

Simulated actions in Albanian criminal procedure

Silvana Lule

Prosecutor in Tirana District Prosecution, Albania

Abstract

Simulated acts, as means of seeking evidence, are implemented in albanian criminal legislation, only in the last years. They were not provided as an institution in the 1995, Code of Criminal Procedure. The reasons for this absence may have been various, but one of the main reason is undoubtedly the lack of evidence in practice (on a large scale) of drug-related crimes. Also, since crimes were being committed in the most sophisticated forms and ways, it was impossible to prevent and combat them effectively.

Coupling with this, it was deemed necessary to enrich the legal-procedural framework, with provisions that would make it possible to seek evidence of guilt, both in drug crimes and in other crimes, which had been impossible to detect, with other investigative instruments. This special investigative method was introduced in the code of criminal procedure, with the additions of law no. 9187, dt. 12.02.2004, "On some additions and changes in the code of criminal procedure", under the general term "Simulation actions".

Keywords: Investigative Methods, Seeking for Evidence, Proactive Investigation, Simulated Act, Simulated Purchase, Drug Trafficking.

Introduction

The Code of Criminal Procedure, adopted in 1995, in its third chapter, specifically provided legal remedies for seeking evidence, which are examinations, searches, sequestration and interception. In the original version of the Code "simulated purchase", were not envisaged as a mean of seeking evidence.

Only with the changes implemented by law no. 1987, dated 12.02.2004, the simulated purchase was codified as a mean of seeking evidence, but with the general term "simulated actions". It is worth mentioning that all means of seeking evidence, including simulation actions, require special care in terms of being enforced. Otherwise, the search for evidence without respecting the formal requirements of the procedure, may constitute a violation of Article 8, of the European Chart of Human Rights and Article 32/2 of the Albanian Constitution.

This paper will be focused on the meaning of simulated purchase, the institutions charged by law for its implementation and problems of practical implementation.

1. Legal provision of simulated actions

Some of the special methods of investigation, were unknown to albanian investigative doctrine and practice, before implementing the law no. 8750, dated 27.03.2001, "On the prevention and fight against trafficking in narcotic and psychotropic substances" and the relevant amendments to the Code of Criminal Procedure. This law regulated the cases and the manner of using these methods and aimed at providing new means

for documenting criminal activity, dealing with the phenomenon of trafficking, which has taken on a transnational character.

“Simulated purchase” means the case when the officer or agent of the judicial police or a person authorized by them, buys narcotic or psychotropic substances, basic chemicals, precursors, hiding the cooperation with the police or his role as a police officer” (Law no. 8750, dt.26.03.2001 “On the prevention and fight against trafficking in narcotic or psychotropic substances”, art.2).

As emphasized above, the purpose of the simulated purchase is to identify persons involved in narcotics trafficking. The simulated purchase can only be carried out by officers and agents of the anti-drug office or a person authorized by them.

The judicial police officer or authorized person, while performing the simulated purchase operation must:

- use an different identity;
- show constant interest in purchasing narcotics;
- hide cooperation with the police (authorized person);
- hide his or her position as a police officer or agent;
- build a trust relationship with vendors implicated in the criminal activity.

Analysing the provision, it can be said that: The simulated purchase of drugs by police agents, previously authorized by the competent institutions, means the creation of a false situation of sale and purchase of narcotics, in order to mislead the seller, to provide evidence of his illegal activity, evidence from which the seller is charged with criminal liability.

Referred to Albanian legislation simulated purchase, is conducted by the authorization of the General Prosecutor, the prosecutor who has initiated criminal proceedings, or the prosecutor who has jurisdiction over the territory, where this action will take place. Making this action able to be conducted by the authorization of any prosecutor is a flexible solution, which allows a wider operation, especially in urgent cases, when circumstances do not promise to receive an authorization, from the highest prosecution level.

The judicial police officer or agent in charge of carrying out the simulated purchase has the right to intercept conversations and communications by technical devices, to make secret observations, photographs and filming. However, despite the importance of these techniques, it should be said that our criminal procedural law, does not prejudice the probative value of any kind of evidence, including documentary evidence. This evidence must be subject to judicial review, as the fact of the authenticity of the content of an audiovisual or phonographic tape, in the case of a simulating a purchase.

This way, the probative value of the document is assessed by the court, in relation to other evidence that confirm its authenticity, according to the principle of freedom of evaluation of evidence.

Article 13 of the aforementioned law, stipulates that the Anti-Drug Service, uses the simulated purchase method, in order to gather evidence, identify and arrest persons involved in drug trafficking. As noted by the provision, the simulated purchase aims at gathering evidence and identifying/arresting persons implicated in the crime.

The simulated purchase creates a seemingly real commercial situation, but in fact

it is a fictitious purchase, realized as a method of investigation. The seller finds the market, sets the price and delivers the goods to the “buyer”. While the “buyer” shows constant interest and is ready to carry out the action.

It is important to note that the simulated acquisition method, is not recommended to be consumed without exhausting all permissible means of seeking evidence, provided by the Code of Criminal Procedure. This is due to the risk that the purchase simulation will be interpreted as a provocative act, in the absence of which the crime would not have been committed. If the provocation is proven, the result cannot be used.

2. The range of actions that simulate a crime

Article 294/a of the Albanian Criminal Procedure Code provides that: “The officer and agent of the judicial police or the person authorized by them may be charged with simulated purchase of items, resulting from a crime or simulation of a corrupt act, or to perform acts of other simulations, to reveal financial data or ownership of a person suspected of having committed a crime, concealing cooperation with the police or their duty as police officers”

This provision allows three possibilities, in order to gather the necessary evidence for the detection of a crime:

1. the simulated purchase of items derived from a crime;
2. simulating a corrupt act;
3. performing other simulation actions in function of financial investigations aimed at detecting financial assets, property titles, etc.

The notion of “actions that simulate a crime” means the procedural actions assumed by officers and agents of the judicial police, previously authorized by the prosecuting authority, characterized by their fictitious nature, within the aim of detecting a crime. This means that simulation actions can be used to detect any type of crime, because Albanian Code of Criminal Procedure does not provide a limited list of criminal offenses, in which this vulnerable method can be used. Meanwhile, the European Convention on Mutual Legal Assistance in Criminal Matters and its Additional Protocol II, provide an exhaustive list of crimes for the detection of which special methods of investigation are used. (Art. 17 of Additional Protocol II of “Convention on Mutual Legal Assistance in Criminal Matters”)

Analysing the article 294/a of the Criminal Code, it can be said that the law allows it and the investigative practice proves that the delivery of the required amounts can be simulated, in cases when there are elements of the offense provided by article 109/b of Criminal Code. The application of simulated actions even in such criminal offenses, expands the scope of this investigative method, but at the same time increases, the risk of human rights violations, protected by the Constitution and the laws. As mentioned, special investigative instruments should be used in case, all other have been exhausted and have been unsuccessful.

2.1 Items derived from a crime

This is the most important entity analysing the above provision. As noted, the provision does offer a specific category of items, derived from a crime, nor does it

provide a definition of what those items are. Such a definition, is not regulated in the substantive criminal law either.

Items derived from a crime are those items obtained as a result of committing a crime. From a legal point of view, these items represent the products of the criminal offense. Items derived from a crime, are also the benefits that the commission of a crime brings (eg: the monetary amount obtained as a result of the sale of a quantity of narcotics or the sale of a certain number of weapons). This amount is a product of an illegal activity, which is carried out with the aim of realizing these monetary revenues.

But what about the price paid to commit a crime?

Referring to the substantive criminal law, the price for committing a crime is the motive, the internal impulse from which the subject who commits the crime is affected. Items deriving from a crime, as they are material evidence, should be confiscated at the end of the investigation, in accordance with article 190 of the Criminal Code. While referring procedural law, the price paid for committing a crime, is considered material evidence, in the sight of article 187 of this Code.

Given the meaning of the proceeds of crime, the price paid for the commission of a crime is an item of monetary value, which is promised and given in possession, to the person who will commit the crime (art. 190 of the Criminal Code provides: In the final decision or in the dismissal of the case, the court or the prosecutor determines what should be done with the material evidence: items that have served or were designated as means of committing a criminal offense and items that constitute the benefit derived from or the service given or promised for its commission). In this view, this award constitutes the object of profit from the commission of the crime.

Do drugs and weapons represent items derived from a crime or do they constitute the material object of the crime?

In order to reach such a conclusion on this issue, a legal analysis of the provisions that provide for these criminal offenses should be done, as drugs and weapons can be presented both as material objects of crime, but also as items derived from a crime. This depends on the manner in which the crime is committed.

For example, in the case of narcotics cultivation, the latter are presented in both forms. Likewise, in the case of artisanal production of explosives by nonauthorized persons, the weapon obtained in this case, will be an item derived from a crime, as this weapon was obtained as a result of committing illegal actions, with the aim of creating illegal items, prohibited in civil circulation. While in the case of committing a criminal offense through trafficking, weapons represent the material object of this crime.

Drugs and weapons represent items derived from a crime, even when they constitute the material object of the criminal offense. In all the cases, they are confiscated by the prosecuting authority.

According to the provisions of the United Nations Convention against Transnational Organized Crime, it is provided that: *"By items derived from a crime, is meant any property obtained from the crime or acquired, directly or indirectly, through the commission of a crime."*

The Convention, in addition to providing a definition of items arising from a crime, does not provide an exhaustive list of what they might be, but expands the scope

of their involvement to include “any property”, provided only that it should be a product derived from the commission of a crime.

The provision given by the Convention, of course, includes drugs and weapons (created by unauthorized persons), but also monetary income realized as a result of the commission of criminal activities.

3. Provocation and circumstances that exclude criminal liability

Simulated actions, in addition to the contribution they have had to the detection of perpetrators in drug and other crimes, have been associated with negative effects, because in practice, there have been cases where the simulated buyer has exceeded the requirements provided by the law. This is a touching subject for the society, as you should not provoke a crime that objectively would not have been committed without this intervention, because it is the guarantee for respecting human rights and freedoms. The duty of the institution is to strike and prevent crimes and not to create the situation and facilitate the conditions for committing a crime.

However, the provisions of Criminal Procedure have left room for the individual (as opposed to the judicial police officer and agent) to investigate a criminal act, committed by another individual, even by provoking the latter to commit a crime.

Article 294/a/3 of the Criminal Code provides: “A criminal act should not be provoked by forcing a person to commit a crime, which he would not have committed; if it has not been for the intervention of the police. When the provocation is confirmed, the result cannot be used ...” This paragraph has sparked numerous discussions in case law, regarding the criteria or degree of illegality of actions performed by a police officer, who simulate a crime. In other words, the discussion goes towards the level of involvement in the crime, of the judicial police agent, performing simulated actions. In order to consider the action committed by the representatives of the competent authority as a provocative act, which stimulates a subject to commit a crime, the legal meaning of the actions, that can be considered as provocative, should be carefully analysed.

Interpreting the criminal procedural law, it can be said that provocative activity is considered the activity exercised by the police agent, in order to detect possible perpetrators of a crime, but by inciting them to commit criminal acts, which will not “*had carried them out, if not been for the agent’s determination and persuasion to carry them out.*”

The application of the simulated acquisition method is important because there are a category of criminal offenses, which due to the impossibility of detection by other investigative means, require the intervention of the police officer or agent, charged by the prosecuting authority, by performing simulation actions. These types of crimes could be considered as crimes with the necessary participation of the agent (Cristina de Maglie, 1989, pg. 62). In this activity, the agent is presented as “*fictus emptor*”, behaving as a buyer of goods, excluded from civil circulation, due to the danger and illegality they present. If the agent under cover interferes with the quality of the buyer, but in fact he lacks a real desire to buy, this would not lead to the realization of an effective sale (Malinverni, 1998, pg.265). On the other hand, the police agent who

simulates the purchase even though he really did not intend to buy the illegal items, has manifested interest in buying these items. In this case, we would consider this as a sale or purchase contract, because it meets all the valid elements, only that it can be treated as a closed contract. This way, the provocative agent has consumed the crime, despite his fictitious desire to possess items excluded from civil circulation. This is the moment that separates the case when the police agent who makes a simulated purchase bears criminal responsibility, from the case when he is expelled by it. Following the idea of considering the simulated purchase as a closed contract, it is important for the criminal liability to match the internal will the external will, as their analysis reveals the intention of the simulated buyer.

Provocation, represents the situation created by the police agent, characterized by active actions of involving the agent in the crime, in the role of instigator, in order to put the other in error for committing the crime, he had not intended for to carry out, to enable his arrest (DeMaglie). Provocative agent is considered any participant who abets other persons to commit a crime, both through an activity of a psychic nature, even material participation, driven by the motive of reporting or catching in flagrante delicto or detecting the provoked, by the prosecuting authorities.

Article 51 of the Italian Criminal Code provides: "The conduct of a provocative agent is decriminalized, only if his interference in a criminal activity, is indirect and biased in the ideation and execution of the fact (criminal offense), because this is above all control, surveillance and restrictive of someone else's illegal actions. If the criminal event also refers to the behavior of the provocative agent, then the latter will be responsible for the same accusation." Regarding this provision, it is considered a provocation, the case when the officer or agent of the judicial police, causes the criminal activity of someone else, or directs a criminal activity, that did not exist before and not the case when he intervenes in a continuous criminal situation, which existed before the agent entered the activity.

According to the aforementioned provision, the activity of a judicial police agent is limited to only three activities, which consist of: controlling criminal activity, supervising and further restricting it.

Italian Court of Cassation in a case alleging provocation, has stated, inter alia "In drug-related crimes, judicial police officers, who make simulated purchases are not punishable (Article 97 DPR 09.10.1990 n .309). Their exclusion from criminal responsibility should extend not only to the "purchase" of drugs, but all activities carried out in function of the latter, aimed at identifying the network of persons, implicated in drug crimes ".

To avoid the risk of being involved in a crime, in the role of instigator, the judicial police officer should perform simulation actions only when there is reliable and verified data that a person is committing or preparing to commit a criminal activity. So, he must not only face an existing offer, but must verify this fact, not to fall into the prohibitions provided by the Code of Criminal Procedure.

From a legal point of view, provoking a crime is evidence, obtained in violation of the prohibitions provided by law, making this evidence useless. The issue of unusability can be arisen at every state or stage of the proceeding.

Referring to the European Court of Human Rights and Fundamental Freedoms has

provided that: In modern democratic societies, the function of the investigative bodies is to protect the society (collective) from organized crime, which exists and is ready to act, and not that of creating crime by pushing into crime subjects, who although sometimes have a negligible readiness for crime, but nevertheless, could not have never commit a criminal offense, if they were not provoked. A provocative tactic would, in fact, be acceptable in a socially-preventive view, with positive incrimination in defense of society, certainly not in an order where the principle of guilt prevails, to which everyone is responsible only for reasons of free self-determination in committing a crime. Police agents should be limited to a surveillance and not push the subjects to commit a crime, which without their intervention, would not have committed (Teixeira de Castro vs Portugal, 44/1997/828/1034)

In conclusion, it can be said that the European Court of Human Rights, has dealt with the problem of provocation from a procedural point of view, whether or not the intervention of police agents, is in line with the due process of law, provided for in Article 6/1 of the Convention.

3.1. Simulate facts by the citizens

Referring to article 294/a of the Albanian Criminal Code, using the result of simulated actions is prohibited, if provocation is involved. This is related to the fact that a person cannot be charged of committing a criminal offense, which he or she might not have committed, if provocation had not been used. This position was also held by the jurisprudence of the Strasbourg Court, in the case of Teixeira de Castro vs. Portugal, 09.06.1998.

But what happens if the simulation of a criminal offense, is imposed by a citizen?

According to the afore mentioned provision, provocation by a judicial police officer and agent, who simulates the purchase of an illegal item is prohibited. As far as the individual is concerned, the procedural law does not provide a special regulation that restricts provocation, committed by him. In these circumstances, the above-mentioned provisions regarding the prohibition of provocation, do not apply and cannot be applied. The result obtained, even using the provocation carried out by a citizen, can be admitted as evidence, subject to judicial review, in the same way as other evidence is involved.

The express non-determination of the types of evidence is a right attitude, that is justified by the fact that it is difficult to determine, what the evidence may be and to exclude notifications and facts related to the criminal offense, which serve to prove the commission or not, of the offense and the guilt of the defendant. Such evidence can be photographs, films and others (H. Islami, A. Hoxha, I. Panda, 2003, pg.212)

Contrary to what mentioned above, the Albanian Criminal Procedure Code of 1979 was based on the principle of taxation of evidence. Its articles 15-30 provided for taxation in evidence and there were no provisions for taking an undisciplined evidence by the law, as in the actual criminal procedural, article 151/3 provides.

Coupled with this, both the provocation made by the citizen, as well as the recording of a conversation conducted by him, should be accepted as evidence, not regulated explicitly by law and be subject to judicial assessment in the same way, as other evidence.

Conclusions

Performing simulated actions, as means of seeking evidence is a new institute in albanian criminal procedure, but very important and effective. This evolution of legal norms is related due to the latest developments, simulated purchase is used especially in cases of serious crimes, such as narcotics or other items, the civil circulation of which is prohibited. Using this method of proactive investigation is a delicate method, especially when developed by a judicial police officer. This is due to the fact that the latter must allow the subject to act with his free will and should not push or influence him to take such an action, otherwise the evidence would not be used. If these investigative actions, were carried out by a citizen, then they would be considered as such.

References

- The European Convention on Mutual Assistance in Criminal Matters.
United Nation Convention against Transnational Organized Crime, and the Protocols.
United Nations Convention against Illicit Traffic in Narcotic, Drugs and Psychotropic substances.
Law No. 8750, dated 26.03.2001, "On the prevention and fight against trafficking in narcotic or psychotropic substances".
Albanian Criminal Procedure Code.
Italian Criminal Code.
H. Islami, A. Hoxha, I.Panda, "Criminal Procedure", Tiranë 2003.
Transnational Organized Crime, Zamir Poda.
Cristina de Maglie, "L'agente provocatore", 1989.
Cosi Malinverni, "L'agente", Giuffe Editore, 1998.
Cass. Sez.VI 6 luglio 1990.
Cass. 29.05.2001, n.33561, RV.220264.