal trial;
- finding the truth;
- the active role of the judicial authorities;
- equality before the law and judicial institutions;
- guarantee of the right to defence;
- the development of the trial in official language.

The principles that *ensure the respect of the human rights and fundamental liberties refer to:*

- guarantee of the individual liberties and safety of the person;
- the benefit of the doubt;
- the respect of human dignity;
- the intangibility of the residence and secrecy of correspondence etc.

Another opinion expressed in the Romanian doctrine regarding the framing of the principles of the criminal trial is that according to which they can be classified in two categories, namely: *principles regarding the entire criminal trial* and *principles related to a phase of the criminal trial or certain institutions of the criminal trial* (for example: institution of evidence, probatory means and proof, procedural measures etc). The principles of the first category are regulated in Title I of the General Part of the Criminal Procedure Code entitled *The principles and limitations of the application of the criminal procedural law.* The ones in the second category are inserted in the texts regarding the stages of the criminal trial or the institutions that govern it (for example: the principle of locality on administrating the evidence, exclusion of the evidence obtained illegally, confidentiality of prosecution, orality, publicity of the trial etc.).

3. Fundamental Principles of the Criminal Trial

Subsequently, the principles regarding the entire criminal trial meaning the general principles, the other principles or rules will be analysed together with the institution they refer to.

Legality of the criminal trial

Article 2 of the Criminal Procedure Code states that the criminal trial takes place according to the dispositions provisioned by law. This legal provision consecrating the principle of legality expresses the requirement that the criminal trial takes place in the conditions prescribed by law. This disposition of the Code of criminal procedure is sustained by article 1, paragraph (5) in the Romanian Constitution according to which the supremacy of laws is mandatory.

The principle of legality imposes that the criminal trial is performed only by the judicial authorities instituted by law and according to the competences provisioned by the legal norms. Also, the judicial authorities, the parties and the other participants at the criminal trial have to act only under the conditions and in the procedural limits proscribed by law. The judicial authorities have to respect the

procedural rights of the parties and procedural subjects and ensure their exertion in respect for the criminal law and civil law.

For the consolidation of the legality *procedural guarantees* have been instituted, such as: invalidity of the procedural acts performed with the break of the general dispositions of the law, sanctioned with annulment, decay of the institution of judicial control etc.

Separation of the judicial functions

Article 3 in the Criminal Procedure Code states that within the criminal trial, the following judicial functions are exerted:

- *criminal prosecution function;*
- *disposition over the rights and fundamental liberties of humans in the stage of the prosecution;*
- *the verification of the legality and prosecution or lack of prosecution and*
- *trial function.*

In the course of the criminal trial, the exertion of the judicial function is incompatible with the exertion of another judicial function (article 3, paragraph (2) Criminal Procedure Code). From this rule, the law admits the exception of compatibility for the function of legality check of prosecution or non-prosecution with the trial function.

The criminal prosecution function represents the gathering of necessary evidence in order to establish if there is ground for prosecution. The gathering of evidence is made by the prosecutor and by the criminal prosecution organs.

The acts and measurements that restrain the fundamental rights and liberties of the individual are disposed during the criminal prosecution by the judge who has attributions in this sector, respectively the rights and liberties judge.

The legality of the prosecution as well as the evidence on which it is based is analysed by the preliminary judge. The latter also decides on the legality of the solutions for non-prosecution decided by the prosecutor, according to the law.

Finally the forth judicial function which is the trial is performed by the courts in panels, according to the legal dispositions.

The benefit of the doubt

According to the dispositions of article 4 in the Criminal Procedure code that consecrates this fundamental principle, any individual is considered innocent until the establishment of the guilt by a definitive criminal decision. Also, the law states that after the administration of the entire probatory, any doubt in the conviction of the judicial organs is interpreted in the favour of the suspect or the accused. The phrasing of the text results in the fact that the benefit of the doubt is directly correlated with the administration of the evidence in the criminal trial. Article 99, paragraph 2 in the Criminal procedure code states that, in the virtue of this principle, the suspect or accused is not obliged to prove his innocence and has the right to not contribute to his own prosecution.

The literature has formulated an opinion according to which the benefit of the doubt has multiple functions, namely:

a) guarantees the protection of the individuals participating in the criminal trial against the arbitrary and criminal liability; underlines the idea that nobody will be criminal prosecuted and sanctioned in a discretionary manner;

b) represents the grounds for all the procedural guarantees and ensures the equality of weapons;

c) ensures the finding of the truth and correct clarification of the circumstances of the facts so that the guilt is established with certainty.

Finding the truth

This principle imposes the judicial organs the obligation to ensure, based on evidence, finding the truth regarding the facts and circumstances that form the object of the cause as well as regarding the suspect or accused. To the same effect, the organs of prosecution have the obligation to gather and administrate evidence both in favour and against the suspect or accused. The rejection or non-registration in bad faith of the evidence in favour of the suspect or accused is sanctioned according to the law (article 5 Criminal procedure code).

Finding the truth regarding the facts or circumstances of the cause implies the assertion of the existence or inexistence of the fact for which the prosecution was triggered, the clear establishment of the circumstances that characterises the facts (time, place, mode and means of the actions, purpose, nature and extension of the prejudice etc.) and other aspects that influence the criminal procedure. Finding the truth regarding the individual suspected or accused means the certainty of the guilt, knowledge of the priors of the accused, of ant nature (criminal, medical, professional) that can have significance in asserting the gravity of the facts, the dangerous character of the individual but also the individualisation of the sanction. Also, finding the truth involves a complete relation between the situation and facts and the conclusions of the judicial organs regarding the facts.

In the criminal trial, the truth must be found only within the frame consecrated by law, meaning only under the conditions provisioned by law, more exactly – according to the principle of legality. There are cases strictly determined by law in which the principle of finding the truth is limited, such as the case of non-inclusion of the prior complaint when the law conditions the start of the prosecution according to its formulation or in case of reconciliation of the parties.

The guarantee of finding the truth in the criminal trial is made mainly through the active role of the judicial organs, through the right of the parties to formulate requests, memoires, submit evidence and request the verification of the loiality of the already administrated evidence.

Ne bis in idem

It is a restatement and a consecration of the Roman law principle *Non bis de eadem re sit action* or *non bis in idem* which states that one cannot prosecute twice for the same cause (Hanga, 1998, p. 79-81). Article 6 Criminal Procedure code states that no individual can be prosecuted or on trial for a crime when that individual received a definitive judicial decision regarding the same action, even if under a different legal analysis. As regulated in the legal text, their principle represents a consequence of another principle, respectively the authority of the judged action. It represents an obstacle before the restatement of the criminal law conflict solved previously, even under a different judicial categorization (Antoniu, Volonciu, & Zaharia, 1988, p. 35).

Obligation to set in motion and exert the criminal prosecution

When a crime is committed, it results in the right for punishment of the criminals. To that end, the judicial organs are obliged to perform procedural activities every time a crime has been committed.

Article 7, paragraph 1 Criminal procedure code provisions the obligation of the prosecutor to set in motion and exert the prosecution on its own motion when there is evidence resulting in the commitment of a crime and there is no legal cause for prevention. Therefore, in principle, the criminal trial starts on own motion without the necessity of fulfilling other conditions, reason for which this principle is also known in the doctrine as the official character of the criminal trial. The application of the principle of obligation to exert the criminal action makes the termination of the criminal trial to be made through the definitive decision of the cause or by the intervention of circumstance that, according to the law, are bale to prevent the exertion of the criminal prosecution. The obligation excludes, as a general rule, the possibility for the parties to stop the criminal trial, this termination being the exclusive attribute of the judicial organs.

According to the Romanian criminal procedural norms, the principle of obligation to set in motion and exertion of the criminal prosecution has certain exceptions.

One exception would considers the cases and conditions expressly provisioned by the law when the prosecutor can renounce to the exertion of the prosecution if, in relation to the elements of the cause, there is no public interest in accomplishing its object.

Another exception considers the crimes for which the law imposes the formulation of a prior complaint as a condition to set the criminal prosecution into motion (for example assault or other violence – article 193, Criminal code). In these cases the prosecutor will set the prosecution into motion after the complaint was submitted.

Finally, a third exception refers to the situations in which, in order for the prosecution to be set in motion, the law imposes the necessity to obtain authorisations or intimations of the competent authorities or the fulfilment of another condition imposed by the law (for example for the crimes of unjustified absence, desertion, breach of consignment, leave of position or command and insubordination, provisioned in article 413- 417 Criminal Code).

Given the above mentioned, the literature contains the idea that in relation to the principle of official character of the criminal trial, the criminal causes ca be classified in three categories:

- public accusation causes in which the principle is applied integrally;

- private accusation causes in which the criminal action is set into motion or is terminated by the will of the victim;

- public - private accusation causes in which there are elements that belong to the categories mentioned above; in the current legislation, these causes are extremely rare.

The exertion ex officio of the criminal prosecution in the cases and conditions provisioned by law present a significant importance for the law order in a well organised democratic society.

The equitable character and reasonable due time of the criminal trial

In the performance of the criminal prosecution and trial, the judicial organs are obliged to fulfil the procedural guarantees and rights of the parties and subjects, so that the facts representing the crimes are determined fully and in time, no innocent individual is criminally prosecuted and any individual who committed a crime is punished according to the law, in due time (article 8 Criminal procedure code).

The economy of the quoted text results in the fact that the judicial organs are obliged to act efficiently in order to solve the criminal cause with the respect of all the rights of the parties and procedural

subjects and in compliance with the rules provisioned by law. The principle of due time or efficiency of the criminal trial was characterised n doctrine as being a *sine qua non* condition of the efficiency and optimization of the entire judicial activity (coordinated by Dongoroz, 1975, p. 62).

The respect of this principle entails the following aspects:

- promptitude in performing the judicial activity;
- quality in performing the procedural acts;
- simplification performing the procedural acts;
- efficiency in accomplishing the procedural purpose and all the tasks related to the judicial organs.

The performance of the criminal trial in due time has as objective the timely determination of the facts representing the crimes, the correct and complete determination of the circumstances of committing the crimes so that no innocent individual has to know the rigors of the criminal law and, at the same time, no guilty person will be unpunished. The efficiency or rapidity, or te due time are not a purpose themselves, but a way to prevent the crimes by closing into the moment of criminal liability generating a significant impact on the human communities and, at the same time, a discouragement for the criminals.

The right to freedom and safety

The personal freedom is a social value of extreme importance. Article 23 in the Romanian Constitution states that freedom and safety of the individual is intangible. The search, detention or arrest of an individual is not allowed unless in the cases and following the procedure provisioned by law. Regarding the efficiency of these constitutional provisions, article 9 of the Criminal procedure code states that during a criminal trial, the right of every individual to freedom and safety is guaranteed. Any restrictive measure is disposed exceptionally and only in the cases and conditions provisioned by law.

Any arrested individual has the right to be informed in the shortest period of time and in a known language over the motives for the arrest and has the right to dispute the arrest measure. When a restrictive measure has been illegal applied, the competent judicial authorities have the obligation to dispose the annulment of the measure and, where necessary, the release of the detained or arrested.

Any person towards which a freedom restrictive measure was illegally imposed during a criminal trial has the right to compensation for the damage, under the conditions and cases provisioned by law.

The guarantees for the freedom and safety of the individuals can be classified in the following more significant aspects:

- the general cases and circumstances of preventive measures are strictly forbidden by law so that no individual can have his freedom restricted except for the situations in which it is according to the law;
- the preventive measures can be disposed mainly by the magistrate and only in certain situations, provisioned by law, by the prosecution authority;
- the duration of the preventive measures is limited and can be prolonged only certain conditions provisioned by law;
- the confinement during the criminal trial can be made only according to certain procedures limited by procedural forms;

- the maintenance of the preventive measures is eliminated when the grounds that justify them have disappeared or when the grounds have changed.

The right to defence

The consequence of exerting the criminal actions against an individual is represented by the criminal liability and application of a punishment. This leads to the general interest that to this judicial treatment would be submitted only those guilty individuals and only according to the gravity of their actions. The right to defence is included in article 24 of the Constitution and guaranteed as such. During the criminal trial, the parties have the right to be assisted by a lawyer, chosen or publicly appointed. The modern legislations consecrate the right to defence definitively rejecting the archaic mentality that minimized the necessity of defence, starting from the erroneous assertion that: either the accused is not guilty therefore he doesn't need defence or he is guilty then the defence is useless.

According to the constitutional text, article 10 in the Criminal procedure code states that the parties and main procedural subjects have the right to defend themselves or be assisted by a lawyer. The guarantee of this right is materialised by legal dispositions according to which the parties, procedural subjects and lawyer have the right to benefit from the time and necessary conditions to prepare the defence.

Also, the subject has the right to be informed immediately and listened in relation to the action for which the prosecution is began and its judicial framing. At the same time, the accused has the right to be informed immediately regarding the prosecution against him and the judicial framing. Before being heard, the suspect and accused have to be informed that they have the right to make no statement. Also, the judicial organs have the obligation to ensure the complete and effective exertion of the right to defence of the parties and the main procedural subjects during the entire criminal trial. The right to defence has to be exerted in good fit, according to the purpose for which it has been recognised by the law.

The guarantee of the right to defence is correlated to the principle of equality of all citizens in front of the law and generally, in justice. In turn, equality in front of the law, the equality in front of the law is determined by the level of the social economic conditions for the existence and reclamation of the political sector. Even since the last decades of the 19th century and the first half of the 20th century, the theoreticians of the criminal procedural law have signalled negative effects in the criminal trial, of economic and social inequalities. Thus, Rene Garraud şi Pierre Garraud (quoted by Volonciu, 1987, p. 71) asserted that the existence of te lawyer "profits more to the rich accused who can pay an experimented lawyer". In the Romanian doctrine, Ion Tanoviceanu wrote: "Currently, the poor is defenceless in the correctional affairs and weakly defended by a public appointed lawyer in criminal matters. When a lawyer will be introduced to the instruction judge, the inequality would begin from the instruction between the defence of the rich, which would be very factitious and the defence of the poor which would be a requisition defence".

The right to defence is not reduced only to the assistance, consultancy and representation, although it represents the important components of them.

The right to defence, according to the legal dispositions is manifested under other aspects such as:

a) the parties have the right to defend their own legal interests. This is translated into the obligation of the judicial organs to bring to the knowledge of the parties the accusation, into the right of the accused not to make statements, into the rights of the parties to submit evidence, formulate requests and memoires, to be heard, give explanations, make conclusions.

b) the judicial organs are obliged to take into consideration all the aspects that are in favour of the party, this resulting from their active role which is manifested independently from the position of the parties.

For the finding of the truth and criminal liability only of the guilty individuals, the judicial organs have to administrate the evidence coming to the defence of the accused, irrespective of his attitude.

c) the parties have the right to judicial assistance. The guidance and help of the parties by a professionally qualified person enhances the possibilities to respect the legal rights and interests of the parties in the criminal trial. The Criminal procedure code provisioned the obligation for defence by a lawyer, these dispositions being themselves a proof of the guarantees ensured by the right to defence.

The legal regulation of the principle of the right to defence results in its following features:

a) the right to defence is guaranteed during the entire criminal process;

b) the right to defence is guaranteed to all the parties and procedural subjects;

c) the right to defence is manifested in many ways such as – the organisation and functioning of the instances (appeal, recourse etc.) which ensures the judicial control; the obligation of the judicial organs to gather evidence both in the favour as well as against the accused; obligation to summon all the parties, judicial assistance, the right of the accused to be heard, to ask questions to the other accused and witnesses, to request the administration of evidence etc.

The respect of the human dignity and private life

The intimate, family and private life, intangibility of residence and secrecy of correspondence are guaranteed by the Romanian Constitution through articles 26, 27 and 28. Expressing these provisions f the fundamental law, the Criminal procedure code consecrates in article 11 the principle of respecting human dignity and private life. According to these dispositions, any individual who is involved in prosecution or trial has to be treated with the respect of human dignity. The respect of private life, intangibility of residence and secrecy of the correspondence are guaranteed. The restraint of exerting these rights is admitted only in the conditions of the law and if this is necessary in a democratic society. The necessity of the restraint in exerting these rights is determined by the protection of national security, order, public health and moral, citizen's rights and liberties. Also, the restraint can be determined, under the conditions of the law, by the process of prosecution, by the prevention of consequences of natural disaster, calamity or extremely serious events.

The measure of restraint in exerting the right to dignity and privacy has to be proportional with the situation that determined it, to be applied in non-discriminatory manner and without bringing prejudice to the rights guaranteed by law.

Official language and right to interpret

Article 13 of the Constitution provisions that in Romania the official language is Romanian. In consequence, the criminal trial takes place in Romanian language, which means that the documents specific for the prosecution and trial are redacted in Romanian language. This principle is stated in article 12 of the Criminal procedure code. According to this text, the Romanian citizens belonging to the national minorities have the right to express themselves in their natural language, the procedural documents being drafted in Romanian language.

The parties and procedural subjects who do not know or speak Romanian are given the possibility, free of charge to use an interpreter to understand the documents of the file as well as to express

conclusions in court. In the cases in which the judicial assistance is mandatory, the suspect or accused has the possibility to communicate, through an interpreter, with the lawyer for the preparation of the hearing, make an appeal or any other request related to the solving the cause.

In the judicial procedures, authorised interpreters are used, according to the law. This category includes the licensed translators and interpreters, according to the law.

These rules can be fulfilled in practice by organisational measures within the institutions with the authority to prosecute or judge, consisting in using public servants or magistrates who speak languages spoken by certain communities, such as the German or Hungarian ones. Thus, eloquent in this case was the motivation of a decision of the Supreme court: "from the documents of the case results that the prosecutors as well as the members of the judging panel spoke Hungarian and were able to communicate with the accused, the civil part and their defenders and witnesses, whose natural language is Hungarian. Thus, the use of an interpreter was considered to be groundless and the judicial organs had the possibility to communicate in Romanian and Hungarian with the parties and the other participants to the trial". (Supreme Court, criminal section dec. no. 1713/1980, R.R.D., no. 6/1981, p. 84). These dispositions are applicable also in the cases in which the texts included in the files of the cause and which are presented in court are redacted in another language than Romanian.[1]

4. Conclusions

Although some opinions have been expressed in the literature according to which the fundamental principles of the criminal trial would not fit in the Criminal procedure code, their authors have considered opportune to expressly regulate them in the body of the law. In adopting this type of concepts prevailed the interest to ensure a fair trial, which is finalised in due time so that the performance of criminal justice is independent and impartial. For the accomplishment of this desideratum it was necessary the regulation of the fundamental principles of the criminal trial. New principles have been formulated that, together with the classical ones, whose validity has been confirmed by a long practice, lead to the elimination of the cases on inefficiency, lack of celerity, guaranteeing the protection of the fundamental right and liberties.

Among the new principles, the separation of the judicial functions in the criminal trial has the purpose of substantially improving the act of justice. The repartition of some attributions and competencies for each judicial function will enhance the quality of the procedural acts, the measures imposed during the trial, considerably reducing the possibilities for errors or abuse. Among the old principles, some have been reconsidered, such as the obligation to put into motion and exertion of the criminal action. Thus, this obligation has been softened according to the subsidiary rule of opportunity according to which, in some cases as well as in some conditions provisioned by law the prosecutor can renounce to the exertion of the criminal actions. This new vision has the purpose to avoid long trials in minor causes in which the public interest does not exist.

The undertakings of the authors of the Criminal procedure code regarding the principles of the criminal trial have been directed towards the enhancement of the professionalism of the judicial organs, reduction of the duration of the criminal trials and guarantee of the rights of the parties.

[1] Supreme Court, criminal sector dec. no. 924/1970, R.R.D., no. 7/1970, p. 165-166.

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