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## PROBLEM QUESTIONS OF THE REALIZATION BY THE LAW-COURT OF THE APPEAL INSTANCE PRINCIPLES OF THE DIRECT EVIDENCES INVESTIGATION

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**The Problem.** The problem situation was appeared in a judge practice, the content of which is in the dissimilar usage by the law-court of the appeal instance principle, which is formulated in the article 23 of the Criminal code of practice of Ukraine (hereinafter CCPU) «The research directness of the implicating evidences, objects and documents»<sup>1</sup>. In some chancery cases, these law-courts, those are changing the conclusion of the inferior law-court, examine all evidences with a usage of the directness principle. And in other cases, they do nothing for it.

**The analysis of the recent researches and publications.** The problems of realization in a criminal proceeding of the research directness principles of the implicating evidences, objects and documents after the attachment of CCPU in 2012 were the subjects of the research of some scientists. The scientific interest of the previous is directed mostly on

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<sup>1</sup> The legislator does not differentiate between concepts «the directness research of the implicating evidences, objects and documents» and «the directness of evidences». In this article they will be used as identical.

ascertainment or on the main questions of the legal regulation and realization of the outlined principle (Dekhthiar O. H.) [1], or on the content of the first instance law-court activity with the direct research of the implicating evidences, objects and documents (L. V. Karabut) [2]. Among the dissertation works, which were done by 2012, but after becoming the independence of Ukraine, It is worth to outline the candidate dissertation of Katkova T. V. [3], but it is dedicated to the research directness of evidences at the stage of pre-trial investigation.

Dekhthiar O. H. particularly touched the outlined problem, but contented herself just with a statement of that is «in the course of the proceeding in the law-court of the appeal instance the direct research of the implicating evidences, objects and documents as an element of the directness principle is realized in conditions of the research fulfillment by the court of the appeal instance evidences (hereinafter our italics L. L.)» [1, p. 15]. A question about the reasons of such research of the evidences in a criminal process science was not viewed. Such scientific researches state from the indicated problem does not satisfy needs of the judicial practice, which requires exact unambiguous scientific warranted recommendations about the realization at the stage of the appeal review of the directness research principle of the implicating evidences, objects and documents, in case of the criminal-law qualification activity change, in which was accused a person at the first instance law-court.

**Problem statement.** To define the content of the question that was submitted to the heading of this article, one must perform such tasks: to ascertain if the appeal law-court has a right, when it agrees with indicated by the local law factual circumstances of the case and do not carry out the judicial enquiry, to give another juridical qualification of the convicted person actions; to indicate if such actions of the appeal instance law-court make an revaluation of the evidences in the case of the view at the statement of the article 23 of CCPU.

### **Statement of the main research material.**

1. A question about that, that if the appeal instance law-court has a right, when it agreed with indicated by the first instance law-court factual circumstances and did not carry out the judicial enquiry, to give another judicial qualification of the convicted person actions, and also if such actions of the appeal law-court make an revaluation of the

evidences in a case of the view at the statement of the article 23 CCPU, is already decided by the Supreme Law-Court of Ukraine (regulation of 21 January 2016 [4]). In this regulation the conclusion is made about that the appeal instance law-court does not have a right to overestimate *evidences* without carrying out a judicial enquiry. The Supreme Law-Court of Ukraine noted in the regulation, that a breach ECHR will be there, where witness, whose testimony has a significant meaning for the case solution, *could not be interviewed*, or because of circumstances, when there were a queue of such witnesses, but anyone of them *could not be interviewed*.

The Supreme Law-Court of Ukraine argued its action also with a law position of ECHR, which was pronounced by it in the Conclusion «Jukovskii against Ukraine» of 3 March 2011, in which is stressed that per the main rule points 1 and 3 «d» the article 6 of the Convention require giving a criminal defendant of the corresponding and applicable opportunity to *deny the implicating evidences of a witness, charges and to interview him during the giving of his implicating evidences or later* [5].

The Supreme Law-Court of Ukraine also appointed, that as per the article 2 of the Protocol # 7 to ECHR, which was confirmed by the Law of Ukraine of 17 July 1997, everybody that was returned guilty by the law-court of the commission of crime, has a right of the revise by the supreme instance law-court of the admission fact of guilty or the imposition to him of sentence. The adduced regulations of the Protocol are agreed with requires of the law about the right to the fair proceeding, adversarial character of parties, the directness of the research of the evidences, their permissibility. The observance of these rules requires: if the appeal law-court factual is the last instance at the realization of this person right, then, apparently, *in the appeal procedure the simplification are not allowed, and proof standards must be at the highest level*; if at the appeal law-court arise a question about the ascertain of the exact *fact* in a different way, than it was fulfilled at the first instance law-court, in that case *the plenitude of the evidences research about this fact* has to be carried out in corpore. Every incident of the breach of these regulations is a right breach of the person to the fair judicature in a meaning of the article 6 ECHR, and consequently is an essential breach

of the requirements of the criminal procedural law which interrupted to the law-court to make a legal and warrant conclusion.

In a criminal case, in which the Supreme Law-Court of Ukraine adopted a regulation [4] on 21 January 2016, one has to overestimate evidences because of that some witnesses, despite the motion of parties, were not interviewed at the appeal law-court, and others were interviewed and gave the implicating evidences, that were different per the content from the implicating evidences, which were given by them at the trial court. The Supreme Law-Court of Ukraine decided that the case must be directed to the new revision to the court of the appeal instance, neither cassation, as it was announced about the revision, when the court canceled the conclusion of the cassation instance. Such decision was pronounced by the need of the evidence research.

2. In science of the criminal process and criminal procedural law there are concepts of the «proof» and «circumstances» («facts»).

*Proofs* are in a criminal proceeding the factual data, which was received in a created CCPU order, which serve as the ground for the court that ascertains a presence or absence of *facts and circumstances*, that mean for the criminal proceeding and have to be proved (part 1 article 84 CCPU). A term «factual data», which was used in this norm-definition, is interpreted as «*data (information about facts)*».

*Circumstances*, which have to be proved in a criminal proceeding, are formulated by the legislator in part 1 article 91 CCPU (event of the criminal misdeed is a time, place, way and other *circumstances* of the criminal misdeed commission); a guilt of the convicted person in a criminal delinquency commission, the form of guilty, reason and aim of the criminal misdeed commission and so on). In a science these circumstances are indicated by the established term «the subject of proving». According to the part 2 article 91 CCPU «the proving is confined in a collection, checking and estimation of *proofs* with a goal of the ascertain of the *circumstances*, which mean a lot for the criminal proceeding».

Therefore, proofs cannot be identified with circumstances, which have to be proved in a criminal proceeding. On the ground of estimation results of *the same evidences (their totality)* about the presence of some circumstances, or at all, the absence of the event. Thus, if the court of

the appeal instance does not have doubts in results of the proofs estimation at the trial court, makes the conclusion about the presence of another circumstances, than those, which were ascertained by the previous, then it is not about the revaluation of proofs, but about the revaluation (another interpretation, including the law interpretation) of the event circumstances. Visually it can be observed in cases about the actions, objective (object and objective party) and subjective (subject, subjective party) signs (circumstances) whose are identic. For example, the criminal misdeeds which are created by the articles 115 (willful homicide) and 118 (willful homicide by the excess of the necessary defence limits or in case of the excess of ways, which are necessary for the apprehension) of the criminal codex of Ukraine (hereinafter CC), are similar by the signs. As opposed to the willful homicide, the necessary sign of the murder, that was committed with the excess of the necessary defence limits or in case of the excess of ways which are necessary for apprehension, is just a sign of the subjective party- motive.

In case, when the law-court of the appeal instance does not deny results of the evidences estimation, which was given by the court of the first instance on all grounds: permissibility, accessories, authenticity, sufficiency (the last one is about the body), this court has a right to make another conclusion about the circumstances of the crime and its criminal-law qualification. Here it is about the *revaluation* of the proofs, but *requalification* of the crime (for example, from p. 1 a.118 CC to p.1 a.115 CC).

If the conclusions of the appeal instance court that is different from the conclusions of the court of the first instance, touched the essence of the proofs signs- permissibility, accessories, authenticity, sufficiency (the last one is about the body), and exactly this could involve the requalification of the person actions to another article (a part of the article) CC (regardless of whether it makes a state of person better or worse). Then the court of the appeal instance must research proofs with a require compliance of the article 23 CCPU. For Instance, in the determination of 25 October 2016 [6], the court of the cassation instance stated right the breach of the requirements of CCPU because of the limitation of the appeal instance court of the interrogation at the session just of the accused and complainant and did not investigate directly other

proofs, which were basis for the conviction. And it came up into the belief about the absence of the ample evidences of the guilty and necessity of the criminal proceeding close because of the absence of the guilty content. «That means that it gave another estimation of the investigation of the first instance law-court to evidences without direct investigation of them at the appeal instance». In the mentioned determination, as well as in the mentioned above regulation of the Supreme Law-Court of Ukraine of 21 January 2016, is about direct research of the evidences parts, that led the revaluation of these evidences considering the accordance to their requirements of the permissibility, accessory, authenticity. The estimation of the separate evidences (which were researched at the appeal court revise) involved the revaluation of the evidence totality from the viewpoint of their sufficiency: the court of the appeal instance acknowledged «new» evidence totality insufficient for the conclusion about the guilty, and hence decided to close a criminal proceeding because of the absence of the guilty content. That is why, the court of the cassation instance noted in its determination of 25 October 2016 right, that the appeal instance court gave another estimation to the researches of the court of first instance to evidences without their direct investigation at the appeal instance. This means that it revaluated proofs, but neither circumstances of the criminal proceeding.

The court of the appeal instance has a right to make its own conclusions on the ground of the same evidence totality, if it investigated all proofs, which were mentioned by the court of the first instance and agreed with them. The last of them, at that, have to be researched directly in the court of the first instance and checked by the appeal instance court. In this way, the evidence totality is firm and steady in the courts of the first and appeal instances. That is why, a change of the action qualification of the person by the court of the appeal instance is not a reason for the conclusion about the revaluation of it evidences of the court of the first instance.

3. A change of the sentence by the appeal court does not create for this court an obligation to research all evidence totality with the observance of the directness principle, if it does not explain in new fashion (different) evidences, which were received in the court of the first instance. In p. 2 a.23 CCPU is indicated that «evidences of intelligence cannot be acknowledged that contain in the implicating

evidences, objects and documents, which were not the subject of the direct investigation of the court». But in case when the court of the first instance researched all possible evidences with observance of the directness principle, but court of the appeal instance agreed with them, then the last one does not need to reinvestigate these evidences in such order as it was done in the court of the first instance. For making a conclusion of the appeal court, it is enough to check evidences of the inferior court, also to listen to the recording of the session in the court of the first instance. A change of the sentence of the appeal court is not a necessary ground for the automatic reinvestigation of all evidences in the case. Because it would mean the substitution of the appeal court of the first instance court without any reasons.

4. The requalification by the appeal court of the convicted person actions is not a consequence of the breach by the court of its rights to the protection, if the last one is at the stage of the pre-trial investigation and judicial revise defended from accusation in a criminal misdeed commission as per the article CC, which court has «switched» by the results of the appeal revise. The factual circumstances of the events are investigated at these two stages and at the stage of the appeal revise. And accused has enough time and opportunities for the denial of these circumstances. Therefore, the person is defending from the accusation with the same arguments and with the same result of the factual circumstances of the case at the stage of the court handling and appeal review.

5. The court of cassation has no rights to collect and estimate proofs, but it has right to gibe another qualification to the crime and to make a conclusion about the impropriety of the standard usage of CC. It also has a right to change the court conclusion (paragraph 4 art 1, article 436 of CCPU), indicating in the motive part of the determination *neither arguments, but circumstances*, which were ascertain by the courts of the first and appeal instances (sub-paragraph 4 paragraph 2 part 1 article 442 of CCPU). A change of the court conclusions of the inferior courts by the superior is possible without the reiterated research by the last one of all evidences.

6. The legislator did not determine the obligation for the appeal instance in every case of the change of the judicial decision in a way of revaluation of the factual circumstances and giving them another

criminal-law qualification than in the court of the first instance to make a judicial investigation. In a part 3 of the article 404 of CCPU is determined a rule about that, the court of the appeal instance for the motion of the judicial proceeding members is *obliged* to research iteratively circumstances, which were established during the criminal proceeding in condition, that they are researched by the court of the first instance incompletely or with a breach, and *maybe (has a right to)* investigate evidences, which were not investigate by the court of the first instance, only if members of the criminal proceeding announced about the investigation of such evidences the motion during the investigation in the court of the first instance or if they became reputed after the determination of the judicial decision, that is appealed. Due to requirements of the research directness of the evidences and considering the law conclusion of the Supreme Law-Court of Ukraine, which was made by it in the determination of 21 January 2016, one can draw a conclusion, that the realization by the appeal court of the indicated right and obligation involves a necessary research by it of all evidences in the case with observing of the article 23 of CCPU.

According to the results of the investigation of the question about the realization of the principle of the research directness of evidences in the court of the appeal instance, one can draw such **conclusion**: if the court of the appeal instance revalues only one evidence, that was received in the court of the first instance, so that is a reason for the directness research by it of all other evidences with the observing of the requirements of the article 23 of CCPU; the revaluation of the court of the appeal instance of the circumstances that were established by the court of the first instance and change according to this of the criminal-law activity qualification is not a revaluation of the evidences and does not involve the obligation of the court of the appeal instance iteratively (after the court of the first instance) to make the directness research of all evidences in the case.

**Further researches' prospects.** The topic, which was researched in this article, is pretty great. One must to carry out a further research for its whole treatment in such ways: to ascertain a question about the permissibility of the particular research of the evidences by the court of the appeal instance according to the requirements of the directness principle; to learn the peculiarities of the directness research of the evidences by the court of the appeal instance.



## Sources

1. Дехтяр О. Г. Засада безпосередності дослідження показань, речей і документів та її реалізація у кримінальному провадженні: автореф. дис. ... канд. юрид. наук. Одеса, 2014. 22 с.
2. Карабут Л. В. Кримінальна процесуальна діяльність із безпосереднього дослідження в суді першої інстанції показань, речей і документів за новим КПК. *Вісн. Запоріж. нац. ун-ту*. 2012. №3. С. 273–276.
3. Каткова Т. В. Проблеми реалізації принципу безпосередності дослідження доказів на досудовому слідстві: автореф. дис. ... канд. юрид. наук. Харків, 1997. 17 с.
4. Постанова Верховного Суду України від 21 січня 2016 р. у справі 5-249кc15. URL: [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/E84BAE31236A51A1C2257F7D00414217](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/E84BAE31236A51A1C2257F7D00414217) (дата звернення: 10.03.2017).
5. Рішення ЄСПЛ «Жуковський проти України» від 3 березня 2011 р. *Офіц. вісн. України*. 2012. №27. Ст. 1032.
6. Ухвала від 25 жовтня 2016 р. у справі №717/1765/15-к колегії суддів судової палати у кримінальних справах Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ. 3 с.

## References

1. Dextyar O. G. Zasada bezposerednosti doslidzhennya pokazan', rechej i dokumentiv ta yiyi realizaciya u kry'minal'nomu provadzhenni [A principle of the directness research of the implicating evidences, objects and documents and it realization in the criminal proceeding: dissertation for the obtaining of the candidate of law science]. – Odesa: 2014, 231 p. [in Ukrainian].
2. Karabut L. V. Kry'minal'na procesual'na diyal'nist' iz bezposeredn'ogo doslidzhennya v sudi pershoyi instanciyi pokazan', rechej i dokumentiv za novy'm KPK/ [The criminal processual activity from the directness activity in the court of the first instance of the implicating evidences, objects and documents as per new CCPU]. *Zaporizhzhya: Visny'k Zaporiz'kogo nac. un-tu*, 2012, no. 3, pp. 273–276 [in Ukrainian].
3. Katkova T. V. Problemy' realizaciyi pry'ncy'pu bezposerednosti doslidzhennya dokaziv na dosudovomu slidstvi [Problems of the realization of the principle of the directness research of the evidences at the court investigation]. – Kharkiv: 1997, 17 p. [in Ukrainian].
4. Postanova Verxovnego Sudu Ukrayiny vid 21 sichnya 2016 r. u spravi 5-249ks15 [The determination of the Supreme Law Court of Ukraine of 21

January 2016 in the case 5-249cs15], Retrieved from [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/E84BAE31236A51A1C2257F7D00414217](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/E84BAE31236A51A1C2257F7D00414217) [in Ukrainian].

5. Rishennya YeSPL «Zhukovs'ky'j proty' Ukrayiny» vid 3 bereznya 2011 r. [The conclusion of the ECHR «Jukovskii against Ukraine» of 3 March 2011]. Ky'yiv: Ofic. visny'k Ukrayiny', 2012, no. 27, st. 1032 [in Ukrainian].

6. Uxvala vid 25 zhovtnya 2016 r. u spravi # 717/1765/15-k kolegiyi suddiv sudovoyi palaty' u kry'minal'ny'x spravax Vy'shhogo specializovanogo sudu Ukrayiny' z rozglyadu cy'vil'ny'x i kry'minal'ny'x sprav [The determination of 25 October 2016 in the case # 717/1765/15-k a collegium of courts of the appellate court in the criminal cases of the Supreme specialized court of Ukraine for the investigation of the civil and criminal cases] [in Ukrainian].

**Loboyko L. M. Problem questions of the realization by the law-court of the appeal instance principles of the direct evidences investigation**

*The article is about the problem questions that appears in the judicial practice in case of the change by the court of the appeal instance of the criminal breach qualification without carrying out of the pre-trial investigation and realization in connection with this the principles of the directness research of evidences. The conclusions was made that in case when the court of the appeal instance revalues only one of the evidences, which was received in the court of the first instance, so this is a reason for the directness research by it of all other evidences; the revaluation of the court of the appeal instance of the factual circumstances, which were established by the court of the first instance, and a change because of this of the criminal-law activity, is not a revaluation of the evidences and does not give an obligation for the court of the appeal instance iteratively to make the directness research of all evidences in the criminal case.*

**Key words:** *the court of the appeal instance, evidences, the circumstances of the criminal proceeding, the directness research.*

**Лобойко Л. М. Проблемні питання реалізації судом апеляційної інстанції засади безпосереднього дослідження доказів**

*У статті розглянуто проблемні питання, що виникають у судовій практиці в разі зміни судом апеляційної інстанції кваліфікації кримінального правопорушення без проведення досудового слідства і реалізації у зв'язку з цим засади безпосередності дослідження доказів. Зроблено висновки про те, що в разі, коли суд апеляційної інстанції переоцінює хоча б один доказ, здобутий у суді першої інстанції, то це є підставою для безпосереднього дослідження ним усіх інших доказів; переоцінка судом апеляційної інстанції фактичних обставин, встановлених судом першої інстанції, і зміна у зв'язку з цим кримінально-правової кваліфікації діяння не є переоцінкою доказів і не породжує для суду апеляційної інстанції обов'язку повторно здійснити безпосереднє дослідження всіх доказів у кримінальній справі.*

**Ключові слова:** суд апеляційної інстанції, докази, обставини кримінального провадження, безпосереднє дослідження.

**Лобойко Л. М. Проблемные вопросы реализации судом апелляционной инстанции принципа непосредственного исследования доказательств**

*В статье рассматриваются проблемные вопросы, возникающие в судебной практике при изменении судом апелляционной инстанции квалификации уголовного правонарушения без проведения судебного следствия и реализации в связи с этим принципа непосредственности исследования доказательств. Сделаны выводы о том, что в случае, если суд апелляционной инстанции переоценивает хотя бы одно доказательство, полученное в суде первой инстанции, то этот факт является основанием для непосредственного исследования судом всех доказательств; переоценка судом апелляционной инстанции фактических обстоятельств, установленных судом первой инстанции, и изменение в связи с этим уголовно-правовой квалификации деяния не является переоценкой доказательств и не порождает для суда апелляционной инстанции обязанности повторно осуществить непосредственное исследование всех доказательств по уголовному делу.*

**Ключевые слова:** суд апелляционной инстанции, доказательства, обстоятельства уголовного производства, непосредственное исследование.

*Рекомендовано до опублікування на засіданні відділу дослідження проблем кримінального процесу, криміналістики та судоустрою НДІ ВПЗ імені академіка В. В. Сташиса НАПрН України (протокол № 3 від 17.03.2017 р.).*