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RIGHTS OF THE ACCUSED AFTER THE INITIATION OF PROCEEDINGS IN PETTY OFFENCES UNDER POLISH LAW

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1. THE RIGHTS OF THE ACCUSED DURING THE PRE-TRIAL STAGE

After the initiation of the court proceedings, but before the opening of the trial, the accused has the right to demand conviction in a certain manner without standing trial, regardless of the offence. The necessary condition to be met, however, is submitting a relevant application by the public prosecutor or by the accused, as provided in Article 58 of the Code of Petty Offences Procedure (CPOP).[1] The institution of conviction without trial is known as the consensual form in the proceedings in petty offence cases.[2]

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[1] See J. Lewiński, *Komentarz do Kodeksu postępowania w sprawach o wykroczenia,* Warszawa 2007, p. 175. Article 58 of the CPOP concerning the institution of conviction of the accused in a specific manner without holding the trial is a manifestation of the legislator's effort to streamline the procedure and make it cost-effective, faster and more efficient. At the same time, it is a good example of introducing the negotiation component into the criminal procedure between the public prosecutor and the accused of a punishable act.

[2] See I. Nowicka, R. Kupiński, *Kontrowersje wokół konsensualnej formy w postępowaniu w sprawach o wykroczenia (art. 57, 73 k.p.w.)*, "Przegląd Policyjny" 2006, vol. 1, p. 111.

An application for conviction, submitted by the public prosecutor and the accused, is a procedural act which assumes the form of a declaration of intent containing the relevant demand. In accordance with the principle under which the parties themselves determine the subject-matter of the case, the application may be withdrawn until examination.[3]

In the case of an application for conviction filed by the public prosecutor, the accused must consent to it. The consent of the accused should cover the entire content of that application, so it should also apply to the type and size of the criminal sanction to be imposed. An application for conviction is not a separate pleading but an integral part of the application for punishment. The consent of the accused can be submitted in the form of a separate document or a statement attached to the hearing record, including the one drawn up when receiving written explanations (Article 40§2 of the CPOP). It should be noted that the accused agrees to the application having a content previously agreed with them.[4]

The application of the public prosecutor for the imposition on the accused of a specific penalty (including penalties that are not intended for a given offence, yet possible to be imposed as extraordinary mitigation of punishment) or a punitive measure or withdraw from imposing a penalty or punitive measure. If the application for conviction in a certain way and without holding a trial provides for the use of the provision on extraordinary mitigation of punishment or withdrawal from imposing a penalty or a punitive measure, it should also indicate the circumstances of the case referred to in Article 39§1 of the CPO.[5]

The application for conviction filed by the public prosecutor can refer only to the accused who was questioned in the course of explanatory procedure in accordance with Article 54§6 of the CPOP, that is, as

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[3] Cf. D. Świecki, *Metodyka pracy sędziego w sprawach o wykroczenia*, Warszawa 2007, p. 85.

[4] Cf. A. Skowron, *Kodeks postępowania w sprawach o wykroczenia. Komentarz*, Gdańsk 2006, p. 257.

[5] See J. Lewiński, *Komentarz do Kodeksu*..., p. 176. Article 39§1 of the CPO reads: "In cases deserving special consideration, taking into account the nature and circumstances of the punishable act or the characteristics and personal conditions of the offender, extraordinary mitigation of penalty may be applied or the court may refrain from imposing the penalty or a punitive measure."

a person for whom there is a reasonable basis to draw up an application for punishment. The public prosecutor can only file the application if the aforesaid condition is met. Abandoning the hearing in a situation that entails major problems, and the suspect provides explanation in writing, pursuant to Article 54§7 of the CPOP, does not allow the application for conviction to be filed without holding a trial.[6]

An effective filing of the application by the public prosecutor for conviction of the accused without trial depends on the fulfilment of conditions given in Article 58§2 of the CPOP. First, in the light of collected evidence, the explanation of the accused and the circumstances of committing the offence cannot be questionable. Second, the objectives of the proceedings will be reached without holding a trial.[7]

The accused, in line with the instruction contained in Article 58§3 of the CPOP, also has the right to submit an application for conviction without trial if the public prosecutor failed to contain such a suggestion in his application.[8] The application by the accused is not contingent upon to his prior hearing in the course of explanatory procedure. If he or she was not heard in the course of explanatory procedure, the court will hear them during the trial. If the accused failed, without justification, to attend the trial or sent their explanation in writing, according to Article 67§3 of the CPOP, the court may accept their application without hearing them. The accused may submit the application for conviction having received the summons or having been notified of the date of the trial. It is also permissible for the accused to file his or her application earlier, immediately after the lodging of the application for punishment by the public prosecutor. The accused may also apply for conviction after the initiation of the trial. However, he or she should do it until the end of their first hearing at the latest. In such a case, when the trial has already begun, the application for conviction submitted by the accused

[6] Cf. D. Świecki, *Metodyka pracy sędziego*..., p. 90.

[7] Cf. H. Skwarczyński, *Uwagi dotyczące nowego Kodeksu postępowania w sprawach o wykroczenia,* "Jurysta" 2001, vol. 11, p. 16.

[8] Cf. W. Kotowski, B. Kurzępa, *Kodeks postępowania sprawach o wykroczenia. Komentarz*, Warszawa 2007*,* p. 280.

is regarded by the court as an application for conviction without trial, in accordance with Article 73 of the CPOP.[9]

The application for conviction without trial submitted by the accused should be in writing because it is made outside the trial. As a pleading, it must fulfil the requirements of Article 119 of the Code of Penal Procedure (CPP) in connection with Article 38§1 of the CPOP. The application must also point to the manner of conviction. The legislator does not indicate (as in the case of the application made by the public prosecutor) what kind of penalty or punitive measures the accused may request. The application of the accused may name any form of conviction, that is, the imposition of a specific penalty or a punitive measure, or withdrawal from the imposition of either of them.[10] To examine the application for conviction without trial, it must meet several conditions given in Article 64§2 of the CPOP.[11]

In principle, an application for conviction submitted by the accused is referred to the court session by the chief justice. The application may also be referred to be examined during the trial but only if it facilitates the course of the proceedings (if the date of the session is later than the date of the trial).[12] Similarly, the chief justice refers to the session the application for conviction filed by the public prosecutor. In both cases, namely the application filed by the accused and the one filed by the public prosecutor, in referring the matter to the session, the chief justice is obliged to issue an order.[13]

The presence of the accused or his or her representative in the session is not mandatory, except if there is a circumstance requiring obligatory defence.[14]

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[9] Cf. I. Nowicka, R. Kupiński, *Kontrowersje wokół konsensulanej...*, p. 113.

[10] See D. Świecki, *Metodyka pracy sędziego...*, p. 91.

[11] See W. Kotowski, B. Kurzępa, *Kodeks postępowania...*, pp. 289-290.

[12] See D. Świecki, *Metodyka pracy sędziego...*, pp. 92-93.

[13] The date of the meeting is not communicated to the victim if he or she failed to submit a statement of acting in the capacity of a private complainant. Such a statement by the victim can be made within 7 days as of being notified by the public prosecutor of bringing to court an application for penalty. *Ibid*., pp. 85-86.

[14] Failure to appear at the meeting of all properly notified parties does not impede the course of proceedings. However, an obstacle to open the case may be failure to

The application of the accused for conviction without trial, just as the application made by the public prosecutor, is examined by the court at the session in accordance with Article 63 of the CPOP.[15] Having examined the application for conviction without trial, the court may recognize or ignore the application.[16]

To recognize the application for conviction without trial, the court may demand that specific modifications be made to its content. Such changes may concern the penalty (type, size, conditional suspension of the penalty of arrest), as well as punitive measures (type, size). Consequently, the court should request the person making the application to modify it. In case of failure of the accused or the public prosecutor to appear at the session, the court should adjourn the session and notify the aforesaid of the need to make changes to the application for conviction. If the application was filed by the accused, the court may summon him or her to appear at the next session in person.[17]

If the application for conviction fails to meet the requirements under Article 58§1 and § 2 of the CPOP, and when the accused and the private complainant oppose the application after modification, the court may conclude that there are no grounds for recognizing the application as eligible. Issuing such a decision means that the case will be examined following the general terms, meaning that it will be referred for trial.[18]

However, having recognized the application for conviction, the court regards the evidence attached to the application as disclosed. For the basis for the court's judgement should be all circumstances disclosed in the proceedings and relevant to the case. The court, having regard to the application, convicts the accused by passing a sentence.[19] The content of

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notify or improper notification of the date of the meeting. Cf. J. Lewiński, *Komentarz do Kodeksu*..., p. 182.

[15] Article 63 of the CPOP addresses the court's examination of the application to convict the accused filed by the public prosecutor. This provision, in accordance with the instruction contained in Article 64§1 of the CPOP applies to the application for conviction filed by the accused accordingly.

[16] Cf. D. Świecki, *Metodyka pracy sędziego*..., p. 87.

[17] *Ibid*.

[18] See J. Lewiński, *Komentarz do Kodeksu*..., p. 189.

[19] *Ibid*.

the sentence relative to the liability of the accused for the alleged offence must correspond to the content of the application for conviction. The imposition of a different or more severe penalty, and the imposition of a different or a more severe punitive measure alike, constitutes a gross violation of the law. The accused may appeal against the sentence in accordance with Article 58 of the CPOP pursuant to the general terms of procedure (Article 103§2 of the CPOP).[20]

2. THE RIGHTS OF THE ACCUSED DURING THE TRIAL

The opening of the most important stage of court proceedings, namely the trial, accommodates the accused with a new right – the right to participate in the trial. Participation of the accused in the trial is seen as a right and not as an obligation. Therefore, the accused should always be notified of the trial even if the court does not see the need for their presence in person. The accused decides whether he or she will take part in the trial on their own.[21]

If the accused, properly notified of the trial, is not able to appear for reasons that justify their absence, they should provide, in a timely manner, and adequate justification together with a request for refraining from hearing the case in their absence. Then, the court is obliged to accept the justification and postpone the trial, even if it does not see the need for the accused to appear. If notified of the date, the accused fails to appear and provide a justification for their absence, the trial may take place in their absence. Failure to appear by the accused while submitting their explanation in writing will result in an in absentia trial.

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[20] See D. Świecki, *Metodyka pracy sędziego*..., pp. 88-89.

[21] See H. Skwarczyński, *Obwiniony w nowym postępowaniu w sprawach o wykroczenia*, "Przegląd Policyjny" 2002, vol. 3-4, p. 216. The concept of *trial* refers to a stage of judicial proceedings involving the oral and generally direct proceedings before the court. The purpose of the proceedings is to issue a judicial decision on the subject of the process, that is, the guilt of the accused, the legal classification of their act or to determine the lack of guilt, and in some cases, to discontinue the proceedings if during the court proceedings the inadmissibility of the process has been ascertained. Cf. D. Świecki, *Metodyka pracy sędziego*..., p. 93.

If, however, the accused fails to appear and fails to submit explanation, any further procedure depends on whether the court is in possession of some previous explanation by the accused.[22]

The participation of the accused in the trial may prove necessary if the chief justice or the court finds that the explanation submitted by the accused is insufficient. In order to hear the accused, the court may, by saying so in the notification of the place and date of the trial, summon the accused to appear in person under pain of forced appearance.[23] Then, the right of the accused to participate in the trial becomes an obligation because the court decides whether the participation of the accused in the trial is necessary.[24]

Another right of the accused that constitutes one of the most important aspects of the internal openness of court proceedings is the right to review the files of the case. This right is exercised under Article 67§2 of the CPOP which provides that the notification of the accused of the date of the first trial should include a caution concerning the right to review the files.[25] The range of access by the accused and their counsel to evidence gathered in the case should be considered a right to use the same knowledge as held by the body conducting the proceedings. The accused is therefore entitled to access the pleadings concerning all procedural acts, both those in which he or she participated as well as others. Access to the files of the case is not only limited to the insight into the files but also covers the authorisation to create duplicates or

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[22] The court's decision to hold an in absentia proceedings should be linked to the application of Article 67§3 of the CPOP. The literal interpretation of this provision demonstrates that the court ordering an in absentia trial should be in possession of the explanation submitted by the accused in the proceedings. However, the system and functional interpretation of Article 67§3 of the CPOP leads to a conclusion that the condition for holding an in absentia trial is the possession by the court of explanation submitted by the accused to the hearing record or in writing, or in a form of a declaration that he or she waives this right. *Ibid*., p. 116.

[23] Cf. H. Skwarczyński, *Wykroczenia w systemie prawa polskiego,* "Jurysta" 2001, vol. 12, p. 18.

[24] *Ibid*., *Obwiniony w nowym postępowaniu*..., p. 216.

[25] See W. Kotowski, B. Kurzępa, *Kodeks postępowania*..., pp. 295-296.

excerpts, which allows the accused to become familiar with the evidence and is particularly useful in complicated cases.[26]

Another right of the accused, constituting a substitute to explanation provided directly at the trial, is to submit written explanation to the court. This right is closely linked to the decision of the court that the presence of the accused at the trial is not necessary. In such a case, a notification sent to the accused should contain a caution that they can submit written explanation without appearing in court.[27]

The accused as a party and the central entity in the petty offence proceedings has the right to defence. This means that they can manage their own defence action throughout the trial. Defence is thus one of the functions of the process, and its aim is to assure the accused of obtaining the most favourable conclusions as regards the subject matter of the proceedings.[28] The accused is vested with the right to defence in two ways: through the right to personal defence and the right to formal defence. Personal defence refers to the entire procedural action taken by the accused to prove their innocence or intended to mitigate or reduce their liability for the committed offence. On the other hand, formal defence is the right of the accused to obtain the assistance of a defence counsel in the entire course of the trial.[29]

Formal defence is granted to the accused only for the proceedings before the court, i.e. from the commencement of the proceeding as decided by the court. The accused must have a defence counsel in situations listed in Article 21§1 of the CPOP, that is, when he or she is deaf, dumb or blind, or when there is reasonable doubt as to their sanity.[30]

The accused, in the cases provided for in Article 21§1 of the CPOP as well as in standard circumstances, has the right to appoint a defence

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[26] Cf. P. Wiliński, *Odmowa dostępu do akt sprawy w postępowaniu przygotowawczym*, "Prokuratura i Prawo" 2006, vol. 11, p. 75.

[27] See H. Skwarczyński, *Obwiniony w nowym postępowaniu*..., p. 216.

[28] Cf. M. Leciak, *Tajemnica państwowa w wyjaśnieniach oskarżonego w procesie karnym*, "Prokuratura i Prawo" 2005, vol. 11, p. 56.

[29] Article 4 of the CPOP reads: "The accused has the right to defence, including the use of the assistance of one defence counsel, of which he or she should be advised."

[30] See J. Lewiński, *Komentarz do Kodeksu*..., p. 69.

counsel. To this end, they issue a written or oral authorisation to be attached to the record of the trial or court session. The counsel may be a barrister or a legal adviser.[31] If the accused has no counsel, the code provides for a court-appointed defence lawyer. Such a lawyer is selected by the chief justice of the court having jurisdiction over the case.[32]

The accused has also a number of entitlements that can be exercised in the second phase of the trial, i.e. during the taking of evidence in the proceedings.[33] The accused, as the main source of evidence, is the first participant who can provide explanation. The taking of evidence by explanation of the accused is done during the hearing.[34] Earlier, however, the accused should be advised of their right to give explanation, to refuse explanation and to refuse to answer questions, and then should be asked whether they admit to the alleged offence and whether they want to give explanation and what it is going to cover. Unfortunately, the provisions of the Code of Petty Offences Procedure and received Article 386 of the Code of Penal Procedure do not prescribe that the accused be asked a question if they understood the accusation and fail to establish the obligation to explain the content of the accusation to the accused. However, such a practice should be recommended, especially in cases where the accused is likely not to comprehend the allegation and at the same time appears before the court without a counsel.[35]

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[31] Article 24 of the CPOP reads: "§ 1. The defence counsel in petty offence cases may be a barrister or a legal adviser. § 2. The defence counsel of the accused shall be governed by the provisions of Articles 83-86 of the Code of Penal Procedure. § 3. Whenever the provisions of the Code of Penal Procedure, applicable pursuant to Article 1§2, mention a defence counsel or a barrister, it is understood that the legal adviser is also included."

[32] Article 23 of the CPOP.

[33] The taking of evidence performed with the participation of the accused and other participants of the trial is essential to establish facts and base the final court's decision on them. Cf. M. Kulicki, *Normy Kodeksu postępowania karnego a kryminalistyczne reguły realizacji czynności dowodowych*, [in:] *Współczesne problemy procesu karnego i jego efektywności. Księga pamiątkowa Profesora Andrzeja Bulsiewicza*., A. Marek (ed.), Toruń 2004, p. 219.

[34] The hearing of the accused in the course of evidence-taking cannot be replaced by any other activity, such as asking or questioning. The hearing must take the form of the full procedural act documented in the court record. Cf. J. Tylman, *Uwagi o nowelizacji procedury karnej*, [in:] *Współczesne problemy procesu karnego*..., p. 403.

[35] Cf. D. Świecki, *Metodyka pracy sędziego*..., pp. 124-125.

The accused in the course of evidence-taking is entitled to submit motions for evidence. The rights of the accused in the taking of evidence result from the adversarial principle which requires that the process should assume the form of a dispute between equals parties before an impartial court. During the adversarial hearing, the accused and his or her counsel have the right to express their opinion on any matter raised by either of the parties. The accused and their counsel have the last word.[36] It should also be noted that the accused questioned at the trial has the right to submit a written statement of evidence in accordance with Article 40§1 of the CPOP. The court should then allow the accused to draw up a written statement in conditions that prevent communication with other people.[37]

Until the end of the first hearing, the accused may apply for conviction without continuing the taking of evidence. This is the last chance to submit such an application. The Code of Petty Offences Procedure fails to indicate the moment from which the accused can make such an application. It is assumed that if the application concerns the conviction in the trial, the accused has the right to file it after the commencement of the trial, i.e. before the hearing. It is also acceptable to submit the application for conviction in writing prior to the trial. An application of the accused for conviction without evidence-taking may be applicable in any case, also when the application for punishment was filed by the public prosecutor or private complainant. The application of the accused, as in the case of an application for conviction without trial, concerns conviction in a certain manner, and so it should contain a recommendation of the imposition of a certain penalty or punitive measure. Only those penalties and punitive measures can be imposed that are provided for a given petty offence.[38]

After judgement, the accused should be instructed about their right to challenge the sentence. Such an instruction is a statutory requirement of

[36] *Ibid*., p. 130.

[37] A written statement does not substitute evidence by explanation or testimony of the accused; it can do so only together with the court record. See J. Lewiński, *Komentarz do Kodeksu*..., p. 120.

[38] Cf. H. Skwarczyński, *Obwiniony w nowym postępowaniu*..., p. 216.

informing the process participants of their rights and obligations, which is central to a fair trial.[39] The accused should be advised of the option of challenging the court's decision, both if such a measure is available and where the decision cannot be appealed against. In the case of a sentence passed at the trial, a verbal instruction is a rule; yet, the instruction in writing is delivered when the sentence passed falls within the conditions referred to in Article 419§2 of the Code of Penal Procedure [40] and upon the delivery of an in absentia sentence.[41]

SUMMARY

The role of the accused in petty offence proceedings is twofold. First, he or she is a party to the trial, and second, they are the source of information about the offence which they have themselves committed. The accused being a party to the proceedings makes them a full participant in the trial. The accused as a passive party has been given a number of rights by the legislator; these rights allow them to mount defence and obtain a favourable decision in the case.

None of the rights granted to the accused in the proceedings, in accordance with the principles of criminal trial, is not prejudiced or restricted when exercised. It is worth noting that the exercise of rights is even attainable before the trial. The accused who admits to committing an offence has the right to be convicted without trial. The right to obtain conviction without trial determines the position of the accused in the court proceedings, the essence of which lies in the negotiation between the public prosecutor and the accused of committing an offence and is fully contingent upon the consent of the latter.

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[39] The obligation to inform the parties of their rights and obligations in a trial has been regulated in Article 16§1-2 of the CPP in conjunction with Article 8 of the CPOP.

[40] Article 419§2 of the CPOP reads: "If the accused deprived of freedom was not present at the announcement of the judgement closing the proceedings in the case, and he or she had no defence counsel, the court's judgement shall be served on the accused. The provision of Article 100§6 shall apply accordingly."

[41] Cf. D. Świecki, *Metodyka pracy sędziego*..., pp. 170-171.