
Legal Remedies Against the Detention Decision with Reference to the Practice of the Supreme Court

Joko Dragojlović, Jovana Stojanović Jandrić and Teodor Čavić
Faculty of Law for Commerce and Judiciary, Novi Sad

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Author Note

Joko Dragojlović  <https://orcid.org/0000-0002-4713-1855>
Jovana Stojanović Jandrić  <https://orcid.org/0009-0006-4563-6127>
Teodor Čavić  <https://orcid.org/0009-0004-7083-9917>

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Corresponding author: Joko Dragojlović

E-mail: jdragojlovic@pravni-fakultet.info

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Abstract

Personal freedom represents one of the basic human rights in modern civilized and democratic societies, a value that is strongly protected by both national and supranational legal instruments, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. This right is certainly not of an absolute nature, and international instruments, as well as domestic regulations, allow this right to be limited. It is precisely the order on pre-trial detention in criminal proceedings, as one of the measures to ensure the presence of the accused, that represents a limitation of this freedom. As it is about restricting one of the basic freedoms, strict conditions have been set that must be met in order for such a restriction to be socially and legally acceptable. Thus, the Code of Criminal Procedure defines the conditions for ordering detention, the purpose of which is to achieve a balance between the individual's right to freedom and the state's interest in the orderly conduct of criminal proceedings. In addition to those conditions, and based on the constitutional guarantees in the case of deprivation of liberty and the right to a legal remedy, the Code of Criminal Procedure provides for and ensures the right to appeal against the first-instance detention decision, which appeal is decided by the Chamber referred to in Article 21, paragraph 4 of the Code of Criminal Procedure, whose decision, as a second instance, is final and legally binding. This paper analyses the positive legal rules on the determination of detention and the right to appeal against such a decision, especially analysing the judgment of the Supreme Court, which, following a request for the protection of legality, had to take on the creative role of a legislator and resolve the issue unsettled by the positive law – the admissibility of a legal remedy against a second-instance decision on detention, and the consequences of this position of the Supreme Court.

Key words: detention, personal freedom, appeal, case-law, Supreme Court

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Introduction

Of all the measures to ensure the presence of the accused in the criminal proceedings, pre-trial detention appears as the harshest and most restrictive measure. Bearing in mind the extent of restrictions and denial of rights that detention entails, reducing the duration of detention to the minimum possible is an absolute imperative (Bjelajac, 2017), but in order to achieve the aforementioned balance, an intensive judicial review of detention is also necessary, which is made possible, first of all, by allowing the defendant an effective right to appeal against the decision of the court that ordered the detention (Dragojlović & Stamenković, 2016, p. 240), respect for basic human rights and the exclusion of any corrupt actions and elements (Bjelajac, 2008 & Bjelajac, 2015). If these principles are not applied correctly or at all, the criminal procedure could be obstructed and thus the application of any other procedural institution would be significantly more difficult or impossible. On the other hand, improper application of these institutes could lead to the prolongation of criminal proceedings and the violation of the right to a fair trial (Trešnjev, 2016, 1).

These principles are elaborated in detail in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, [ECHR]. (1950).), which defines in detail the reasons for ordering detention, and insists that everyone who is arrested or deprived of liberty must without delay be brought before a judge or other official designated by law to perform judicial functions and must have the right to be tried within a reasonable time or to be released until trials. In this sense, the ECHR specifically guarantees that "[e]veryone who is deprived of his liberty has the right to initiate proceedings in which the court will urgently examine the legality of the deprivation of liberty and order his release if the deprivation of liberty is unlawful." (Art. 5, para. 4). The provisions of

the ECHR are particularly significant for Serbia, i.e. domestic courts, given the fact that Serbia is a member of the Council of Europe, but also that the rights and freedoms guaranteed by this convention are provided with judicial protection at the European level – before the European Court of Human Rights (hereinafter: European Court).

International standards regarding the determination of pre-trial detention, as a legitimate form of deprivation of liberty, are of particular importance since they define minimum uniform standards regarding one of the basic human rights – freedom (Bjelajac, 2013; Bjelajac, 2015). However, in addition to the above, international standards in this matter are important because the Constitution (National Assembly, 2006) stipulates that the ratified international agreements are directly applied, and they represent an integral part of the internal legal order of Serbia (Art. 16, para. 2), and that provisions on human and minority rights are interpreted in accordance with valid international standards of human and minority rights, as well as the practice of international institutions that supervise their implementation (Art. 18, para. 3). From this, it clearly follows that Serbia, which implies both its courts and the criminal procedure itself, is bound not only by the text of international treaties, but also by the practice of international courts (Majić, 2008, p. 196), including the ECHR and the European Court, which often, with its practice, the ECHR gives content to abstract guarantees.

The application of the above is of particular importance in the situation dealt with in this paper, which implies a procedural situation that is not regulated by positive legislation, and where the defendant's right to freedom was completely limited by ordering pre-trial detention, so the Supreme Court, as a way out of this situation, resorted to the direct application of the rights guaranteed by the ECHR and the Constitution, taking into account the practice of the European Court.

Ordering of Pre-Trial Detention at the Request of the Public Prosecutor

Bearing in mind that pre-trial detention most encroaches on the rights and freedoms of the defendant, pre-trial detention represents

the most serious measure for ensuring the presence of the defendant and the orderly conduct of criminal proceedings (Ilić Drecun, 2003, p. 51). Although detention is the most effective measure for ensuring the presence of the accused and the smooth conduct of criminal proceedings, its sensitivity, as a coercive measure, is reflected in the possibility of repressive action against the possible perpetrator of the criminal act, so and an innocent person (Memedović, 2006, p. 825). The decision on detention can always be made only by the court. This is a generally accepted standard, so there is almost no state in the world that transfers this authority to another body (Ananian-Welsh, 2015, 757). The procedure for determining, extending or revoking pre-trial detention is, therefore, regulated by the rules contained in the Code of Criminal Procedure, which comprehensively regulate the matter of the reasons for determining pre-trial detention, the subject-matter, territorial and functional jurisdiction of the court that decides on the pre-trial detention of the defendant in the appropriate phase of the criminal procedure, the need the existence of the initiative of the parties to the proceedings, as well as other issues governing detention as a measure to ensure the presence of the accused.

In terms of general protections, the Code stipulates that detention can be ordered only under the conditions stipulated by the Code of Criminal Procedure, and the condition is that the same purpose cannot be achieved by another measure (Matijašević-Obradović, 2016). Due to the nature of pre-trial detention as a measure, and as a consequence of the fact that pre-trial detention is the most difficult measure to ensure the presence of the accused, there is a legal provision that stipulates that during the entire procedure, pre-trial detention must be terminated as soon as the reasons on the basis of which it was determined cease to exist (National Assembly, 2011, Art. 210, paragraph 3). As a special protection, defined as the duty of acting authorities, the obligation of all authorities participating in criminal proceedings and authorities providing them with legal assistance to reduce the duration of detention to the shortest necessary time and to act with particular urgency if the defendant is in pre-trial detention is prescribed (Art. 210, paragraph 2). These basic

protective provisions are further developed through individual provisions of the Code.

When he believes that there are reasons for ordering detention, the public prosecutor is an authorized entity that can propose to the court to order detention. In this respect, Article 212 of the CPC makes a distinction between two procedural situations: 1) ordering pre-trial detention before confirming the indictment and 2) ordering pre-trial detention after confirming the indictment. In the first procedural situation, pre-trial detention will be ordered at the proposal of the public prosecutor, which implies that the initiative of the prosecutor is necessary for ordering pre-trial detention. On the other hand, in second procedural situation, the Code authorized the court, *proprio motu*, to order pre-trial detention, after the indictment has been confirmed, so no initiative of the public prosecutor is necessary.

A special rule for ordering pre-trial detention is provided when the issue of ordering pre-trial detention is decided in the investigation phase. Namely, this situation is governed by the provisions of Article 214 of the CPC (National Assembly, 2011), which stipulates that detention during the investigation can be ordered by the judge for preliminary proceedings or the panel from Article 21, paragraph 4 of the CPC. The rule that detention, during the investigation phase, can only be ordered at the initiative of the public prosecutor is completely logical and understandable, bearing in mind that the concept of public prosecutor's investigation implies that the public prosecutor is the primary body of the procedure and is to the greatest extent responsible for its legal and efficient conduct. As a logical consequence of this setting of the prosecutor's investigation, in which the court has a supervisory function, the rule emerges that when the public prosecutor makes a proposal to order pre-trial detention, the court cannot add any new grounds for ordering or extending detention beyond that proposal, unless it can, in a situation where if the public prosecutor proposed two or more grounds, remove one of them. From the above, it can be concluded that, in terms of ordering pre-trial detention during the investigation phase, the court is a somewhat passive body, which

will strictly adhere to the presented proposal of the acting public prosecutor.

In any case, before ordering pre-trial detention, the court is obliged to hear the defendant about the reasons for ordering pre-trial detention as well as all the circumstances that are important for deciding on the proposal for ordering pre-trial detention (Art. 212, para. 2, National Assembly, 2011).¹ The public prosecutor and the defense attorney may attend the hearing of the accused on the circumstances of the reason for ordering detention, before ordering detention or afterwards. The court is obliged to inform these persons in a convenient way about the time and place of hearing the accused. Given that the Code provides that the public prosecutor and the defense attorney can attend the hearing, which means that their presence is not mandatory, the only condition for the hearing is that they have been properly informed (Art. 212, para. 3, National Assembly 2011). Regarding the standard of suspicion, when ordering pre-trial detention, the court sets out to determine whether there is reasonable suspicion and whether there are legal reasons for ordering pre-trial detention. The functional jurisdiction of the court for ordering pre-trial detention is different and depends on the stage in which the proceedings are.

When the court is satisfied with regard to the standard of suspicion and the existence of a legal basis for ordering pre-trial detention, and after hearing the defendant, the court makes a decision on the proposal for ordering pre-trial detention - in the form of a decision (Matijašević-Obradović & Zarubica, 2018, p. 7). The decision on the determination and extension of pre-trial detention (hereinafter referred to as: the detention decision) is a strictly formal act, i.e. an act in which all the elements are exhaustively and precisely determined (see Art. 213, para. 2, National Assembly, 2011), and a special element of this decision is a lesson on the right to appeal against that decision.

¹ From this rule, however, certain understandable deviations are foreseen, which are contained in Article 195, paragraph 1, points 1 and 2 of the CPC, as well as in the event that there is a threat of delay. In these cases, within 48 hours from the time of arrest, the court will hear the defendant about the existence of reasons for ordering detention. After the hearing, the court will decide whether to leave the decision on detention in force or to revoke the detention (Art. 212, paras. 2, 4-5, National Assembly, 2011).

Appeal on the Decision Determining or Extending Detention

The right to appeal is one of the basic rights in modern democratic societies. As a rule, it is always available and available to individuals when deciding on their right, obligation or legal interest.

The procedural institute for legal remedies, which guarantees the adoption of a legal and correct judicial decision, is the basic premise for achieving a fair trial, which is proclaimed as the goal of criminal proceedings.

The Constitution of the Republic of Serbia also guarantees the right to a legal remedy as one of the basic human rights, which stipulates that everyone has the right to appeal or other legal remedy against the decision about his right, obligation or interest based on the law (Art. 36, para. 2, National Assembly, 2006). As the detention decision limits, or withholds, freedom as one of the basic human rights, such a decision is certainly subject to review by legal remedy, in the sense of the above – mentioned article of the Constitution. The appeal against the decision achieves two goals. First, judicial control of the lower court is enabled, which, in itself, contributes to the realization of the principle of a fair trial. Secondly, bearing in mind the nature and importance of the rights that are limited by detention, it is justified and necessary for another, independent, objective and law-based court to review the reasons for determining such a drastic measure, thereby contributing to the protection of the defendant's rights and reducing the likelihood of arbitrariness by the first instance court.

With this in mind, the Code of Criminal Procedure (National Assembly, 2011) sets out the rules related to the appeal of decisions imposing or terminating pre-trial detention. Thus, the decision determining or extending detention is one of the decisions against which an appeal is always allowed – Article 214, paragraph 3 and Article 216, paragraph 5 of the CPC – explicitly, by using the wording "against the decision from paragraph 2 of this article" – allows appeal against the decision. Certainly, the permissibility of filing an appeal against this decision comes as a reflection of the issue that is being decided by this decision – the freedom of the individual, as a basic

human right. Otherwise, if the detained person is not given the right to contest the detention decision immediately, this would violate the detained person's right to an effective legal remedy, but it would also unreasonably interfere with the right to freedom.

In terms of the above, the parties and the defense counsel may file an appeal against the decision on detention in the investigation referred to in Article 21, paragraph 4 of the CPC, provided that the appeal does not delay the execution of the decision. The appeal, decision and other documents are submitted immediately to the Chamber, which is obliged to make a decision within 48 hours. After the indictment has been filed against the decision on detention, the parties and the defense attorney can file an appeal, which, as in the previous case, does not delay the execution of the decision. The appeal, decision and other documents are submitted immediately to the Chamber of the second-instance court, which must decide on the appeal immediately, because the procedure in detention cases is urgent, but not bound by a deadline (Art. 214-216, National Assembly, 2011). Only in the first situation, when detention is determined by the decision of the judge for the preliminary proceedings, the appeal will be decided by the non-trial Chamber of the same court (Art. 21, paragraph 4, National Assembly, 2011). The second-instance decision, that is, the decision made following an appeal against the first-instance decision on pre-trial detention, is final and legally binding, which is a feature of all second-instance court decisions. This follows from the provision of Article 277, paragraph 1 of the CPC (National Assembly, 2011), according to which the decision becomes legally binding when it can no longer be challenged by appeal or when the appeal is inadmissible. Second instance decisions, as a rule², are not subject to appeal, but possibly to extraordinary legal remedies.

² An appeal against a second-instance decision in criminal proceedings can only be made in the case of Article 463 of the CPC - "An appeal can only be made against a verdict by which the second-instance court reversed the first-instance verdict acquitting the accused and issued a verdict declaring the accused guilty." As the provision itself says, this is about an appeal against a *verdict*, not against a decision, while the provisions governing appeals against a decision, i.e. corresponding application (Art. 468-469), do not provide for the corresponding application of Article 463 of the CPC, from which, in our opinion, the CPC does not foresee the possibility of appealing to the second-instance decision.

Since the special provisions that contain the rules for determining, extending and canceling detention do not contain specific reasons for challenging this decision, by applying the rules from Article 469 of the CPC (National Parliament, 2011), the decision on detention can be challenged for all the reasons provided for challenging the verdict, which reasons are contained in Article 437 of the CPC (National Assembly, 2011), namely: 1) significant violation of the provisions of the criminal procedure; 2) violation of the criminal law; 3) incorrect or incompletely established factual situation; 4) due to the decision on criminal sanctions and other decisions.³

It has already been pointed out that an appeal against a decision on detention of a judge for preliminary proceedings is decided by a panel of the same court referred to in Article 21, paragraph 4 of the CPC, and that an appeal against a decision on detention by a trial panel (or non-trial panel) during the proceedings is decided by a panel of the immediately higher court (Art. 467, National Assembly, 2011). Thus, the CPC (National Assembly, 2011) stipulates that: "the court examines the decision within the grounds, part and direction of the refutation highlighted in the appeal. The appeal against the decision of the first-instance court is decided by the second-instance court in the session of the panel, unless this Code provides otherwise. The parties may be notified of the panel session if the court considers that their presence would be useful for clarifying the matter. The panel of the same court decides on the appeal against the decision of the judge for the preliminary procedure (Article 21, paragraph 4), unless otherwise specified by this Code. The court can inform the parties about the panel session if it considers that their presence would be

³ At this point, we point out that, although the text of the legal provision does not explicitly mention it, that is, it does not exclude this ground for contesting the decision, we believe that the decision on pre-trial detention cannot be contested on the grounds of a wrong decision on criminal sanction. As the criminal sanction, by its nature, is part of the meritorious decision that is made at the end of the criminal procedure, this reason is unsuitable to be used as an appeal ground for refuting the decision on pre-trial detention, or even other decisions that are made during the procedure. Although the legislator technically acted correctly by using the words "apply accordingly", we believe that, for the sake of precision, it is desirable to narrow the application of reasons for appeals against decisions in criminal proceedings by excluding the reason from Article 437, point 4 of the CPC.

useful for clarifying the matter. Ruling on the appeal, the court can by decision reject the appeal as untimely, illegal or irregular, reject the appeal as unfounded, or accept the appeal and modify or reverse the decision and, if necessary, refer the case for a new decision. The court is obliged to deliver the decision on the appeal with the files to the procedural body that made the decision within 30 days from the day when it received the files with the public prosecutor's proposal, unless otherwise specified by this Code".

Analyzing this article, it is clear that the panel from Article 21, paragraph 4, i.e. paragraph 2 of Article 467, is what the legislator meant in the first paragraph of that article when he used "unless this Code provides otherwise."⁴ Observing these provisions, together with the provision of Article 465, paragraph 4 of the CPC, according to which "no appeal is allowed against the decision of the second-instance court, unless otherwise specified by this Code", the conclusion is reached that against the decision of the panel from Article 21, paragraph 4 of the CPC⁵ cannot file an appeal directly to a higher court. The decision of the panel is legally binding and final.

By adopting such an approach, the legislator opened the door to procedural situations in which the first-instance decision rejects the public prosecutor's request to order pre-trial detention, and the

⁴ At this point, it should be pointed out that the determination of the legislator to entrust the decision-making authority on the appeal against the detention decision of the judge for the preliminary proceedings to the panel of the same court is not in accordance with the general principle of devolution and the two-tiered authorities that decide on the disputed issue, and also, at least when it is about the basic court, inconsistent with the Law on the Organization of Courts (National Parliament, 2023; which is essentially identical to the previous legal text), where Article 25, paragraph 2, point 1 expressly stipulates that **the higher court is** the one to decide on appeals against the decisions of the basic court on measures to ensure the presence of the accused and for the orderly conduct of criminal proceedings. Although, it is true, Article 24 establishes that the basic court performs other competences and tasks determined by the law, we believe that the intention of the legislator was not to, without an explicit legal basis in the substantive law, expand the actual jurisdiction of the basic court through the procedural law. The same can be applied to the relationship between the higher court and the appellate court. However, as a matter of fact, this approach of the legislator does not seem to have created difficulties in practice.

⁵ Although it is not, strictly speaking, a "court of second instance", the decision of this panel is of second instance, and it is exclusively competent to decide on the appeal to the decision of the judge for the preliminary proceedings, it should be considered that it is a court of second instance.

second-instance court (or panel), ruling on the public prosecutor's appeal, orders pre-trial detention to the defendant in a modified decision. In such, albeit rare, procedural situation, the defendant was detained for the first time only by a second-instance – and legally binding – decision, against which appeal is not allowed, according to general rules, and bearing in mind the fact that it is a court decision and there is no legal basis for the application of Article 463 of the Code of Criminal Procedure. A detained person in such a procedural situation does not have an effective legal remedy at his disposal.

Right to Appeal in Case of Legal Gap – Created by the Decision of the Supreme Court

Unlike the usual and typical situations that arise during criminal proceedings, to which the rules presented in the previous chapters absolutely apply, from time to time a situation arises in practice that is not regulated by positive procedural legislation, and that is exactly the situation when the first-instance decision of the acting court rejected the proposal of the public prosecutor to order detention, so that decision would be modified by the second-instance decision, which created the procedural situation mentioned above. Thus, the Supreme Court had the opportunity to face this problem, when in its judgment no. Kzz 1052/23 of 17.10.2023, deciding according to the defense attorney's extraordinary legal remedy, considered the aforementioned procedural situation which is not regulated by positive regulations.

Namely, according to the facts stated in the Verdict (VS Kzz 1052/23):

From the case file, it is determined that by the decision of the judge for the preliminary proceedings of the Basic Court in Pančevo Kppd 107/23 of 27.08.2023. rejected the proposal of the public prosecutor of the Basic Public Prosecutor's Office in Pancevo, to order the defendant AA into pre-trial detention, which decision was modified by the decision of the criminal panel of the Basic Court in Pancevo Kv 579/23 of 30.08.2023 by accepting the appeal of the public prosecutor of the Basic Public Prosecutor's Office in Pancevo, so that the defendant was ordered to be detained for up to 30 days, in accordance with the

provisions of Article 214 in connection with Article 211, paragraph 1, point 3) of the CPC. The second-instance court is deciding on the appeal of the defendant's defense attorney filed against the decision of the criminal panel of the Basic Court in Pančevo Kv 579/23 dated August 30, 2023, judged it illegal, finding that the panel from Article 21, paragraph 4 of the CPC, of the Basic Court in Pancevo, decided on the appeal filed against the decision of the judge for the preliminary proceedings of that court; and rejected it as illegal, referring to the provisions of Article 467, paragraph 4 of the CPC.

Having previously found that in the specific case, it is an issue of importance for the correct application of the law (Art. 486, paragraph 2, National Assembly, 2011), the Supreme Court began its analysis with the statement that "The Code of Criminal Procedure did not regulate a specific procedural situation, that is, whether the defendant can file an appeal against the decision of the non-trial panel, which accepted the public prosecutor's appeal and changed the decision of the judge for the preliminary proceedings, which rejected the public prosecutor's proposal to order detention." (para. 10, VS Kzz 1052/23).

We certainly believe that, faced with such a situation, the court cannot simply refuse to deal with the disputed issue, but had to go into the merits and make a decision. This is certainly in accordance with the position of the European Court of Human Rights in Strasbourg, which held that the national court must respect the European Convention if the domestic legislation does not provide for a certain legal situation, i.e. if there is a legal gap, so that, in the interpretation of legal gaps, the ECHR must also be respected (McBride & Macovei, 2004, 23).

Bearing in mind the above, the Supreme Court proceeded with the decision on the merits under an extraordinary legal remedy. Thus, the Supreme Court took the position that when the measure of detention was determined for the first time, the defendant "in any case has the right to file an appeal against that decision, even when it was decided by the decision of the criminal panel (Article 21, paragraph 4 of the CPC) ", by which the first-instance decision rejecting the

proposal was changed, because, according to the ruling of the Supreme Court, "such a decision, although second-instance, in the formal procedural sense for the defendant has the character of a first-instance decision ordering him to be detained, which is why the defendant in a specific procedural situation should be allowed the right to appeal against the decision of the non-trial panel." (para. 11, SC Kzz 1052/23).

With this, in our opinion, completely correct position, the Supreme Court, in a certain part, deviates from legal provisions. Although, as we have seen, there is no express provision of the wording "against this decision no appeal is allowed", such a legal conclusion can be made quite clearly by applying the provisions mentioned in the previous chapter.

The Supreme Court, explaining its decision, starts from the fact that Article 5, paragraph 1 of the ECHR stipulates that "everyone has the right to freedom and security of person, and according to paragraph 4 of the same article of this convention, it is determined that everyone who is deprived of his liberty has the right to initiate a procedure in which the court will urgently examine the legality of the deprivation of liberty and order release if the deprivation of liberty is illegal." The Supreme Court connects this general principle from the European Convention with the right-guaranteed provision of Article 36, paragraph 2 of the Constitution (National Parliament, 2006) a guaranteed right to a legal remedy, so that everyone has the right to appeal or other legal remedy against a decision that decides on his right, obligation or interest based on law.

Connecting and applying the principle from Article 5, paragraph 4 of the ECHR and Article 32, paragraph 2 of the Constitution, the Supreme Court took the view that the High Court in Pancevo, in the specific case, "violated the right of the defendant to appeal against the decision on detention guaranteed by the cited provisions of the European Convention on human rights and the Constitution of the Republic of Serbia" (para. 14, SC Kzz1052/23). Proceeding from the above, the Supreme Court accepted the request of the defendant's defense attorney, so it quashed the decision of the High Court in

Pancevo and sent the case back to the High Court in Pancevo for a new decision on the defendant's defense attorney's appeal.

Certainly, the consequence of this decision of the Supreme Court is far wider than an individual case. On this occasion, the Supreme Court filled a legal gap that existed since the adoption of the current Criminal Procedure Code. Although the explanation of the judgment of the Supreme Court is relatively short and concise, with general references to certain provisions of the European Convention and the Constitution, without reference to the corresponding practice of the European Court and without a detailed analysis and explanation of why the court went beyond the text of the CPC, the decision on its merits represents a strong positive step in the interpretation of criminal legislation in favor of the accused.

Although there is no explicit legal basis for the application of Article 463 of the CPC, we believe that the court could have explained much more easily the analogous application of this – already established - legal rule, i.e. the legal principle contained in it, and that there was no need to resort to the creation of a completely new legal rule and formulations such as "the right to appeal should be allowed" (para. 11, VS Kzz 1052/23). Certainly, the court, and especially the Supreme Court, should take on the creative role of the legislator in a situation where there is a legal gap, in order to fill that gap, all in the interest of legal certainty, as well as a fair trial. However, the court, and not even the Supreme Court, is not unlimited in performing that creative role. The court should choose the path and the option that a reasonable legislator would have chosen if he could have foreseen the situation that arose. Certainly, we believe, a legal gap in criminal law cannot harm the defendant – the defendant cannot suffer for the omission of the legislator. Although we do not touch the result achieved by this judgment of the Supreme Court – what's more, we welcome the position of the court - we believe that the Supreme Court should have reached that result by a different path. A reasonable legislator provided a rule in Article 463 of the CPC that the second-instance revising decision to the detriment of the defendant, by which he is convicted, will be subject to another appeal, in order to decide on his

guilt in two stages. We also agree with the Supreme Court that the right to appeal should be provided for, but it is not. It is far simpler to imagine, accept and reason that the same reasonable legislator who provided the rule from Article 463 would also provide for its corresponding application to the pre-trial detention decision (if not to other decisions), because the goal of such a provision is to in two stages, two independent courts (or panels) consider in detail and decide on the deprivation of liberty of a person.

If, on the other hand, the Supreme Court opted for the approach it did, we believe that it should have been explained in more detail, both from the aspect of analyzing the relevant provisions and the doctrinal approach, as well as with the support of the corresponding judicial practice. The essence of the detailed explanation is not only to make the judgment not seem arbitrary, but also to make it impossible for a later court or a later panel to, on a whim, deviate from the previous practice. Although judicial practice is not a formal source of law, it has long been settled the issue that the unequal treatment of courts in the same or substantially similar factual and legal issues represents a violation of the right to equal protection before the law and the right to a fair trial (see e.g. Decision of the Constitutional Court UŽ 4411/15).

Bearing in mind everything that has been stated, as well as the fact that it was performing the creative role of a legislator, setting a rule for all future similar cases, the Supreme Court could and should have provided a more detailed explanation of its position.

Conclusion

It has long been established that penal legislation is *the lex stricta*. Regardless of the fact that, when it comes to penal legislation, it is taken as an irrefutable assumption that the legislator was perfect, and that he predicted everything he wanted to predict exactly in the way he wanted to, reality often shows the opposite. No legislator is perfect and no one can predict all the circumstances, situations and contingencies that may arise in the application of a penal regulation in

practice. However, when such a situation arises in practice, the state authorities, primarily the courts, cannot allow the defendant to suffer negative consequences due to an imperfect legislator. It is then that the courts must assume a creative role, which usually belongs to the legislator, and enable the application, even immediate, of those rights guaranteed by the Constitution to every person.

Since detention limits one of the fundamental human rights, which is protected not only by national but also international instruments, the need for a careful and serious approach to the issue of detention is necessary. Only the absolute regulation of all material and procedural issues concerning the determination, duration and termination of detention will lead to complete legal certainty. It seems unimaginable that, in modern society, the existence of the right to a legal remedy – as one of the basic and universally accepted human rights – depends on the majority in a five-member panel of the Supreme Court.

In particular, it should be pointed out that the court must certainly take on the creative role of the legislator when deciding in situations where there is a legal gap, it is not limited in this. On that occasion, one should be guided by the idea of how a reasonable legislator would act if he could imagine the disputed situation at the time of the adoption of the regulation, and in that effort, as little as possible disturbs or violates the principles and provisions already found in the regulation, but rather by analogous application of other provisions and the spirit of the regulations, a satisfactory and fair solution is reached. Otherwise, the power of the judicial branch of government would be worryingly, almost unlimited.

Speaking *de lege ferenda*, we believe that the legislator should correct his omission and introduce a provision in the Code of Criminal Procedure that will regulate this procedural situation - the case when the second-instance decision ordered the defendant into pre-trial detention for the first time. The legislator could achieve this by providing for the corresponding application of Article 463 of the CPC to the situation when the first-instance decision was modified by a second-instance decision and the defendant was ordered to pre-trial detention, when an appeal to the second-instance decision would be

expressly allowed. This would eliminate any possibility of legal uncertainty, and would prevent a subsequent panel of the Supreme Court from changing its position. Also, we suggest that the decision-making in the third instance, i.e. on the appeal of the second-instance decision, is carried out by a court immediately higher than the court that made the second-instance decision.

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Pravna sredstva protiv odluke o pritvoru sa osvrtom na praksu Vrhovnog suda

Joko Dragojlović, Jovana Stojanović Jandrić and Teodor Čavić
Faculty of Law for Commerce and Judiciary, Novi Sad

Sažetak

Sloboda kretanja predstavlja jedno od osnovnih ljudskih prava u savremenim civilizovanim i demokratskim društvima, vrednost koja se snažno štiti kako nacionalnim, tako i međunarodnim pravnim instrumentima, poput Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda. Ovo pravo, svakako, nije apsolutnog karaktera, pa i međunarodni instrumenti, ali i domaći propisi omogućavaju da se ovo pravo ograniči. Upravo određivanje pritvora u krivičnom postupku, kao mere za obezbeđivanje prisustva okrivljenog, predstavlja ograničenje ove slobode. Kako se radi o ograničavanju jedne od osnovnih sloboda, to su postavljeni strogi uslovi koji moraju biti ispoštovani kako bi takvo ograničenje bilo društveno i pravno prihvatljivo. Tako, Zakonik o krivičnom postupku opredeljuje uslove za određivanje pritvora, a čija je svrha ostvarivanje balansa između prava pojedinca na slobodu, te interesa države za neometanim vođenjem krivičnog postupka. Pored tih uslova, a polazeći od ustavnih garancija u slučaju lišenja slobode i prava na pravno sredstvo, Zakonik o krivičnom postupku predviđa i obezbeđuje pravo žalbe na prvostepeno rešenje kojim se određuje pritvor, a o kojoj žalbi odlučuje vanpretno veće iz člana 21, stav 4 Zakonika o krivičnom postupku, čija je odluka, kao drugostepena, pravnosnažna. Ovaj rad analizira pozitivnopravna pravila o određivanju pritvora i prava žalbe na takvu odluku, posebno analizirajući presudu Vrhovnog suda koji je, po podignutom zahtevu za zaštitu zakonitosti, morao da preuzme kreativnu ulogu zakonodavca, te razreši pozitivnim pravom neuređeno pitanje dozvoljenosti pravnog leka na drugostepenu odluku o pritvoru, te posledice ovakvog stava Vrhovnog suda.

Ključne reči: pritvor, sloboda kretanja, žalba, sudska praksa, Vrhovni sud