Legal Grounds for Determining Detention According to the CPC, and Court Practice in the Republic of Serbia

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Abstract

When the presence of the defendant is mandatory during the conduct of criminal proceedings and the defendant avoids doing so and facilitates the smooth conduct of the same, there are, the Law on Criminal Procedure provides for the conditions by which his presence is ensured. There are several foreseen measures by which the presence of the defendant can be ensured, starting from summons as the mildest measure to detention as the most severe measure provided for by the Code of Criminal Procedure of the Republic of Serbia, providing that detention can be applied as the last measure of procedural coercion.The reasons for ordering custody are determined by Article 211 of the Code of Criminal Procedure, with the basic prerequisite for ordering custody of the defendant being the existence of reasonable suspicion that the defendant has committed the criminal offense charged against him. In this paper, we will look individually at the grounds provided by law, which justify and mandate the determination of the measure of detention against the suspect.

Key words: custody, Code of Criminal Procedure, conditions for determining custody, judicial practice.

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Introduction

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5, Paragraph 1) guarantees every person the right to personal freedom, it nevertheless provided several grounds when deprivation of liberty will not be considered illegal.

Also, the Constitution of the Republic of Serbia provides in a general formulation that "everyone has the right to personal freedom and security, and deprivation of liberty is permitted only for the reasons and in the procedure provided for by law." crime, will be prosecuted in accordance with positive legal regulations, and in order to ensure his presence and the smooth conduct of the criminal proceedings, if he avoids it, a series of measures from the lightest to the most severe, which are decided by the competent court, are foreseen.

In order to determine the measure of detention, as the most severe measure that ensures the presence of the accused and the unhindered conduct of the criminal proceedings, it is necessary that there are reasons that justify such a decision. Special importance during the hearing of the accused is established by Article 33, paragraph 4 of the Constitution of the Republic of Serbia and Article 6, paragraph 3, item c of the EC, so that every person who is available to the court and who is tried for a committed criminal offense has the right to be tried in his presence, that is, to allow him to be heard and to be able to present his defense.

Thus, in order to prove the existence of the conditions provided by the Code for ordering custody, at any stage of the procedure, the competent authority is obliged to hear the defendant and determine the existence of the reasons prescribed by the Code of Criminal Procedure, i.e. to accurately state the legal basis according to to whom the defendant is ordered to be detained. During the hearing, the defendant can be questioned only about the grounds of suspicion that are charged against him in connection with the committed criminal act.

All rights of the defendant are provided for in Article 68 of the Code of Criminal Procedure. Among others, the defendant has the right to freely choose the way of defense. And if the prosecutor and his chosen defense attorney can attend his hearing (Article 6, paragraph 3c of the EC, Article 14, paragraph 3d of the MoJ, Article 33, paragraph 2 of the Constitution), as well as an ex officio defense attorney in the case when the defendant does not have a selected defense attorney, which he alone decides on.

According to judicial practice, the circumstances on the basis of which custody is determined must be assessed both individually and in connection with each other (Decision of the High Court in Belgrade, Kž2. no. 470/16, 2016:25).

Criminal legislation treats custody as a preventive deprivation of liberty of the accused person, which is used as a means of securing his presence and enables the criminal proceedings to be carried out smoothly, which does not constitute a criminal sanction.

The grounds according to the Code of Criminal Procedure for determining the detention measure are:

Reasonable suspicion

The basic and mandatory condition that must be met in order to order custody of the defendant is the existence of a well-founded suspicion (a high degree of probability) that a certain person has committed a certain criminal act, and thus acquired the status of a defendant. This type of doubt represents content that is not determined by law. There needs to be evidence of actions that indisputably indicate that they are the work of the defendant, which can be confirmed by evidence, documents or forensic evidence. Earlier interpretations that evidence is a sufficient reason that represents the possibility of starting an investigative procedure, which would be sufficient for starting an investigation and thus for ordering detention, proved to be insufficient. It proved necessary for the court to gain conviction on the basis of concrete evidence that the existing suspicion represents a higher level of certainty that a certain person has committed the criminal offense charged against him by his actions.

It is possible to establish a well-founded suspicion when, in the determination process, it is proven that there is more solid material evidence that can be concluded with certainty that they are in some way connected with the committed criminal act that is charged against a certain person. It is a debatable question whether it is necessary to examine the validity of suspicion in a specific case in every case when a decision is made to review the determination, extension or termination of detention.

The new Code of Criminal Procedure introduced certain changes in relation to the previous provisions in this area, so that in Article 216, paragraph 4, there is a possibility that in the case after the confirmation of the indictment due to the lack of grounds for suspicion, the court may, in the sense of Article 377, paragraph 4. examine the indictment and make a decision. This condition for ordering custody is stipulated by the Constitution of the Republic of Serbia. (Article 30, paragraph 1, item 18), and is a conditio sine qua non in the procedure for determining custody.

"Reasonable suspicion" means a set of facts that directly indicate that a certain person is the perpetrator of a criminal offense, and is a constitutional category incorporated into the Code of Criminal Procedure as a condition for ordering detention. In addition to the existence of well-founded suspicion, which is not a sufficient reason for ordering and extending custody, it is necessary that there is another reason for ordering custody, such as the risk of escape or the risk that the defendant will repeat the criminal offense, which is also prescribed in the conditions provided for in Article 5, paragraph 1 EC and according to the practice of the European Court of Human Rights (ECtHR).

According to a certain person, the court can order (and extend) detention only if at the same time it assesses that there is a well-founded suspicion that he has committed a criminal offense and that his detention is necessary for the smooth conduct of criminal proceedings.

The Code of Criminal Procedure recognizes different degrees of suspicion, namely:

- "grounds of suspicion" as a set of facts that indirectly indicate that a criminal offense has been committed or that a certain person is the perpetrator of a criminal offense. Certainly, "ground of suspicion" represents a weaker ground of probability in terms of blaming the commission of a criminal act.
- "reasonable suspicion" as a set of facts that directly indicate that a certain person is the perpetrator of a criminal act; and
- "justified suspicion" as a set of facts that directly support the well-founded suspicion and justify the filing of charges.

A degree of doubt should exist during every decision on custody in the pre-investigation procedure and in the investigation. After confirmation of the indictment, it is logical that the degree of suspicion in relation to custody should follow the same quality of suspicion that is required for confirmation of the indictment, so at that stage of the procedure, in relation to detention, the relevant suspicion should be – justified suspicion (Criminal Procedure Code , Article 2, point 17, 18 and 19).

The existence of a well-founded suspicion that the defendant has committed the criminal acts charged against him, and he has no registered residence, nor residence in the territory of the Republic of Serbia, that his address of residence has been deregistered, that the defendant is unemployed according to his own statement, and that he does not have any personal documents from what it follows that the center of the defendant's business and life activities is not connected to one particular place in the Republic of Serbia, which represent special circumstances that indicate that the defendant will flee if he is at liberty and thus become unavailable to the judicial authorities of the Republic of Serbia, which is why the detention of the defendant is based on the law from Article 211, paragraph 1, point 1 of the CPC, shows that it is a necessary and necessary measure to ensure the presence of the accused, so that the proceedings could be conducted smoothly (Decision of the High Court in Belgrade, Kž2. no. 1019/21 of 5 august 2021).

Also, in addition to the existence of a reason for ordering custody, in the case where the defendant, during the hearing with the

presence of an ex-officio defense attorney, and to the circumstance of the existence of a reason for ordering custody according to Article 211, paragraph 1, item 1 of the CPC, stated that he did not could report to the search, because he was undergoing treatment ..., that he would not run away and leave his residence, and then the defense counsel proposed the imposition of a milder measure - a ban on leaving the apartment pursuant to Art. 208 of the CPC, the first-instance court is obliged to consider the possibility of imposing a milder measure to ensure the presence of the accused (Decision of the Basic Court in G. Milanovac, Kv 24/20 of 11/02/2020 and Decision of the High Court in Čačak, Kž 5/20 of 14/02/2020).

On the part of proceduralists, there are different interpretations on defining the grounds of suspicion, such as:

- defining suspicion according to the degree of certainty – reasonable suspicion exists if there is a greater degree of certainty (Grubač & Vasiljević, 1999:328).
- defining suspicion according to the degree of probability - reasonable suspicion exists if there is a higher degree of probability that a criminal offense has been committed than in cases of suspicion and ordinary suspicion (Jeremić, 1981:146).
- definition according to the seriousness of the evidence – reasonable suspicion exists if there are serious evidence that a criminal offense has been committed (Vuković, 1981:126).
- definition according to the existence of evidence – reasonable suspicion exists if there is certain evidence for it (Lazin, 1997:76).
- definition according to the strength of the evidence – reasonable doubt exists if there is strong enough evidence for it (Lazin 1997:402).

According to Bejatović, in practice, stable criteria are built up on what evidence and what level of evidentiary credibility, reasonable suspicion is based on, through years of action by the courts and in general by the official actors of the criminal procedure. According to the ruling opinion, this is a justified reason that until now the Code has not

defined reasonable suspicion, but it has been left to the free belief of the official actors of the criminal procedure, and above all the court, with the fact that in this respect, the decisive influence of the established judicial practice. That free belief is, of course, realized within the framework of the principle of free evaluation of evidence, and the rules related to the burden of proof.

Grounds for suspicion and well-founded suspicion should be viewed from two aspects.

The first one, which refers to the mutual relationship between the degree of suspicion, which is characterized by the fact that the basis of suspicion is a lower degree of suspicion compared to well-founded suspicion, and justified suspicion, a somewhat higher degree of suspicion compared to reasonable suspicion, and another aspect that is of a procedural nature and, accordingly, the grounds of suspicion are characteristic of the pre-investigation procedure and investigation, while reasonable suspicion exists when, in those stages of the procedure, a higher degree of suspicion is required to determine detention, and the existence of justified suspicion is necessary to confirm the indictment (Škulić & Ilić 2013:31).

Escape danger

In addition to other reasons specified by law, the risk of flight is also a basis for ordering detention. The Code of Criminal Procedure, Article 211, paragraph 1, point 1, provides that detention can be ordered when the defendant is hiding or his identity cannot be established or if he avoids appearing at the main trial, that is, when there are certain circumstances that indicate danger from running away.

Concealment of the accused exists when the accused hints by his actions that he will make it impossible to establish his identity and the possibility of appearing at the main trial. These actions can manifest in very different ways. They occur in the frequent change of residence that the defendant fails to report, i.e. fictitiously registering at a specific address and avoiding staying at the same address. Also, the action of the defendant to avoid appearing, but to stay in a hidden place, is a

way of hiding, which prevents him from attending the proceedings against him.

Whether the competent authority will judge that these are actions that indicate hiding the defendant and avoiding appearing in the proceedings against him, depends on the morals and character of the person, on his previous behavior and attitude towards state authorities, previous convictions, his family and personal circumstances, as well as the defendant's expectations of what kind of decisions will be made in the proceeding. The impossibility, that is, the problem of determining the identity (identity) of the defendant can be a difficulty, which depends on the defendant's behavior. Namely, not having personal documents, avoiding presence in order to take impressions of papillary lines, changes in physical appearance, etc. they represent the problem of establishing identity. When establishing the identity requires a long time, the Code of Criminal Procedure provides for the possibility of ordering the defendant into custody until his identity is established.

That due to the fact that the identity has not been determined correctly, there may be a wrong decision by the competent authority on the determination of custody, is proven by judicial practice that knows the case that after the determination of custody, the defendant, during his stay in custody, informed the court about the fact that his name and surname are longer rather than the one indicated in the decision on detention. (Decision of the Basic Court in Belgrade, Kž.98/04 of January 20, 2004).

The legislator has foreseen several circumstances that may indicate the obvious preparation of the defendant to avoid being present during the conduct of proceedings where his presence is necessary. The actions of the defendant in this sense exist in cases where the defendant is not hiding, but does not respond to the summons of the court in order to obstruct and delay the proceedings. This is the reason for ordering detention, however, this is a factual issue and it is up to the court to assess in each relevant case whether failure to respond to a court summons constitutes an act of avoiding attending the main trial (Mirković, 2000:40).

In such situations, the court takes into account the number and frequency of these actions of the defendant, as well as the intensity of avoidance and possible justifications by which the defendant wants to confirm his actions as justified. Often, by canceling the power of attorney to the chosen defense attorney, at the moment when the deadline for the procedure before the acting authority is scheduled, the defendant obstructs by hiring another defense attorney and thus avoids going to court, according to him in the manner allowed by law. Thus, the defendant repeatedly hired a new defense attorney immediately before the main trial, and then, when the defense attorney would come to the main hearing and ask for a postponement due to the defendant's illness, and the court ordered the defense attorney to submit medical documentation, he canceled the defense attorney's power of attorney and hired a new one - case OSB, Kž. no. 266/07 of February 6, 2007 (Simić & Trešnjev, 2008:281).

In addition to the above-mentioned circumstances that indicate the danger of the defendant fleeing, the court determines and assesses whether there is any other basis that also indicates the possibility that the defendant may avoid attending the court by his activities and behavior, and it is necessary to analyze and take into account the character of the person, his relationship with state authorities, previous convictions, eventual frequent change of place of residence, his financial condition, family and personal circumstances, etc.

According to judicial practice, the risk of flight exists when a person who is without property and without permanent sources of income, who is not bound by personal or family circumstances to a specific place of residence, as the center of his life activities. The fact that he has registered his residence in the meantime is not important. (Decision of the Court of Appeal in Belgrade, Kž2 1348/19 of July 12, 2019), as well as the fact that the defendants, as migrants, crossed the territory of a number of countries without documents, until arriving in the territory of the Republic of Serbia, indicate the existence of a risk of escape (Decision 208/19 of the Court of Appeal in Belgrade and the decision of the High Court in Belgrade No. 4587/18 of January 4, 2019).

If the defendant is hiding, there is a possibility of preparing to escape, which is an action that can make him unavailable to the competent authority to act. Thus, the apparent avoidance of attendance at the main hearing is a circumstance that indicates the existence of a risk of escape, and the first-instance court, when it postponed eight scheduled hearings at the request of the defendant, and did not hold seven hearings due to the unjustified absence of the defendant, ordered custody of the defendant (Ilić, 2013:494).

Circumstances that indicate that the defendant intends to hide and be unavailable during the proceedings against him are manifested in unreasonably frequent changes of residence, failure to report a change of residence and making it impossible for the competent authority to find him, as well as a change of identity.

The defendant usually begins his escape by hiding, although hiding often also represents preparation for the realization of the escape. However, hiding cannot be equated with running away. In contrast to escape, hiding is not characterized by a dynamic character, but rather by a static one, e.g. stealth in another location (Matijašević & Joksić 2019:22).

The defendant's escape makes it impossible to establish his identity and is a reason for ordering custody, with the fact that there are no circumstances that indicate a risk of escape, and there is no reason to order custody in the case when the court knows the address where the defendant resides undeclared, regardless of the fact that the defendant does not lives at the address where he has registered residence (Decision of the Court of Appeal in Belgrade, Kž2. no. 1411/11 of April 29, 2011).

Collusive danger

The danger of collusion, that is, the danger of evidentiary obstruction of the defendant, is a special basis for ordering custody.

According to Article 211, paragraph 1, item 2 of the Code of Criminal Procedure, this danger exists in cases where existing circumstances indicate that the defendant will destroy, hide, alter or falsify evidence or traces of a criminal offense or if special

circumstances indicate that he will interfere with the proceedings by influencing witnesses , accomplices or concealers. When there are circumstances that indicate that the defendant can directly or indirectly influence witnesses or accomplices, destroy documentation and other valid evidence, collude with them, blackmail or threaten them, this is an aggravating circumstance for the authority conducting the proceedings, as well as the procedure of proving the committed criminal offense that is charged to the defendant, which justifies that the acting authority determines the measure of custody. Also, there is a danger that the defendant may destroy, hide or replace the evidence or traces of the committed criminal offense that have not been found until then, as well as that his possible accomplices may help him in this. These are justifiable reasons that demand that the defendant be ordered into custody and that his activity in the aforementioned sense be disabled and that the authorities conducting the proceedings be given the opportunity to collect material evidence to establish the defendant's guilt and the possibility of unhindered criminal proceedings.

The defendant can exert causal influence either in a direct conversation, i.e. verbal contact with witnesses, accomplices or concealers, either in a telephone conversation, through the exchange of letters, e-mail correspondence, or any other adequate technical means of communication (Bejatović, et al., 2013:186).

The duration of detention on this basis can be in effect until the evidence for which it was determined is provided, and at the latest until the first-instance judgment is passed, so the Code of Criminal Procedure distinguishes between the possibility of obstructing the accused by influencing two groups of evidence, namely, as material evidence and as statements that arise from certain personal sources of evidence, i.e. from the testimony of certain persons.

The defendant can destroy, hide, change or falsify material evidence in order to avoid the possibility of not proving or disputing the well-founded allegations of the prosecution about the facts against him in the proceedings. Destruction of evidence can be done by physically destroying evidence or traces. Hiding is the moving of evidence to a location unknown to the procedural authorities that would use it in the

procedure. In each specific case, it is necessary to assess whether there is a possibility of evidential obstruction by the defendant, and therefore, whether it is justified to order detention on the basis of this optional reason.

It is necessary for the court to point out the existence of causal danger in each specific case with its decisions. Thus, it can happen that during the interrogation, the defendant gives different statements about the defendant's participation and role in the commission of criminal acts, while he is on friendly terms with the second accused who has not yet been heard because he is on the run (Matijašević, et al 2008:19).

During his stay at liberty, there is a possibility that the defendant may change the evidence by physical, chemical, mechanical or other actions, and he may also falsify the original evidence in its content and form, thus making it impossible to prove his participation in the commission of the criminal offense charged against him. The existence of the defendant's causal danger is also reflected in the actions he undertakes by influencing the statements of witnesses, accomplices or concealers, given that their testimonies represent a crucial means of evidence for the final outcome of the criminal proceedings. The defendant can use his activities to intimidate witnesses or promise them certain rewards if they testify in his favor. Thus, the legislator foresees the means of protection of witnesses, accomplices and concealers, in order to prevent influence on them, and all for the purpose of sealing false and "fabricated" statements that they would give in the process of establishing the truth about the committed criminal act.

For the extension of detention on this basis, it is not enough to indicate only the abstract possibility of influencing the statements given by witnesses, accomplices or concealers, but special circumstances that predict the existence of this danger should be determined and specified. When detention is ordered on this basis, its duration can be until the moment of securing the evidence that should have been obtained. Therefore, the court cannot extend detention on the basis of the evidence obtained until then, given that there must be other reasons provided by law for further extension of detention. When a decision is made on the extension or cancellation of detention, it is necessary to

specify the specific circumstances on the basis of which the decision is made, as well as its justification.

Danger of repeating the act

In order to determine this measure provided for in Article 211, paragraph 1, item 3 of the Code of Criminal Procedure, it is necessary to have special circumstances that indicate that the defendant will repeat the criminal offense in a short period of time, complete the attempted criminal offense, or commit the criminal offense he threatens to commit. it represents a danger of repeating the criminal act and grounds for determining the measure of detention for preventive reasons. As recivism violates and violates the basic human rights of citizens, the legislator prescribed this measure in order to protect people's safety. The conditions for determining this measure are circumstances that would exist and indicate the possibility that the defendant will repeat or complete the attempted criminal offense, that is, that he will commit the offense he threatens. Each of these dangers is both an independent, and a common, i.e., simultaneous reason that is the basis for determining custody. The criminal offense that the defendant repeats can be the same or of the same type, while the criminal offense that was charged to the defendant and ended in an attempt can be completed. During all the aforementioned actions of the defendant, it is necessary that the expressed threat is manifested and understood as serious. When it comes to the court's opinion regarding the facts that are "special circumstances" on the basis of which the decision to determine custody and the existence of real danger will be based, it is necessary to take into account the defendant's previous convictions, the time interval from the last conviction of the defendant to the time when he committed a new criminal offense that is not being charged, as well as whether the committed criminal offenses were of the same type and whether they were committed against the same injured person.

In the process of making a decision as to whether there is a danger of repeating the criminal act, it is necessary in each specific case to determine the factual assessment of the situation and its evaluation, which gives the possibility of correct decision-making when making the

decision. Thus, the facts and circumstances that indicate the danger of repeating the criminal act, which were already the subject of the assessment and the basis for ordering the detention of the defendant, and then for the extension of the detention, lose their importance and weight with the passage of time, and in the absence of new facts, they can no longer be the basis for the application of detention as the most severe measure, but the same purpose can be achieved by the application of milder measures. (Decision of the Appellate Court in Belgrade, Special Department, Kž2-Po1. 109/21. dated 16.7.2021).

The danger of repeating the crime (as a basis for ordering custody) must be determined to the extent of the existence of special circumstances "that" the defendant will repeat the criminal offense in a short period of time, so detention cannot be ordered against the defendant if the court determines the existence of circumstances that indicate "that could repeat the work in a short period of time. (Decision of the High Court in Belgrade Kž2 No. 436/21 of April 7, 2021 and Decision of the Basic Court in Mladenovac K. No. 399/20 – Kv No. 148/21 of March 17, 2021).

A number of objective circumstances may indicate that the defendant may repeat the criminal offense, such as: the fact that the defendant is a special returnee, i.e. there is a well-founded suspicion that he has committed the same or related criminal offense for which he was already convicted, that he is addicted to the use of psychoactive substances , that a large amount of objects that were intended or used for the commission of criminal acts of document forgery, illegal production, possession, carrying and trafficking of weapons and explosive substances, counterfeiting of money or forgery and misuse of payment cards were taken from the defendant.

Special circumstances that indicate that the defendant will repeat the criminal offense in a short period of time, in this particular case, are that the defendant is accused of committing a criminal offense while serving his prison sentence in the premises where he lives. (Decision of the High Court in Belgrade Kž2 No. 963/21 of July 27, 2021 and Decision of the Basic Court in Obrenovac K. No. 70/21 of July 5, 2021).

This ground for detention, although it also acts as a preventive measure to prevent the commission of a criminal offense, essentially indirectly satisfies the legitimate goal by which detention is intended to achieve the goal defined by the CPC and the Constitution of the Republic of Serbia - that detention is a measure that is determined only when it is necessary for conducting criminal proceedings (Sinanović, 2013:61).

According to the defendant, detention is justified for the reason that he often changes residences, is not employed and is a heroin addict, who in a short period committed several criminal acts of robbery in order to get the money he needs as a heroin addict. In order to determine the measure of detention on this basis, it is necessary to determine the relevant and special circumstances that indicate the danger that the defendant will repeat the crime if he is at liberty, with the fact that there is a legal obligation to establish the existence of special circumstances for the said reason for detention.

The decision on determining or extending detention due to the risk of repeating the criminal offense must contain specific reasons based on collected data and evidence, from which it can be concluded with certainty that there is some legal basis for granting detention, and which must be argued with a detailed explanation.

Public disturbance

Determining the measure of custody due to public disturbance is provided for in Article 211, paragraph 1, point 4 of the Code of Criminal Procedure, with the cumulative existence of the stipulated conditions. It is debatable on the basis of which parameters the court makes an assessment and which criteria it uses in relation to making a decision that the foreseen procedures could cause "public disturbance" which could threaten the smooth and fair conduct of criminal proceedings. Certainly, this condition represents the unity of the objective gravity of the committed criminal act and the punishment provided for that crime, along with the mandatory condition of cumulativeness, which requires that the manner and severity of the criminal act charged to the defendant, may lead to public uproar, which could also affect to the smooth and fair conduct of criminal proceedings. It can be stated that,

first of all, public disturbances should be viewed from the aspect of protecting citizens, i.e. preserving public safety, which would be violated due to the way the crime was committed and the consequences of the crime, and which among citizens can to see in the fact that due to the severity and consequences of the committed criminal act, due to the defendant's stay at liberty, fear or panic prevailed among them. In order for public disturbance to be a condition for detention, it is necessary that the manner and severity of the consequences of the committed criminal act be causally-consequently related to public disturbance, as well as the need for public disturbance in that case to be in a cause-and-effect relationship with the emergence of the possibility of jeopardizing the smooth and fair conduct of criminal proceedings procedure, with the existence of causality between them. The legitimacy of certain detention for this reason would be justified only if there is a possibility of proving that the release of the defendant would undeniably disturb the public and possibly violate public order. The extension of detention is justified for this reason if public pressure would be more pronounced, which could endanger the rights of the accused and the smooth conduct of criminal proceedings.

Disturbing the public, as one of the cumulative conditions, justifies the extension of custody on the legal basis provided for in Article 211, paragraph 1, item 4 of the CPC, with the fact that the criminal offense charged to the defendant is prescribed a prison sentence of more than ten years, that is, a prison sentence of more than five years for a criminal offense with elements of violence or that the first-instance verdict imposed a prison sentence of five years. From the following example of court practice, it can be stated that, considering that the defendant was charged with the criminal acts of rape and attempted rape, for which the punishment is more than 10 years in prison, that the manner of committing the criminal acts and the severity of the consequences led to disturbing the public which may threaten the smooth and fair conduct of criminal proceedings because there is reasonable suspicion that the defendant committed them in the house of the injured party, that the defendant and the injured party were the first neighbors who live in a small town and know each other, that light

physical injuries were inflicted on the injured persons, that the said criminal acts cause the injured persons a feeling of shame, humiliation, suffering and pain, especially in a small community. (Decision of the Court of Appeal in Kragujevac, Kž 370/2016 of April 21, 2016).

When the execution of the criminal offense was accompanied by cruelty, recklessness or some manner that makes it particularly difficult, which represents the existence of particularities in the manner of execution of the criminal offense or the consequences that occurred, this is also one of the cumulative conditions on the basis of which the court can issue a decision to order the defendant to be detained, because his stay at liberty could cause a lot of pressure from the public, which could threaten the defendant's rights to a fair trial, as well as the reactions of victims and citizens.

Disturbing the public as a reason for ordering detention must exist at the moment when the court makes a decision whether to order the defendant into custody, bearing in mind that not every public disturbance is a reason for ordering detention, but only that which may threaten the smooth and fair conduct of criminal proceedings. In order to extend the detention on this basis, it is necessary that public concern exists and continues at the moment when a decision is made whether the detention needs to be extended

The court certainly has an obligation when deciding whether there is a basis for harassment, to precisely state and explain the reason, that is, the way in which public harassment can affect the smooth and fair conduct of criminal proceedings. By the way, the public's anxiety also arises due to the way the crime was committed, that is, the consequences that occurred after that. This basis for ordering detention combines as an objective condition the seriousness of the crime and the threatened punishment, but it also sets an additional condition that must be cumulatively fulfilled, so that the manner of execution or the seriousness of the consequences of the criminal offense led to public anxiety, and this could threaten the smooth and fair administration criminal proceedings. According to the Decision of the Appellate Court in Belgrade Kž2 Po1 no. 208/12 of May 21, 2012 and the decision of the High Court in Belgrade - Special Department K.Po1 no. 11/12 – Kv.Po1

no.292/12 of May 3, 2012. public harassment in terms of its scope and intensity must exceed the usual harassment that is usually present in all cases where serious criminal offenses are tried. This measure is also imposed when criminal proceedings are conducted for the committed criminal acts of aggravated murder as well as criminal acts against sexual freedom, especially when they were committed against children or minors, as well as when the defendant is a public figure or holds a high position in society.

Also, the public may be upset when the course of the proceedings is monitored by the media that report on it to the public, so that the presentation of certain facts in the proceedings may have an impact on the obstruction and smooth and fair conduct of the criminal proceedings. In addition to the stated grounds for ordering custody, special grounds are also prescribed in the summary procedure, the procedure for imposing a security measure of mandatory psychiatric treatment and during the extradition procedure.

Conclusion

The presence of the accused is necessary for the smooth and successful conduct of criminal proceedings. When the defendant avoids to facilitate the smooth running of the same by his presence, the legislator has foreseen the measures that will be determined against him and thus force him to act. The most difficult measure for ensuring the presence of the accused and for the smooth conduct of the criminal proceedings is detention, which requires the fulfillment of certain conditions in order to determine its presence against the accused.

The legal reasons for ordering detention, for a person who is suspected of being the perpetrator of the criminal offense charged against him, are prescribed by Article 211 of the Code of Criminal Procedure.

They refer to establishing the identity of a person who avoids attending the main hearing, which indicates the possibility of escape, as well as circumstances that indicate the possibility of destroying, altering, falsifying evidence of a committed criminal offense, as well as the possibility of influencing witnesses, accomplices or concealers. Also,

the reasons for ordering detention can be the circumstances that there will be a repetition of the criminal offense in for a short period of time or to commit a new criminal offense that he threatens, as well as a reason that may arise from disturbing the public, which may threaten the smooth and fair conduct of criminal proceedings.

Regardless of the reasons for which the court makes a decision on the detention of a certain person, in each specific case it is obliged to always assess whether the conditions prescribed by law for the application of this measure are met, as well as whether it is necessary to apply it, bearing in mind the principle of legal security of guaranteed human rights, above all, the right to personal freedom.

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Zakonski osnovi za određivanje pritvora prema ZKP-u, i sudskoj praksi u Republici Srbiji

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Sažetak

Kada je obavezno prisustvo okrivljenog u toku vodjenja krivičnog postupka a okrivljeni izbegava to učini i omogući nesmetano vođenje istog, postoje, Zakonom o krivičnom postupku predviđeni su uslovi kojima se njegovo prisustvo obezbeđuje. Postoji nekoliko predviđenih mera kojima se prisustvo okrivljenog može obezbediti počev od poziva kao najblaže mere do pritvora kao najteže mere koju je predvideo Zakonik o krivičnom postupku Republike Srbije, predviđsjući da se pritvor može primeniti kao poslednja mera procesne prinude. Razlozi za određivanje pritvora određeni su članom 211 Zakonika o krivičnom postupku, s tim da je osnovni preduslov za određivanje pritvora okrivljenom postojanje osnovane sumnje da je okrivljeni učinio krivično delo koje mu se stavlja na teret. U ovom radu osvrnućemo se ponaosob na zakonom predviđene osnove, koji opravdavaju i nalažu određivanje mere pritvora prema osumnjičenom.

Ključne reči: pritvor, Zakonik o krivičnom postupku, uslov za određivanje pritvora, sudska praksa.