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CRIMINAL LAW

BRIEF THEORETICAL AND PRACTICAL CONSIDERATIONS CONCERNING CRIMES AGAINST LIFE. POSSIBILITY OF COEXISTENCE OF MANSLAUGHTER AND HOMICIDE WITH REGARD TO THE SAME VICTIM*

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Abstract: *This article intends to carry out an analysis of the practice of Prosecutor's Offices to order the prosecution regarding certain defendants for having committed manslaughter, in the context in which investigations were carried out in terms of homicide committed by another person, with regard to the same victim. Thus, assuming that the crime perpetrator cannot be held criminally liable or is not identified, the criminal investigation bodies have ordered the prosecution for manslaughter by persons who, by failing to meet some legal or contractual obligations, facilitated the occurrence of death.*

Key words: *Public Law, Criminal Law, Manslaughter, Crimes against Life*

Introduction

Lately, in criminal cases which deal with the investigation of facts which resulted in the death of people, we note an increasing trend of the prosecuting authorities to proceed to trigger the criminal prosecution under the accusation of manslaughter against persons other than the immediate author of the act, in situations where the identification of the manslaughter perpetrator did not succeed or the latter is not criminally liable.

Thus, although the data existing in the case file show with obvious evidence that the victim's death was caused by the willful misconduct of a person who, for various reasons, cannot be prosecuted, the prosecution authorities choose to investigate other persons, for which there is no reason to prevent the further prosecution or the initiation of criminal proceedings for the crime of manslaughter.

This article aims to analyze, from a theoretical and case-law point of view, to what extent the two crimes - murder or involuntary manslaughter - can coexist in the presence of the same victim.

Thus, we shall briefly present the main theories developed in the specialized literature with regard to the causal connection as part of the objective side of the crime.

We shall also present two cases of judicial practice, where the Public Ministry ordered the prosecution of defendants for committing the crime of manslaughter, although it was known that the victim's death was due to the intentional action of a third party who was either not identified (in the first case) or did not meet the requirements of the law to be criminally responsible (in the second case).

1. Brief theoretical Considerations on Causation

In the doctrine, causation was defined as a variable concept consisting of the cause and effect relationship, which must exist between the action or inaction as provided in the incrimination norm, which constitutes the material of the offense and the immediate consequence thereof[1]. Thus, it was argued that it is necessary to determine, on a case by case basis, whether a particular act or omission committed by a certain person may be retained as a cause of generated result[2].

Published literature revealed the existence of two current trends with reference to the theories developed on causation: one current supports the monistic thesis, while the other supports the pluralist thesis[3].

According to the theories advocating the monistic thesis, the immediate consequence has only one cause, so that, in the event of the existence of a plurality of human contributions, these are considered to be simple conditions without criminal significance[4].

In general, monistic theories are accused of narrowing the causal antecedence to only one human contribution[5].

On the other hand, according to the theories that support the pluralistic thesis, the production of the result may be due to a concurrence of causes[6]. The most

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[1] M. Udroiu *Drept penal: partea generală (Criminal Law: General Part)*, 5th Edition, Bucharest: C.H. Beck, 2018, page 107

[2] Ibid; For an exhaustive discussion of the main theories regarding the causation relationship, see M. Hotca, *Curs de drept penal. Partea generală (Course on Criminal Law. General Part)*. Bucharest: Editura Universul Juridic *(Universul Juridic Publishing House)*, 2017, pages 181-183.

[3] C. Mitrache, C. Mitrache, *Drept penal român: partea generală: conform Noului Cod penal: curs universitar* (*Romanian Criminal Law: general part: according to the New Criminal Code: University Course*), Bucharest: Universul Juridic Publishing House, 2014, page 163.

[4] Ibid.

[5] Ibid.

[6] Idem, page 164.

important of these are the theory of equivalence conditions and the theory of necessary conditions.

The theory of equivalence conditions, also known as the *causa sine qua non* theory, was formulated in 1860 by the German author Von Buri[7]. According to this theory, the causes of the produced result are all the conditions that preceded it and without which the result would not have occurred. In other words, it is considered that any condition which preceded and is related to the outcome, is equivalent to the cause[8].

In the doctrine, this theory was criticized for placing on the same level all conditions, without emphasizing the differences between their contribution to the production of the outcome and without distinguishing between the different conditions in terms of their role in the production of the outcome[9].

According to the theory of the necessary condition, any condition necessary for the production of the outcome is considered as its cause, taking into account the actual contribution of each condition[10]. The doctrine appreciated that this theory offers most of the possibilities to solve the issue of causation as it correctly established the sphere of contributions with a causal link[11].

However, the published literature expressed the view that this theory would not bring any new element as regards the issue of causation in the context where *post factum* all conditions appear necessary after the outcome has occurred[12].

All these theories have both advantages and disadvantages, so the judicial doctrine and practice have reached an agreement on the line of thinking which would be preferable to follow in terms of establishing the existence or non-existence of the causal link between the actions or inactions of a person and the result produced in a given case.

Judicial practice showed that most of the problems arising from the need to establish the causation occurred primarily in relation to crimes against offenses against life and limb[13]. Thus, there existed situations where it was difficult to determine the causal link due to the fact that many people had contributed to the exercise of violence, due to the victim's own contribution to the worsening of their own state of health, the latter medical fault, when providing medical treatment and attention to the victom, as well as due to the subsequent contribution of a third party to the worsening of the victim's health condition[14].

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[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] G. Antoniu, *Raportul de cauzalitate în dreptul penal* (*Causation Relationship in Criminal Law*), Bucharest, Editura Ştiinţifică, 1968, pages 138, 157.

[11] C. Bulai, B.N. Bulai, *Manual de drept penal, Partea generală (Manual of Criminal Law, General Part) Bucharest: Universul Juridic Publishing House*, 2007, page 182.

[12] C. Mitrache, C. Mitrache, *op cit.*, page 164.

[13] M. Udroiu, *op cit.*, page 108.

[14] Ibid, page 109.

2. Legal Proceedings against the CEO of a Company, under the Accusation of Manslaughter, as he failed to take the necessary Measures for the Safety and Health of two of his Employees who were the Victims of an armed Attack by a third Party

In 2009, on the territory of the municipality of Brasov an armed robbery took place on a motor vehicle for the transportation of money, belonging to a company that conducted foreign currency exchange activities. Following this attack, one person died and another was seriously injured, both were employees of the aforementioned company. So far, the attacker has not been identified, nor held criminally liable.

The indictment of the Prosecutor's Office attached to the Brasov District Court *(Judecatoria Brasov)*, ordered, among other things, the prosecution of the said C.V., executive manager of SC. E.C. SRL, in relation with the perpetration of the crimes provided by art. 37 paragraph 1, 2 and 3 of the Law no. 319/2006[15], manslaughter, provided by art. 178 of the Criminal Code paragraph 1, 2[16] (the victim I.C.), and involuntary bodily injuries, provided and punished by paragraphs 2, 4 of art. 184 of the Criminal Code (the injured party G.R.P.), consisting in the fact that as the employer of the victim I.C. and of the injured party G.R.P., out of negligence, failed to provide for all legal measures for the safety and health at work, as provided by article 8, paragraph 1, article 12, paragraph 1, letters a, b, article 13 letters a, b, f, h, j, r, article 25 paragraph 2 of Law no. 319/2006 on the safety and health at work, in the sense that he did not provide the employees with the appropriate protective equipment, fire arms and a vehicle adequately equipped to transport monetary values, i.e. equipped with bulletproof windows, armor in vulnerable areas, armored safe, etc., thus exposing them to a very likely risk of aggression which was materialized by the armed attack by an unknown person on the two employees, who were carrying about 425,000 euros, an aggression which resulted in the death of one of the employees and the very serious injury of the other employee, who suffered traumatic injuries requiring 90 days of medical care, endangered his life and caused him permanent physical infirmity and an organ loss.

During the trial, the defendant C.V. asserted in his defense that in this case there was no causal link between the inaction of which he was accused (that he had not taken measures for the safety at work) and the actual outcome (death of I.C. and the injury suffered by G.R.P.), an outcome which was caused solely by the act of the attacker who fired several shots on the two employees. Thus, it was argued that it was impossible for a the same result to be caused both by a deliberate action

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[15] *Law no. 319 of the 14th of July, 2006* on Health and Safety at Work, published in the Monitorul Oficial al României *(Official Gazette of Romania)*, Part I, no. 646 of the 26th of July 2006.

[16] *Law no. 286 of the 17th of July, 2009* on the Criminal Code, published in the Monitorul Oficial al României *(Official Gazette of Romania)*, Part I, no. 510 of the 24th of July, 2009.

and an omission due to negligence, so either we admit that the outcome was due to the armed attack or it was caused by the inaction of which C.V. was accused, meaning that he failed to take the necessary measures for the safety at work.

It was also asserted that in the event that the attacker were to be identified and subject to criminal liability, we would find ourselves, in case the thesis of the Public Ministry were to be accepted, in a situation where two different people were sentenced for causing the same result (death or bodily injury), under the same circumstances (the event on the 29th/01/2009) on the same passive subjects (I.C. and G.R.P.), but acting under different types of fault: C.V. out of negligence, i.e. he had not taken the necessary labor safety measures and the attacker by intention, as a result of the shots he fired on the two victims.

This situation would be unacceptable in terms of legal logic, as it is virtually impossible for the same change of the objective reality to be caused both intentionally by action and out of negligence, by inaction, by two different authors.

By the judgment no. 1990 of 10th/11/2015 the District Court of Brasov[17] ordered the acquittal of the defendant C.V. in relation with the committing of manslaughter, respectively bodily injury by negligence.

The court noted that from the evidence submitted in the case one may retain the failure of the S.C. E.C. SRL and of the defendant C.V. to apply the statutory requirements as imposed by Law no. 319/2006 on the safety and health at work. However, the court did not consider that the socially dangerous outcome - in this case the death of the victim I.C., and the bodily injury of the injured person G.R.P. was not a direct consequence of the non-compliance with provisions on the health and safety at work, but is the result of the act committed by a third party - author of the armed attack - for which the two defendants are not held liable.

Thus, the judge called to decide in the case was of the opinion that in the case it was necessary to verify whether produced outcome - death and bodily injury - is a consequence of the state of danger created by the inaction of the defendants by not taking measures to comply with the law on safety and health at work. Only to the extent that the typical result is a manifestation of the state of danger caused by the inaction of the two defendants by not taking the legal measures for safety and health at work, the result can be attributed to the author. The imputation will, however, be excluded if the result was determined directly by a cause outside the action of the author, owing to an external factor.

Thus, although by the inaction of the two defendants a state of danger was unquestionably created in terms of social relationships with regard to the health and safety at work, the produced outcome cannot be attributed to them, nor is it within the scope of the infringed law, which is aimed at preventing any accident that might occur during the carrying out of the activity by the employees.

[17] District Court of Brasov, Criminal Division, *criminal Sentence no. 1990/2015*, unpublished.

In this case, it held that the act of the third party who opened fire on the two employees of the S.C. E.C. SRL contains the entire causality of the produced outcome, reason why these were considered as the sole cause of the death of the said I.C. and of the injury of the victim G.R.P., an aspect which exonerates the two defendants from responsibility for the facts adduced against them by the indictment.

In other words, the court held that in the absence of a causal link between the failure of the defendants to implement the provisions on health and safety at work and the actual results produced by the action of a third party, one cannot argue that the act of the defendants corresponds objectively to the abstract model as set out in the incrimination norm, reason why their acquittal is necessary, pursuant to art. 16, para. 1, letter b of the Criminal Procedure Code.

The same point of view was embraced by the Brasov Court of Appeal, which, in the Criminal Decision no. 400/2016 dated 18th of May, 2016[18], held that the armed attack on the two men is normally a totally unexpected and unpredictable event in Romania, reason why one cannot argue that the two defendants did not foresee the possible result of infringing their obligations to provide for conditions of safety and health at work, although they should and could have foreseen it.

3. Indictment of a physician on duty under the accusation of manslaughter because she had was alleged not to have complied with the rules applicable to the restraint of patients suffering from mental illnesses, a situation which made the victim unable to defend herself against the assault a hospital ward colleague, which resulted in her death.

Through the indictment of the Prosecutor's Office attached to the Sf. Gheorghe District Court, the defendant V.I.C. was sent to trial for having committed the crime of manslaughter, as provided and punished by art. 192 para. 2 Criminal Code, consisting in the fact that, as a physician on duty at the Psychiatry Section of the Hospital in the municipality of S., on the 19th/11/2013, she did not comply with the legal provisions in force, i.e. the Order of the Ministry of Health no. 372/2006 on the enforcement procedures of the Law on mental health[19] allowing the restraining of the victim P.J. in breach of the law, then by not monitoring her while she was restrained, thus the victim was made unable to defend herself against the action of suppression of her life, committed by a ward colleague of the victim, the said B.Z.

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[18] Brasov Court of Appeal, Criminal Division, *decision in the Criminal Case no. 400/2016*, unpublished.

[19] *Order of Ministry of Health no. 372 of 10th of April 2006, on the enforcement rules for the Law on Mental Health and Protection of People with Mental Disorders no. 487/2002, as amended, published in the Official Gazette no. 373 of the 2nd of May, 2006*

The prosecutor alleged that, as regards the material element of the crime, it was represented by an inaction, resp. the fact that the defendant V.I.C. remained passive when she was informed that the defendant D.A.Z.– a registered nurse in the Psychiatric Section, had restrained the victim. Thus, the defendant V.I.C. was accused by the prosecution that she did not check whether the taking of such measure was necessary and neither did she make sure that the victim was properly monitored after the restriction. At the same time, the prosecution accused the defendant that she did not perform checks on the other patients in the same ward with the victim, and as a consequence she did not know that murder perpetrator had previously been admitted to the Psychiatric Section on numerous occasions as a result of aggressive manifestations, so he was a potential danger to the other patients.

Likewise, the prosecutor considered that the immediate consequence arose from the action of the said B.Z., but it would not have occurred had the victim not been restrained and therefore unable to defend herself, and if she had been appropriately monitored by the medical staff after the restriction.

Regarding the causal link which must exist between the material element of the crime and the generated result, in this case the victim's death, the prosecutor argued that it exists, because if the legal provisions applicable in the matter had been complied with, the death would not have occurred. The two defendants – the physician on duty and the nurse who decided on the restraining – are professionals, people with medical background and rich professional experience, who should have anticipated that a restrained patient, left unattended in a ward with other patients with psychiatric disorders, would be extremely vulnerable to the actions of the latter.

Finally, the prosecution alleged that the form of guilt which characterized the actions of the two defendants is the actionable negligence - they did not foresee the result of their action, although they could and should have.

By the judgment in the criminal case no. 87/2019, pronounced on the 25th/06/2019[20], the District Court of S. ordered, pursuant to art. 16 para. 1 letter b thesis I of the Criminal Procedure Code, the acquittal of the two defendants for having committed the crime of manslaughter, considering that in the respective case there was no causal link between the actions or inactions adduced against them and the produced result – the death of the victim P.J.

The court held that the objective imputation theory of the outcome was the most suited to the particular circumstances of the case and involved first the establishment whether the action of the defendant created a legally relevant risk for the protected social value, then whether the result produced was a consequence of the state of danger created by the action. Thus, in a first step, one should check whether the produced result is the outcome of the exposure to danger as created

[20] District Court of Sf. Gheorghe, *judgement in the Criminal Case no. 87/2019*, unpublished.

by the action. To the extent that the typical result is a materialization of the state of danger as mentioned in the first stage, the result can be attributed to the author. Similarly, the imputation will be excluded when, although the author created a danger for the protected value, the result does not appear as a materialization of said danger, but is due to an external factor, which occurred by accident.

Therefore, it was considered that in the respective case, although the existence of the socially dangerous outcome is undeniable, neither of the two defendants can be accused for the death of the victim P.J., which is a materialization of the state of danger generated by the sending of the said B.Z. to the same ward with the victim and a direct consequence of the action of the latter, which the defendants could not objectively anticipate.

The court pointed out that for the deficiencies ascertained in the performance of their professional duties, the defendants can be accused of the infringement of the rights of the patient P.J. to receive an adequate medical care, but the guilty conduct of the defendants cannot attract their criminal liability, neither for the crime of manslaughter, nor for any other criminal offense, as it is situated outside the sphere of the criminal offense.

Conclusions

As can be seen from the court cases above, the courts of law tend to embrace the point of view that, in the event the produced result – the death of the victim - is due to the actions of a third party which, for various reasons, cannot be held criminally responsible for the crime of homicide, the person who recklessly, did not fulfill certain obligations, thereby facilitating the production of the death, cannot be criminally prosecuted since there is no causal link between their actions or inactions and the occurred outcome.

Thus, we can see that the theories of causation developed in the published literature as presented above, the ones belonging to the monist trend were the only ones which found resonance in the judicial practice.

We consider that the acquittal solutions pronounced in such matters are legal and justified, as the courts made a pertinent analysis of the causation, both in theoretical and in practical terms, taking into account the specific circumstances of each case.

Given this case-law orientation, in the sense of finding that the typical elements of the crime of manslaughter are not met in such cases, we hope that, as a result of the dissemination of the argumentation used by the courts of law to substantiate the delivered solutions, a change will occur also as regards the practice of the Prosecutor's Offices so that in future such cases may already be solved during the criminal prosecution phase by ordering a *nolle prosequi* solution *(of taking no further action)*.