The Illegality of the Decision to Sever in Relation to Certain Material Acts of a Continuing Offense

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Abstract: *The criminal investigation authority is obliged to take all necessary measures to ascertain the truth and clarify the case from all perspectives. In practice, situations may arise where, due to many defendants, the investigation of the case proves challenging. Thus, except in cases expressly regulated by the legislator, severance of cases may be ordered to ensure the proper administration of justice. This paper analyzes the circumstances under which the joinder or severance of cases may be ordered, whether such measures taken during the criminal investigation can be subject to preliminary chamber proceedings, and identifies the sanction applicable to an unlawfully ordered severance by the prosecutor. The study begins with a theoretical analysis of the institution of joinder and severance of cases, followed by an empirical investigation based on practical cases found in national jurisprudence, concluding with the author's own inductive research. The topic is of interest to both practitioners and theorists of criminal procedure law.*

Keywords: *severance of criminal cases; requests and exceptions raised in preliminary chamber proceedings; competence of the preliminary chamber judge*

1. General Aspects Regarding Severance in Criminal Proceedings. The Correlation Between Joinder and Severance of Cases

According to legal doctrine, severance is a measure ordered by the prosecutor or the court to ensure the proper conduct of criminal proceedings, consisting of the separate investigation or trial of certain offenses or suspects/defendants (Udroiu, 2018, p. 218).

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Pursuant to Article 43(1) of the Code of Criminal Procedure, the joinder of cases is mandatory in the case of a continuing offense, a formal concurrence of offenses, or any other situation where two or more material acts constitute a single offense.

According to Article 43(2) of the same code, joinder is discretionary, left to the court's discretion, when two or more offenses are committed by the same person, when two or more persons participate in the commission of an offense, or when there is a connection between two or more offenses, and joinder is necessary for the proper administration of justice.

Pursuant to Article 46 of the Code of Criminal Procedure, for well-founded reasons related to the proper conduct of the trial, the court may order the severance of the case with respect to certain defendants or certain offenses.

According to Article 63(1) of the Code of Criminal Procedure, the provisions of Article 46 also apply during the criminal investigation.

As joinder and severance are correlative institutions, and interpreting Articles 43 and 46 of the Code of Criminal Procedure systematically, it follows that severance of cases is not permissible in the situations provided for in Article 43(1) of the Code of Criminal Procedure and may be ordered in the cases provided for in Article 43(2) when, for reasons related to the proper conduct of the trial, the court does not order their joinder.

Article 43 of the Code of Criminal Procedure groups, under the term "joinder of cases," the situations of connexity and indivisibility previously regulated by the 1968 Code of Criminal Procedure. In practice, the new code regulates two categories of joinder situations, abandoning the previous distinction between connexity and indivisibility, namely: cases where joinder is mandatory and cases where joinder is discretionary.

Thus, the current Code of Criminal Procedure no longer explicitly regulates indivisibility and connexity. The different legal treatment of situations where joinder is mandatory and those where it is discretionary reflect precisely the distinction that must be made between cases of indivisibility and cases of connexity.

Through this new legislative approach, the Code of Criminal Procedure allows, as a rule, the prosecution of defendants in smaller groups in cases involving many defendants, which are very difficult to handle under the old code, which did not provide for this legal solution.

Over time, this reclassification of cases of indivisibility, which no longer requires the prosecution of all participants in an offense in the same case (same file), allows defendants who participated in the commission of the same offense to be grouped based on the gravity of their contribution and prosecuted in separate cases, so that courts do not handle cases with dozens or hundreds of defendants.

Thus, by leaving the severance of cases to the discretion of the court or prosecutor in situations where two or more persons participated in the commission of an offense, the legislator has created the possibility, in cases with a large number of suspects and defendants that are difficult to handle when resolved as a single case, for participants to be grouped and prosecuted in separate cases based on their contribution to the offense and other aspects related to the specific resolution of the case.

In this way, criminal cases with many participants can be resolved more easily, respecting the requirement of a reasonable timeframe for case resolution.

In principle, ordering a severance is not possible during the preliminary chamber phase (Udroiu, 2018, p. 219).

However, some courts have held that such a request would be admissible during preliminary chamber proceedings, considering that Article 46 of the Code of Criminal Procedure is part of the general provisions of the code and, by its placement, suggests a broad scope of applicability in all stages of criminal proceedings until the case becomes final, not only during the trial phase.

Thus, it has been held that severance of a case may also occur in the preliminary chamber phase if the proper administration of justice requires it to ensure the parties' right to a fair trial, particularly regarding its duration.

This view was supported by the Resolution of the Superior Council of Magistracy No. 3243 of December 22, 2022, approving the Internal Regulations of Courts, which provides in Article 102(3) and (4) that if resolving a request, proposal, complaint, or challenge by a single judge of rights and liberties is not possible due to the large number of defendants involved, multiple cases may be formed for groups of defendants.

The method of forming cases for groups of defendants is determined by the court president, and the provisions of paragraph (3) apply both to the resolution of an initial request, proposal, complaint, or challenge and to those subsequently submitted during the criminal investigation in the same case. From the interpretation of these legal provisions, it has been inferred that severance is possible even when exercising the function of a judge of rights and liberties (Timișoara Court of Appeal, Final Ruling No. 168 of September 18, 2024).

This legal issue was debated during the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and the courts of appeal, dedicated to discussing non-uniform practices in criminal law and criminal procedure law, held on May 16-17, 2019, at the Bucharest Court of Appeal. The unanimous opinion of the participants was that severance of a case and its return to the prosecutor for certain defendants while proceeding with the trial for others is not permissible.

We submit that, until legislative intervention or a resolution of this legal issue by the supreme court, the issue of ordering severance during preliminary chamber proceedings will remain controversial.

2. Specific Aspects Regarding the Severance Decision During the Criminal Investigation

Through an indictment issued by the Iași DNA Service, defendant N.T. was prosecuted for the offense of bribery in a continuing form, as provided by Article 6 of Law No. 78/2000, as amended, in conjunction with Article 289(1) of the Criminal Code, with 32 material acts of this offense being identified.

It should be noted that in this case, the continuation of the criminal investigation was ordered against defendant N.T. for 61 material acts of the offense of bribery in a continuing form, with evidence identified for only 32 material acts.

Through the act of referring the case to the court, the prosecutor ordered the severance of the case and the formation of a new file for continuing the investigation regarding the 29 material acts for which there was no evidential support.

The reasoning for the severance decision was based on the difficulty of identifying the bribe-givers, which significantly hindered the criminal investigation, as some bribe-givers had not been identified even at the time of issuing the indictment.

Thus, the prosecutor justified the severance decision based on the significant time required to identify the bribe-givers.

It is also relevant that in this case, the identification of the bribe-givers and the collection of evidence for the 32 material acts of the bribery offense charged against defendant N.T. were completed in approximately two months.

Furthermore, the court was seized approximately ten days before the cessation of defendant N.T.'s status, which determined the material competence of the Iași DNA Service.

Thus, in the severed case, the criminal investigation will be conducted by another prosecutor from the Prosecutor's Office attached to the Tribunal, not by the prosecutor who initially handled the case.

Although the expeditiousness of the procedure remains a fundamental principle of criminal proceedings, it cannot be used as a justification for primarily refusing to collect evidence that appears less readily obtainable and referring the case to the court with a fragmented accusation, or secondarily ordering a dismissal based on Article 16 (c) of the Code of Criminal Procedure.

Analyzing the sequence of procedural acts in the case under discussion, defendant N.T. was investigated by the Iași DNA Service for committing multiple material acts of a single offense under Article 6 of Law No. 78/2000, as amended, in conjunction with Article 289(1) of the Criminal Code.

According to Article 43(1) of the Code of Criminal Procedure, the court shall order the joinder of cases in the case of a continuing offense, a formal concurrence of offenses, or any other situation where two or more material acts constitute a single offense.

Pursuant to Article 63(1) of the Code of Criminal Procedure: "The provisions of Articles 41–46, 48, and Article 50(2) and (3) shall apply accordingly during the criminal investigation."

By combining the provisions of Article 43(1) with those of Article 63(1) of the Code of Criminal Procedure, it follows that the criminal investigation authority shall order the joinder of cases in the case of a continuing offense, a formal concurrence of offenses, or any other situation where two or more material acts constitute a single offense.

Thus, in the case of a continuing offense, joinder is mandatory.

Since severance is the inverse operation of joinder, it can only be applied in cases of discretionary joinder under Article 43(2), and it is excluded in cases of mandatory joinder, regardless of the reason invoked.

This is also the view of specialized doctrine, which states that severance is not possible in the case of a continuing offense, a complex offense, a habitual offense, or a collective natural unity, as these are cases of mandatory joinder stipulated by the Code of Criminal Procedure: "Severance is not possible in the case of a continuing offense, a complex offense, or a habitual offense, both because Article 46(1) of the Code of Criminal Procedure refers to certain offenses (whereas a continuing offense, a complex offense, and a habitual offense are single offenses) and because there would be a risk of incorrectly resolving the case…" (Micu, Slavoiu, Zarafiu, 2022, p. 110).

The prejudice caused by a severance ordered with respect to material acts forming part of the same offense lies in the trial of the offense at different times, the potential imposition of two penalties for the same continuing offense, and their merger under the conditions of concurrence, which results in harsher punishment due to the mandatory surcharge provided for in the case of concurrence.

It must also be considered that, in the event of prosecution in both the original and severed cases, the defendant would be placed in the position of presenting largely the same defenses in two different cases. In such a situation, there is a risk that the presumption of innocence becomes illusory or that judicial practice becomes inconsistent.

Moreover, conducting multiple criminal proceedings unnecessarily against the same person does not contribute to correcting their future conduct but prolongs a state of uncertainty and pressure, which undermines the very purpose of criminal proceedings.

Furthermore, the severance decision explicitly acknowledges that the criminal investigation was incomplete, requiring further investigation.

According to Article 5(2) of the Code of Criminal Procedure: "Criminal investigation authorities are obliged to collect and administer evidence both in favor of and against the suspect or defendant. The bad-faith rejection or failure to record evidence proposed in favor of the suspect or defendant shall be sanctioned in accordance with the provisions of this code".

Given the obligation of the criminal investigation authority to collect evidence both in favor of and against the suspect or defendant after the commencement of the investigation, and considering the imminent cessation of the status conferring the competence of the Iași DNA Service, the severance decision appears as a partial refusal to resolve the case and a delegation of responsibility to another prosecutor.

Regarding the reasoning for the severance decision, the case prosecutor did not provide a substantiated rationale for violating the provisions on mandatory joinder of cases or justify the urgency of prosecuting defendant N.T. in a fragmented manner for only part of the accusation.

The lack of effective reasoning for the severance decision constitutes a ground for its nullity, and thus, this decision by the case prosecutor may be subject to review by the preliminary chamber judge.

We submit that in the case under discussion, it is the duty of the preliminary chamber judge to establish the nullity of the severance decision and return the case to the prosecutor's office for the completion of the criminal investigation, as it is mandatory to join the two cases and conduct the investigative acts necessary to achieve the goal of ascertaining the truth, with the artificial fragmentation of the accusation being inadmissible.

The sanction applicable to the severance decision is relative nullity. We submit that the only solution to remedy the deficiencies of a defective criminal investigation, as in the case under discussion, is to return the case to the prosecutor's office to fulfill the prerequisite for a valid referral, namely the completion of a thorough criminal investigation.

3. Jurisprudential Aspects Contrary to the Presented Solution

In national judicial practice, some courts have held that the review of severance decisions ordered during the criminal investigation is not within the scope of preliminary chamber proceedings.

Thus, the preliminary chamber judge of the Cluj Court of Appeal held, regarding the nullity of the severance ordinance concerning members of an alleged criminal group, that severance is a matter of prosecutorial discretion, regulated during the criminal investigation phase by Article 63(1) in conjunction with Article 46 of the Code of Criminal Procedure.

Severance may pertain, according to legal provisions, to certain defendants who allegedly committed an offense together (irrespective of whether it involves a constituted plurality or another type of plurality) or to certain offenses allegedly committed by the same person.

The prosecutor was not obliged to explain in detail why they opted for this form of severance, as it was within their discretion. Consequently, the defense's argument regarding the severance ordinance was deemed unfounded (Cluj Court of Appeal, Preliminary Chamber Judge Ruling No. 167 of April 24, 2024).

Similarly, it was held that verifying the legality of a severance ordinance is unrelated to the accusation brought before the court and cannot be reviewed in preliminary chamber proceedings.

From a theoretical perspective, the severance procedure is part of the prosecutor's investigative strategy, being a matter of discretion rather than legality.

Regarding the consequence of the severance decision, namely that persons investigated separately for the offense of bribery in the form of complicity or bribery—offenses related to the bribery charged against the defendant—the result of this approach was that the defendants were heard as witnesses, thus attributing an artificial witness status that violates the fairness of the procedure.

It was held that the legal basis for analyzing this criticism is provided by Article 63(1) in conjunction with Articles 43 and 46 of the Code of Criminal Procedure. The situation brought before the court falls under Article 43(2)(c) of the Code of Criminal Procedure, namely "when there is a connection between two or more offenses, and joinder is necessary for the proper administration of justice."

Although the preliminary chamber judge considered that the proper administration of justice would have required these cases to be resolved together, as there were no serious arguments justifying severance, the nullity of the severance decision was not established, as it involved a case of discretionary joinder.

Thus, no prejudice to the defendant's rights was found, and the exception raised by the defendant was dismissed (Cluj Court of Appeal, Preliminary Chamber Judge Ruling No. 135 of July 17, 2022).

4. Jurisprudential Aspects Supporting Our Opinion

The mandatory nature of joinder in the case of a continuing offense has also been emphasized by judicial practice.

The supreme court has held that joinder is mandatory in cases of indivisibility provided for in Article 43(1) of the Code of Criminal Procedure and discretionary in cases of connexity regulated by Article 43(2) (High Court of Cassation and Justice, Criminal Section, Preliminary Chamber Panel of Two Judges, Ruling No. 31/C of December 4, 2020).

Through Criminal Decision No. 252/A issued by the Bucharest Court of Appeal on March 18, 2020, the Criminal Sentence of June 18, 2019, issued by the Bucharest Tribunal was entirely overturned, and the case was remanded for retrial, as it was held that the severance of the three offenses of the defendant from the four offenses of abuse of office and her separate trial from the other two defendants constituted a serious judicial error that could not be remedied by the appellate court in any way, even though an appeal is a devolutive remedy.

Furthermore, through a specific ruling of the Iași Court of Appeal, namely Criminal Ruling No. 40 of July 21, 2021 (concerning the nullity of the joinder ordinance), it was held that all investigative acts that procedurally established the framework for the administration of evidence, including the procedural act of ordering joinder and the procedural act (ordinance—also criticized by the defendant for lack of reasoning) ordering such a measure, are subject to review in preliminary chamber proceedings.

Considering, first, that issues regarding the reasoning (lack of reasoning/insufficient reasoning, by failing to comply with applicable legal provisions) of a procedural act performed by the criminal investigation authority constitute a criticism of illegality (and not of unfoundedness), and second, that the nullity of the joinder ordinance would result in the material incompetence of the criminal investigation authority with respect to the offense provided by Article 335(2) of the Criminal Code, leading to the illegality of the investigative acts performed in the case, the judicial review court held that these aspects are subject to review in preliminary chamber proceedings.

It was noted that the first instance court erroneously held that "the validity of the joinder decision of the two offenses in the same criminal investigation file cannot be subject to review by the preliminary chamber judge, and the criticism regarding the incompetence of judicial police officers seconded to the DNA is unfounded."

The High Court of Cassation and Justice held, with binding effect, in the reasoning of Decision No. 10/2019 issued by the Panel for Resolving Legal Issues, published in the Official Gazette of Romania, Part I, No. 416 of May 28, 2019, that severance is merely a procedural measure for the proper resolution of a case, but in reality, both the original case and the newly formed case resulting from severance constitute a single case.

Even though criminal procedure law allows a participant in the commission of an offense—who has previously received a final conviction—to be heard as a witness in the severed case, they cannot be considered a genuine witness under the offense provided by Article 273(1) of the Criminal Code.

It was held that a genuine witness is one who has not participated in any way in the commission of the offense but merely has knowledge of it or of essential facts or circumstances that determine the outcome of the case. It was further noted that a participant in the commission of an offense provided by criminal law is, in reality, an "assimilated witness" for whom the law does not establish a specific procedural status but who has a close connection to the offense brought before the court, having been previously convicted by a final decision.

From the reasoning of this binding decision, it is clear that a participant in the commission of an offense can only be heard in the case after their final conviction, which depends on the prosecutor's discretion if the preliminary chamber judge does not find irregularities in the referral act with respect to the severance decision.

Thus, if it were held that the preliminary chamber judge cannot review the severance decision issued by the case prosecutor, it would allow the prosecutor's office to exercise a purely discretionary right regarding the timing of when these persons could be legally heard.

It must be considered, as noted by the Constitutional Court in Decision No. 236 of June 2, 2020 (paragraph 65), that "a participant in the commission of an offense provided by criminal law has a close connection to the offense brought before the court, such that a presumption of partiality applies to them—similar to parties and principal procedural subjects."

By contrast, a witness, in principle, stands outside the interests of the specific legal relationship brought before the court and is therefore expected to be objective and contribute to ascertaining the truth. The status of a witness presupposes a fair and loyal participation in the proceedings by those who have information that can lead to resolving the case or determining the guilt or innocence of a person.

This status must be maintained throughout the proceedings, as only then can the witness be required to consistently recount the truth.

Thus, if such people were heard as witnesses before a decision is issued regarding the accusations in the severed case, in addition to the presumption of partiality arising by law from the reasoning of the aforementioned Constitutional Court decision, there is also the issue of the actual possibility of rehearing these persons.

In the absence of a decision regarding the accusations in the severed case, all these people may invoke their right not to make any statement, guaranteed by Article 118 of the Code of Criminal Procedure.

In other words, by ordering such a severance, the defendant could be placed in the impossible position of directly rehearing former co-defendants who were heard before the severance decision, which could irreparably affect their right to a defense.

Thus, we submit that the severance decision cannot be left to the discretion of the case prosecutor, and the principle of expeditiousness and the goal of proper administration of justice cannot conflict with the defendant's right to a defense and a fair trial.

For these reasons, the severance decision ordered by the prosecutor during the criminal investigation can and must be subject to preliminary chamber proceedings.

5. Conclusions

Severance of cases is not permissible in the situations provided for in Article 43(1) of the Code of Criminal Procedure. Furthermore, we submit that severance is not possible during preliminary chamber proceedings, although until legislative intervention or a resolution by the supreme court, judicial practice will remain divided on this issue.

Regarding the case analyzed in this paper, we submit that the prosecutor's decision is unlawful, as severance cannot be ordered in the case of a continuing offense.

It is irrelevant that in this case, no criminal action was initiated against the defendant, as the legal text makes no distinction in this regard.

Furthermore, a severance decision cannot be based on the prosecutor's refusal to continue collecting evidence or to order a dismissal under Article 16(c) of the Code of Criminal Procedure.

We submit that the severance decision must be thoroughly reasoned, specifying the factual grounds for such a measure. If the severance ordinance lacks reasoning, the preliminary chamber judge must establish its relative nullity.

Regarding the competence of the preliminary chamber judge to review such a decision by the prosecutor, we do not share the view of some courts that summarily dismiss exceptions raised in connection with severance decisions on the grounds that they are merely administrative measures left to the prosecutor's discretion.

When the parties raise issues concerning the legality of the severance decision, rather than its appropriateness, it falls within the competence of the preliminary chamber judge to review these aspects, especially since the consequences of fragmenting the criminal accusation may affect the defendant's right to a defense and a fair trial.

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