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PRELIMINARY SESSION JUDGE IMPORTANT ACTOR AND GUARANTEE OF DUE JUDICIAL PROCESS AFTER COMPLETION OF PRELIMINARY INVESTIGATIONS PHASE

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Abstract

Constitutional reform (A.Vorpsi, A.Anastasi, G.Ibrahimi, S.Berberi, 2016) and that in Justice (Code of Criminal Procedure, 2017) of 2016 in Albania, brought the need for intervention and changes in the Criminal Procedure Code. A new change in this Code is the figure of the Judge of the Preliminary Session, as a new subject in the criminal process, at the stage of completion of preliminary investigations. This new procedural institute, placed between the prosecutor and the judge of the foundation, serves as a filter to control the procedural actions of the prosecutor, carried out during the phase of the preliminary investigations, if they are complete and final, paving the way for the trial of the case. n` foundation. In this work, research, analytical and comparative methods were used, with the aim of highlighting the problems that have to do with the procedural subject of the Judge of the Preliminary Session, as well as the hypotheses with the questions that are asked. The jurisprudence of the cases of judicial practice of the Courts of the General Jurisdiction of the Appeal and of the First Instance, the Supreme Court and the Constitutional Court deal with the competencies and functions of the Judge of the preliminary session as well as the problems that arise during at this stage of the criminal proceedings.

Key words: *The judge of the preliminary session, the judge of the preliminary investigations, the judge of the foundation, the prosecutor, the request for sending the case for trial, the judicial decision of the preliminary session.*

INTRODUCTION

In the Code of Criminal Procedure of the Republic of Albania, before the changes of the justice reform in 2016, there was no figure of the Judge of the Preliminary Session. As subjects of the criminal procedure in the code of criminal procedure were the prosecutor, the judicial police, the judge of preliminary investigations, the judge of the foundation, the accuser in the criminal process, the plaintiff and the civil defendant. This fact showed a gap for the demands of the parties during the phase of preliminary investigations, which could not be handled by the judge who would judge the case on the merits. (*Criminal Procedure Code, 2015, p.225*) After the completion of the preliminary investigation phase, the prosecutor decides, as the case may be, whether to send the case to court, dismiss or suspend it. (*Criminal Procedure Code, 1995, amended, p.224*) When there is complete evidence for the defendant's guilt, the prosecutor submits to the court a request for the trial of the case.

At the preliminary investigation stage, the actions of the prosecutor, (*Criminal Procedure Code, 1995, amended, Article 24*). must be controlled by a judicial entity. For this purpose, in the Code of Criminal Procedure, a new figure was provided, which is the Judge of the Preliminary Session. The provision of this new procedural subject is related to the regular judicial process, the guarantee of basic human rights and freedoms and the new standard in the process of proving the criminal offense. The requests of the parties related to the personal security measures during the preliminary investigation phase are examined by the judge of the preliminary investigations, while the requests related to the invalidity of the acts or the decision, the insufficiency of the evidence, the request for a summary trial, or for the dismissal of the case is examined by the new procedural subject which is the Judge of the Preliminary Session.

For this reason, in the Code of Criminal Procedure, it is provided that the preliminary session will take place behind closed doors where only the prosecutor, the defendant and his defence, the victim and the private parties will be present. (*Criminal Procedure Code, 1995, amended, Article 332/a and 332/4*) This court session is presided over by a single judge, who is the judge of the preliminary session chosen by lot, who does the preliminary verification of the indictment before the criminal case goes to the trial court.

The prosecutor's procedural actions, which were related to the completion of preliminary investigations, were not controlled by any judicial procedural subject. During this phase, the prosecution, as a sui generis centralized body next to the judicial system, played an essential role and was not subject to real control. With the new changes in Law 35/2017, the prosecution functions as a decentralized body where its functional duties are sanctioned and, at the end of the preliminary investigation phase, a new figure was foreseen in the Criminal Procedure Code, which would control all procedural actions of the prosecutor.

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This figure was that of the Judge of the Preliminary Session, who examines the request of the prosecutor to send the case to trial. (*Criminal Procedure Code, 1995, Article 332, p.225*).

I. PRELIMINARY SESSION JUDGE NEW PROCEDURAL SUBJECT IN THE CODE OF CRIMINAL PROCEDURE

With the changes made to the "Criminal Procedure Code of the Republic of Albania" with law no. 35/2017 "On some additions and changes to law no. 7905, dated 21.3.1995 as amended", the figure of the Judge of the Preliminary Session was sanctioned. This new procedural figure was created to control the prosecutor's actions during the preliminary investigation phase. (*M. Hulaj, S. Beqiri, 2015, p.7*). The Judge of the Preliminary Session exercises this function through the specific powers given to him in the Code of Criminal Procedure. (*Criminal Procedure Code 1995, Articles 232 -332/e*) The figure of the Judge of the preliminary session is taken as a model from the Italian criminal procedural law. (*Italian Criminal Procedure Code, 2011, p.823*). The changes made in the Code of Criminal Procedure show that the prosecutor has no decision-making authority on the request to send the case to court, as now the Judge of the Preliminary Session has this competence. In this sense, a control filter was created against the prosecutor's actions carried out in the preliminary investigation phase. This procedural subject is given a number of important powers related to the dismissal of charges or criminal cases, the return of acts to the prosecutor and the continuation of investigations when it is deemed that the investigations are not complete, or when it is required to formulate a new charge. (*Albania Criminal Procedure Code, 1995, Articles 329/b, 332/ç, 332/de 332/dh*).

According to Article 328 of the Code of Criminal Procedure, (*Unifying Decision of the Supreme Court, 2002, page 429, and 2008, page 306*). At the end of the preliminary investigations, the prosecutor of the state has the power to decide the dismissal of the charge or the criminal case when proceeding for a criminal offense. An appeal can be made against the prosecutor's decision to dismiss the case, (*Albania Criminal Procedure, 1995, Articles 329. Unifying Decisions of the High Court 2013, page 532, 2002, page 429, and 2009, page 318*) which is examined in the counseling room by the Judge of the preliminary session, deciding, as the case may be, the dismissal of the case, the return of the acts to the prosecutor and the continuation of the investigations when they are not complete, or when a new charge must be formulated.

The judge of the preliminary session examines the request for trial of the prosecutor within 30 days from the date of its filing, (*Albania Criminal Procedure Code, 1995, amended, Article 332/3*), and after notifying the defendant, the victim or his heirs, sets the day, time and place where the court session will take place. (*Albania Criminal Procedure Code, 1995, amended, Article 332/a*).

This session, due to its very nature, should take place quickly and without being too long, respecting the procedural deadline provided in the provision of Article 332 of the Code of Criminal Procedure.

The court session takes place behind closed doors, with the mandatory participation of the prosecutor (*L'udienza preliminare*, 2022, page 4.

<https://www.dirittoconsenso.it>), and the defenders of the defendant. (*Albania Criminal Procedure Code, 1995, amended, Article 332/b.*) The court verifies the presentation of the parties and declares the judicial review open, where at the beginning the prosecutor presents in a way to summarize the results of the preliminary investigations and the evidence supporting the request for sending the case to court. Then the defendant takes the floor, who can submit a request for the invalidity of the acts of preliminary investigations, the lack of evidence, the need to receive other evidence, a request for a summary trial. (*Albania Criminal Procedure Code, 1995, amended, Article 332/c.*)

The judge of the preliminary session, when he considers that the preliminary investigations are not complete, orders their completion. However, when the fact turns out to be different from what is described in the request for sending the case to court, the prosecutor changes the charge and communicates it to the defendant. When during the preliminary session it turns out that the legal classification of the fact is wrong, or when the charge is not formulated in a clear and precise way, the Court invites the prosecutor to make the necessary corrections or corrections.

In this type of trial, the issue that can be discussed is when the defendant is absent from the judicial process. (*Albania Criminal Procedure, 1995, Article 332/dh.*) The rights of the defendant in a process are not the same as those of the defense counsel chosen or appointed by the proceeding body. There are some actions that are the sole prerogative of the defendant, such as a request for summary judgment or an appeal to the court of appeal and his signature on the decision of the court of first instance. However, the defendant can delegate these rights by authorization or power of attorney to his legal representative or lawyer. Also, in this type of trial, the submission of the defendant's requests for special trials, such as a summary trial or a trial by agreement, is also important. The defendant is right to request an abbreviated trial or one with an agreement in this phase of the trial of the preliminary session, in the opposite case, if he does not exercise it, he loses this procedural right, which he cannot exercise in other stages of the trial.

However, the Italian Code of Criminal Procedure has resolved differently the submission of requests for a summary trial or trial by agreement, providing for these requests of the defendant as an alternative that can also be requested in the preliminary hearing.

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II. CASES OF ADJUSTMENT FROM PRELIMINARY SESSIONS

The criminal procedure takes place in several stages, which are the stage of preliminary investigations, the stage of the preliminary session and finally the stage of trial based on the criminal case. Above we dealt with the cases of trial in the preliminary session where the parties present their claims. However, in the criminal proceedings there are some cases which avoid the judgment of the judge of the preliminary session. These exceptional cases are as follows:

1. When the defendant is arrested in flagrante delicto and is investigated for the commission of a criminal offense judged by a judge, the prosecutor submits to the court the request for a direct trial. (*Albania Criminal Procedure Code, 1995, as amended, Article 400*). when the defendant is arrested in flagrante delicto and a request is made for his validation and concurrent trial. (*Albania Criminal Procedure Code, 1995, as amended, Article 400*).

2. When the prosecutor decides to dismiss the charge or the case when proceeding for a criminal misdemeanor. (*Albania Criminal Procedure Code, 1995, as amended, Article 328*).

3. When the prosecutor sends the court the request for the approval of the criminal order when the defendant is accused of committing a criminal misdemeanor.

If we compare the competences of the judge of preliminary investigations, the judge of the preliminary session and those of the judge of the foundation, we conclude that the judge of preliminary investigations decides only on requests related to security measures during preliminary investigations. However, the competences of the judge of the preliminary session and those of the judge of the foundation intersect with each other, but not that this overlaps with each other. Despite the fact that the judge of the preliminary session has the power to decide the dismissal, this should not be equated with the role of the judge of the foundation, who decides the dismissal if the commission of the criminal offense is not proven. In the preliminary session, the dismissal is decided only when there are evidently "prima facie" elements of the criminal responsibility of the defendant and not when this can result only after the judicial examination and debate of the evidence. The legislator has given the judge of the preliminary session the right to dismiss the criminal case, only when elements of criminal responsibility are blatantly missing, which justify the need to dismiss the criminal case. In this type of trial, the moment and the procedural deadline for submitting the requests of the parties in the process must be distinguished. This is due to the fact that their failure to appear before the competent judge at the time and deadline causes the loss of the rights of the parties in the trial. The Code of Criminal Procedure, in the third paragraph of its article 332/dh, has provided that: "*The review procedure in the preliminary session does not replace the judgment*

of the case on the merits, nor does it prejudge its final decision."

The judge of the preliminary hearing has the task of verifying whether the case is ready for trial, whether the investigations are complete and the charges are properly filed. Thus, we can mention the requests related to the change of the charge, when a new fact emerges, or when the change of the legal definition of the criminal fact is requested. In these cases, the court decides to change the charge, allows the communication of the charge for the new fact for which it must be processed mainly on the request of the prosecutor and the consent of the defendant, or changes the charge when during the preliminary hearing it appears that the legal definition of the fact is wrong or the accusation is not clear. In these cases, the court invites the prosecutor to make the necessary corrections or to return the acts when the prosecutor does not act. (*Albania Criminal Procedure Code, 1995, Article 332/d*).

III. DECISION OF THE PRELIMINARY HEARING JUDGE

(Albania Criminal Procedure Code, 1995, Article 332/dh).

Article 332/dh of the Code of Criminal Procedure defines the decision of the judge of the preliminary session after hearing the claims and discussions of the parties in the process. From the content of this provision, the decision of the judge of the preliminary session is related to:

- a) accepting the request of the prosecutor and sending the case to court, when it is deemed that there is sufficient evidence to support the accusation;
- b) the continuation of the trial by the same court, when the parties present an agreement on the conditions of the admission of guilt and the determination of the punishment;
- c) to invite the parties to present the final discussions when the defendant has requested a summary trial, sending the case to the competent court when the defendant has requested a summary trial, after verifying the state of the acts, according to the provisions of Article 332/c of this Code;
- ç) dismissing the accusation or the case when there are cases of paragraph 1, article 328, of this Code.
- d) declaring incompetence and sending the case to the competent court.

The provision related to Article 332/dh has changed in 2021 in relation to special trials such as summary trial and trial by agreement. If before the changes to this provision the judge of the preliminary session accepted the requests of the parties for the abbreviated trial and the trial by agreement by taking the case for trial before the judge of the foundation, after the changes in the Code, these types of trials are judged by the judge of the preliminary session without sent the matter to the judge of the foundation. In this case, the judge of the preliminary session continues the trial with the abbreviated trial procedure (*Albania Criminal Procedure Code, 1995, Article 405*) and that of judgment by agreement, (*Albania Criminal Procedure Code, 1995, amended, Article 406/dh*), respecting the requirements and the trial procedure underlying the case. The implementation of

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this procedure is also related to the economicization of the judicial process for a quick and fair trial.

Regarding the dismissal of the charge or the case, the judge of the preliminary session is competent and decides only on criminal charges that are punishable by a maximum of two years of imprisonment.

IV. THE JURISPRUDENCE OF THE HIGH COURT

The Supreme Court has a diverse practice in the trial of criminal cases, maintaining a position both in the uniformity of the judicial practice and in its change. The Criminal College of the Supreme Court has judged various cases in relation to the judge of the preliminary session, (*Supreme Court, Periodical Bulletin, 2022-2024*, <https://www.gjykataelarte.gov.al>, Bulletin no. 6, 2024) whose decisions are briefly as follows:

1. In decision no.115(53), dated 18.02.2022, the Criminal Panel of the Supreme Court reasons that the criminal procedural law does not provide in any legal provision the right of the court of foundation to control the performance of investigative actions by the prosecution, much less the return of the case for further investigations. Such a competence, with the amendments of the Code of Criminal Procedure, belongs to the judge of the preliminary session, who has the right to order the prosecutor to complete the investigations by determining their direction, referring to article 332, letter "ç", of the CPC. The basic court does not verify the investigative actions, but if it assesses that there is not enough evidence to support the accusation, it takes a verdict of not guilty.

2. In decision no.1151(183), dated 24.06.2022, Criminal College of the High Court stated that the use of erroneous evidentiary standards in judging the request for sending the case for trial or for dismissing the case, according to articles 332/dh/a and 328/1 of the CPC, positions the judge of the preliminary hearing in the capacity of the judge of foundation, when it is expressed regarding the verifiability of the accusation, considering the decision-making in conditions of illegality.

3. In decision no. 1235 (261), dated 13.10.2022, *Criminal College of the High Court* reiterates that the period of detention spent during the phase of dealing with the case before the judge of the preliminary session, when the latter has decided to send the case to trial, is considered part of the detention period of the trial phase (basically, in degree first) of the case.

4. In decision no.469(8), dated 16.01.2023, *Criminal College of the High Court* decides that the defendants are not entitled to file an appeal/recourse against the decision-making of the appellate court, which partially changed the decision-making of the judge of the preliminary session of the first instance to send the case to trial, since this means of appeal is not provided for in the provisions of special provisions of the criminal procedural law.

5. In decision no.40, dated 17.01.2023, *Criminal College of the High Court* points out that when the judge of the preliminary session orders the sending of documents to the prosecutor for "completion of investigations", according to Article 332/c of the Criminal Code, he also disposes of the requests of the parties for the extension of the detention periods, spent on account of the investigation phase preliminary, according to article 263/1/b of the CPC.

6. In decision no. 94 (23), dated 19.01.2023, *Criminal College of the High Court* decides that the judge of the preliminary session can dismiss the charge, when the circumstances provided by the law exist, but cannot enter into the assessment and appreciation of the evidence, as this is characteristic of the trial of the case on the merits.

7. In decision no.00-2023-1333, dated 28.07.2023 *Criminal College of the High Court* assesses that the judge of the preliminary session cannot dismiss the case and assign medical measures to the person under investigation, since such a thing must be requested from the judge of the foundation by the prosecutor. In order to resolve the conflict of competence, the College considers that the judge of the preliminary session should return the case to the prosecutor to make possible the exercise of criminal prosecution through the submission of the request for the trial of the case and for the appointment of the medical measure.

CONCLUSION

The main purpose of the provision in the Code of Criminal Procedure of the figure of the Judge of the Preliminary Session for the control of the actions of the prosecutor during the preliminary investigation phase and the strengthening of the investigation phase, as the weakest phase of the criminal process, is realized through the concrete powers that they are left to this judge.(Report on additions and changes to the criminal procedure code, 2017).

- The judge of the preliminary session has the obligation to express himself in the case of judging the Prosecutor's request for sending the case to trial. He does not comment on the basis of the charge, the verification of the defendant's guilt regarding this charge disputed by the Prosecutor. However, the judge of the preliminary session can express the sufficiency and suitability of the evidentiary material, the sources of evidence gathered by the Prosecutor during the preliminary investigations, or if there is a need for conducting other investigations.

- The judge of the preliminary session cannot enter into the evaluation of the evidence, their value, in relation to the fact and the analysis of the elements of the criminal offense, since this can only be done in the court session of the trial of the merits of the case, under the conditions of judicial debate and contradiction.

- Dismissal of the charge or the case in the preliminary session is decided only when elements of the defendant's criminal responsibility are obviously

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missing and not when this can only result after the judicial examination and debate of the evidence.

- Review procedure in preliminary session it does not replace the judgment of the case on the merits and nor does it prejudge the final decision her.

- The judge of the preliminary session cannot make a deeper assessment than that required for the judgment of the case on the merits, as well as cannot go into the matter of evaluating the evidence and valuing it in the sense of being proven, an assessment that is carried out in a later stage of the proceedings, that of judging the case on the merits.

- In case of a change in the charge, the prosecutor communicates it to the defendant at the hearing or to his defense, while in the case of a new charge, it is allowed to be communicated to the defendant or the defense at the preliminary hearing only if he gives his consent. In contrast, the prosecutor orders the registration of a new proceeding.

- In the case of submitting a request for securing evidence in the preliminary session, the judge does not examine it, but passes it on to the judge who examines requests of an urgent nature during the preliminary investigation phase.

- The right of the judge of the preliminary session to control the legal qualification of the fact, as well as the clear and precise formulation of the accusation, is a prerogative of this new procedural subject.

- When it considers that the preliminary investigations are not complete, the court does not declare that the discussion is closed and orders their completion, determining the directions of additional investigations and, when appropriate, the acts that must be performed. The court also determines the deadline within which the investigations must be completed and the date of the new session.

- The preliminary session is avoided in the cases where the proceedings are for a criminal misdemeanor, in the cases of the direct trial and the request for the approval of the criminal order.

- The judge of the preliminary session has the obligation not only to justify the decision related to the continuation of the investigations when he considers that there is room for further investigations, but it is imperative that in the ruling he also states about the return of the documents.

- At the stage of the preliminary hearing, conviction of the defendant's guilt is not required, but the sufficiency of the evidence in support of the charge.

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