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EVIDENTIARY PROCEEDINGS BEFORE AN APPELLATE COURT IN THE POLISH CRIMINAL TRIAL

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The scope of the evidentiary proceedings that are conducted before a court *ad quem* determines a model of the appellate proceedings. In the contemporary systems of criminal procedure law, there are three models:
1) an appeal one,
2) a review one[1],
3) a mixed one[2].

An appeal model of the appellate proceeding, in the course of examination of the judgement appealed against, covers defaults in the field of law as well as wrong assessment of facts and errors in orders or judgements. In its classical form, an appellate court is a court that re-examines the evidence. In the appellate proceeding, a new sentence is pronounced with no possibility of revoking the sentence appealed against and referring the case to the court *a quo* for re-exanimation in the first instance[3]. In

[1] P. Rogoziński, Postępowanie dowodowe na rozprawie apelacyjnej w sprawach karnych [Evidentiary proceeding in the appellate hearing in criminal cases], *Studia Prawnicze* 2010, vol. 1, p. 145 and literature indicated there.

[2] D. Świecki, Konstytucyjna zasada dwuinstancyjności postępowania sądowego a możliwość reformatoryjnego orzekania w instancji odwoławczej w świetle wchodzącej w życie 1 lipca 2015 r. nowelizacji Kodeksu postępowania karnego, karnego [Constitutional principle of two-instance judicial proceeding and a possibility of amend judgement in the appellate instance in the light of Criminal Procedure Code amendment entering into force on 1 July 2015], [in:] *Polski proces karny i materialne prawo karne w świetle nowelizacji z 2013 r. Księga Jubileuszowa dedykowana Profesorowi Januszowi Tylmanowi z okazji Jego 90. Urodzin [Polish criminal trial and substantive criminal law in the light of 2013 amendment. Professor Janusz Tylman's 90th birthday jubilee book]*, (ed.) T. Grzegorczyk et al., Warszawa 2014, pp. 215–216 and literature indicated there.

[3] K. Marszał, System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure], [in:] *Studia Iuridica. Volume 33. Węzłowe zagadnienia procedury karnej. Księga ku czci Profesora Andrzeja Murzynowskiego [Key issues of criminal procedure. The book in honour of Professor Andrzej Murzynowski],* (ed.) P. Kruszyński, Warszawa 1997, pp. 164–165; K. Marszał (ed.), *Proces karny. Przebieg postępowania*, Katowice 2012, p. 218–219.

this model, the course of a trial is usually a three-instance procedure, which means that parties can file a cassation appeal against the sentence of the second instance to the Supreme Court, where only the interpretation of law may be ruled because facts had already been examined twice[4]. It is highlighted in jurisprudence[5] that "an appellate-cassation model creates a possibility of a two-stage control and noticing defaults that might have occurred in the judgement; on the other hand, however, it results in substantial lengthening of the proceeding".

A review model of the appellate proceeding was introduced to the Polish criminal procedure in the Act of 27 April 1949 on amending criminal procedure regulations[6], where Article 1 (110) of Book VIII, Chapter II was called: Chapter II Review. This way, 'review' substituted for 'appeal'. As a result of the change, a proposal for a two-instance procedure was implemented ensuring that the first-instance court examined facts and the second-instance court was only of control nature[7]. Thus, generally speaking, a review model is characterised by a two-instance procedure system, a possibility of requesting a control of a sentence with respect to the law as well as the facts, no binding limitations of appeal measures for the appellate court in case it is necessary to issue an amend judgement for the benefit of the accused, a possibility of passing a different judgement on the case matter from the one passed by the first instance court and totally to the benefit of the accused, and to a limited extent to their disadvantage[8]. On the other hand, in the evidentiary proceedings before the court *ad quem* in the review system, there is a principle that the court does not conduct evidentiary proceedings with regard to the case matter but finds the truth through the examination of the files[9]. The appellate court verifies the sentence appealed against based on the materials in the case files and the appeal proceeding is of a control nature. However, there is an exception because of the speed of proceeding. The appellate court may, in extraordinary situations, recognising the need to supplement the court proceeding, decide to examine evidence in the course of its proceeding if it contributes to the acceleration of the proceeding and it is not necessary to conduct a new court proceeding as a whole or its major part again.

Therefore, the adoption of a review model of the appellate proceeding in the Polish system of criminal proceedings made this proceeding be of a totally control nature in relation to the judgement passed by the first-instance court and the scope of the evidentiary proceeding before the court *ad quem* was reduced and adjusted to the need of efficient implementation of the principles of that court within the adopted appellate model[10].

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[4] K. Marszał (ed.), *Proces karny. Przebieg postępowania [Criminal trial: Course of proceeding]*, p. 219.

[5] *Ibid*.

[6] Journal of laws of 1949, No. 32, item 238.

[7] P. Rogoziński, *Postępowanie dowodowe [Evidentiary proceeding]*, p. 146.

[8] *Ibid*.

[9] S. Waltoś, *Proces karny. Zarys systemu. Wydanie 10 [Criminal trial outline, 10th edition]*, Warszawa 2009, pp. 357–359.

[10] M. Rogacka-Rzewnicka, Apelacyjny model kontroli odwoławczej [Appeal model of appellate review], [in:] *Nowe uregulowania prawne w Kodeksie postępowania karnego z 1997 r. [New legal regulations in the Criminal Procedure Code of 1997]*, (ed.) P. Kruszyński, Warszawa 1999, p. 364 and subsequent ones; K. Marszał (ed.), *Proces karny. Przebieg postępowania [Criminal trial: Course of proceeding]*, p. 219.

Article 1 (26) of Act of 29 June 1995 on amending the Criminal Procedure Code, Act on the military court system, Act on fees charged in criminal cases and Act on the procedure with regard to juveniles[11] changed the title of Chapter 40 'Review' into 'Appeal'. The statement of reasons for the governmental bill on Criminal Procedure Code of 1997 emphasises that "the change of the word 'review' into 'appeal' aptly reflects basic features of the appellate measure regulated in Chapter 49, [i.e. appeal – Z. K.]. In the light of the regulation, the appellate court is designed to control the correctness of actual findings that are grounds for a sentence and can adjudicate on the "matter, including on the legal and penal consequences of finding the accused guilty" [12]. Thus, apart from the change of the term 'review' into 'appeal', the model of the appellate proceeding did not change in fact[13]. An appeal constituted a reflection of the former review developed on the elements of the former appeal and cassation of the interwar period and the existing model of the appellate proceeding did not have many features typical of the appeal model[14]. Thus, an appeal, apart from the name, did not introduce essential changes to the appellate proceeding, which remained a two-instance process.

The provision of Article 452 § 1 CPC of 1997[15] in its original wording was: "An appellate court shall not be allowed to conduct evidentiary proceedings pertaining to the intrinsic nature of the case". Thus, also in jurisprudence[16], the regulations excluding the possibility of conducting evidentiary proceedings "pertaining to the intrinsic nature of the case" from the appellate instance were described as regulations of a "cassation type". The regulation on admissibility of the evidentiary proceeding in the appellate proceeding constituted the opposite of the classical form of an appeal[17].

It must be noticed that in order to define the scope of admissibility of evidentiary proceeding before an appellate court, proper interpretation of Article 452 § 1 CPC will

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[11] Journal of Laws of 1995, No. 89, item 443.

[12] See *Nowe kodeksy karne z 1997 r. z uzasadnieniami – Kodeks karny, Kodeks postępowania karnego, Kodeks karny wykonawczy [New criminal codes of 1997 with statements of reasons: Criminal Code, Criminal Procedure Code, Penal Execution Code]*, Warszawa 1997, p. 436.

[13] T. Grzegorczyk, Ku usprawnieniu postępowania apelacyjnego i szerszemu reformatoryjnemu orzekaniu przez sąd odwoławczy [In order to improve appellate proceeding and broaden amend judgement by an appellate court], [in:] *Fiat iustitia pereat mundus. Księga jubileuszowa poświęcona Sędziemu Sądu Najwyższego Stanisławowi Zabłockiemu z okazji 40-lecia pracy zawodowej [Supreme Court Judge Stanisław Zabłocki's 40th anniversary of work jubilee book]*, (ed.) P. Hofmański, Warszawa 2014, pp. 141–142.

[14] R. Kmiecik, Trójinstancyjny system apelacyjno-kasacyjny, czy dwuinstancyjna hybryda rewizyjno-kasacyjna, [Three-instance appeal-cassation system or two-instance review-cassation hybrid], [in:] *Lubelskie Towarzystwo Naukowe. Materiały z sesji naukowej „Kierunki i stan reformy prawa karnego" [Lublin Scientific Association. Materials from a scientific session called "Directions and state of criminal law reform"]*, Lublin 1995, p. 69; K. Marszał, *System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure]*, pp. 165–167.

[15] Act of 6 June 1997 – Criminal Procedure Code (Journal of Laws of 1997, No. 89, item 555 with subsequent amendments).

[16] R. Kmiecik, Z problematyki dowodu ścisłego i swobodnego w postępowaniu apelacyjnym i kasacyjnym [On evidence in the appellate and cassation proceeding], *Prokuratura i Prawo* 2003, no. 1, p. 15.

[17] K. Marszał, *System apelacyjno-kasacyjny w polskim procesie karnym [Appeal-cassation system in the Polish criminal procedure]*, p. 166; M. Rogacka-Rzewnicka, *Apelacyjny model kontroli odwoławczej [Appeal model of appellate review]*, p. 364 and subsequent ones.

be of great importance. The provision, what has already been indicated, excluded the possibility of evidentiary proceedings in the appellate-instance court with regard to the case matter as a functionally selected type of action[18]. However, it did not exclude evidentiary proceedings with regard to admission of evidence "pertaining to the intrinsic nature of the case" in exceptional procedural situations, which was directly confirmed by the wording of Article 452 § 2 CPC[19]. Based on the provision of Article 542 § 1 CPC, it was highlighted that, on the one hand, the second-instance court should not conduct evidentiary proceedings with regard to the case matter because it should not 'impersonate' the court *a quo* as its proceeding served the purpose of control of the sentence appealed against[20], and on the other hand, the possibility of conducting evidentiary proceedings with regard to the case matter in the appellate-instance court was sometimes absolutely necessary in order to properly hear the appeal[21]. Thus, T. Grzegorczyk[22] rightly stated that "the provision of Article 452 § 1 CPC did not forbid to conduct evidentiary proceedings with regard to the case matter in the appellate-instance court and only forbade to conduct evidentiary proceedings with respect to the case matter in the scope exceeding the limits laid down in § 2". The limits of legally admissible evidentiary proceedings in the course of the appellate proceeding are laid down in Article 452 § 1 CPC. As the provision of Article 452 § 2 CPC in its original wording was of extraordinary character, extended interpretation was not allowed to be applied to it pursuant to the principle *exceptiones non sunt extendendae*. The provision of Article 452 § 2 CPC in its original version read: "In exceptional cases the appellate court, if it finds the completion of a judicial examination necessary, may nevertheless take evidence directly at the appellate trial, if this will expedite the judicial proceeding, and there is no necessity to conduct the whole of it, or a major part thereof, anew. Before the appellate trial, the court may also issue an order on the admission of evidence."

In the light of the quoted provision, it was rightly assumed in jurisprudence[23] that "the statement included in it that the judicial examination completion is necessary indicates the proceeding before the first-instance court because the evidentiary proceeding is its most important part". The provision of Article 452 § 2 CPC laid down two conditions for the completion of the judicial examination in the course of the appellate proceeding. The first one was positive in character and required that the conduction of the evidentiary proceeding before the court *ad quem* contribute to the acceleration of the proceeding. The second, on the other hand, was negative in character and required that the proceeding should not be conducted again as a whole or in a major part. The normative form of the provision of Article 452 § 2 CPC also indicated that the conduction of the evidentiary proceeding in the course of the appellate trial was

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[18] P. Rogoziński, *Postępowanie dowodowe [Evidentiary proceeding]*, p. 158 and jurisprudence opinion quoted there.

[19] *Ibid*., p. 159

[20] A. Gaberle, *Dowody w sądowym procesie karnym. Teoria i praktyka [Evidence in the criminal court proceeding: Theory and practice]*, 2nd edition, Warszawa 2010, p. 82.

[21] S. Waltoś, *Proces karny. Zarys systemu [Criminal trial: System outline],* pp. 537–539.

[22] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz [Criminal Procedure Code: Commentary]*, Warszawa 2008, p. 974.

[23] D. Świecki, *Rozprawa apelacyjna w polskim procesie karnym [Appellate hearing in the Polish criminal trial]*, Warszawa 2006, p. 127.

left to the discretion of the court. The "appellate court" decided, [recognising – Z. K.] the need to complete a court examination, it can conduct the evidentiary proceeding in the course of its proceeding.

In the light of the conducted analysis of the provisions of Article 452 § 1 and 2 in the original wording, it must be stated that the appellate court could not conduct the evidentiary proceeding "pertaining to the intrinsic nature of the case" as a whole or in a major part. It could, however, in extraordinary situations, conduct the evidentiary proceeding "pertaining to the intrinsic nature of the case" but in a minor part and under the condition that it would contribute to the acceleration of the proceeding[24].

The scope of evidentiary proceeding conducted before the appellate court presented above did not fully match the appeal model of recognising appellate measures. Therefore, the Act of 27 September 2013 on amending Act – Criminal Procedure Code and some other acts[25] introduced substantial changes into the appellate proceeding, which stopped being a control proceeding only and became a proceeding aimed to not only control the judgement passed by the first-instance court subject to appeal but also to examine the case matter. The above-mentioned Act developed a mixed model of appellate proceeding containing elements of appeal, cassation and review typical of individual systems of appellate measures recognition[26]. Thus, it allowed for passing broader amend judgements and limited the possibility of cassation judgements by the appellate court and this way limited one of the main factors causing lengthening of the criminal proceeding and as a result generating the excessive length of proceedings[27].

The extension of the possibility of conducting evidentiary proceeding in the course of the proceeding before an appellate court (Article 452 CPC) was the most important change in this area. As a result of the amendment, Article 452 § 1 CPC was repealed. It constituted a cassation element of the appellate proceeding and clearly indicated a dominant control (review) function of the appellate proceeding[28]. As a system solution, the provision of Article 452 § 1 CPC *expressis verbis* indicated that the Polish model of the appellate proceeding, despite the change of the name of the appellate measure into "appeal" is not 'solely' appeal-related in character because an appellate court was not able to conduct the evidentiary proceeding in the same scope as the first-instance court.

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

[25] Journal of Laws of 2013, item 1247 with subsequent amendments, Journal of Laws of 2015, item 396

[26] D. Świecki, *Konstytucyjna zasada dwuinstancyjności postępowania sądowego [Constitutional principle of two-instance judicial proceeding]*, pp. 215–216 and literature indicated there; S. Zabłocki, Między reformatoryjnością a kasatoryjnością, między apelacyjnością a rewizyjnością – ku jakiemu modelowi zmierza postępowanie odwoławcze po zmianach kodeksowych z lat 2013–2015? [Between amend and cassation judgements, between appeal and review judgements – what is the direction of appellate proceeding after the criminal codes amendments of 2013–2015?], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal trial after 1 July 2015: Guide to the amendments]*, (ed.) P. Wiliński, Warszawa 2015, p. 416 and literature indicated there

[27] See Statement of reasons for the Bill amending the Criminal Procedure Code, the Sejm Paper no. 870/VII; T. Grzegorczyk, Podstawowe kierunki projektowanych zmian procedury karnej [Basic directions of planned amendments to criminal procedure], *Państwo i Prawo* 2012, no. 11, p. 26.

[28] R. Kmiecik, Zasada kontroli [Principle of control], [in:] *System Prawa Karnego Procesowego. T. 3. Zasady procesu karnego. Cz. 2 [System of criminal procedure law, Vol. 3, Criminal trial rules, Part 2]*, (ed.) P. Wiliński, Warszawa 2014, p. 1671.

Thus, it was rightly stated in jurisprudence[29]: "the provision of Article 452 § 1 CPC was in the review mode because in connection with Article 452 § 2 CPC it assigned the appellate court a control function and not one relating to the examination of the case matter".

It is worth mentioning that the repealing of § 1 of Article 452 CPC in connection with the amendment of § 2 of Article 452 CPC, which after the change stipulated: "An appellate court shall issue an order on the admission of evidence in the course of its proceeding if there is no necessity to conduct the whole proceeding again (…)", and the new wording of § 2 of Article 437 CPC, indicates that the legislator aimed to increase the appellate mode of the second-instance proceeding with respect to the evidentiary proceeding, thus to limit its cassation character via the possibility of revoking the sentence appealed against and referring the case to the first-instance court for re-examination in order to complete the evidentiary proceeding.

In the literature on the criminal proceeding[30], it is rightly indicated that the changes in Article 452 § 2 CPC apply to a few issues. Firstly, using an obligating mode in Article 452 § 2 CPC, the legislator gave this provision an imperative character. Pursuant to Article 452 § 2 CPC, in the wording after the amendment, "the court (…) shall conduct the evidentiary proceeding, and not only may (…) conduct the evidentiary proceeding". Thus, meeting other conditions imposes on the court *ad quem* an obligation to conduct the evidentiary proceeding. Secondly, eliminating the phrase "in exceptional cases", the legislator eliminated the condition substantially narrowing the possibility of conducting the evidentiary proceeding in the course of an appellate proceeding. Thirdly, the negative condition for conducting the evidentiary proceeding was substantially limited because pursuant to the wording of Article 452 § 2 CPC after the amendment, it was not admissible only in the event of the necessity to conduct the whole court proceeding again and not also in the case of a major part of it. Thus, the conduction of a major part of the court proceeding again became possible in the appellate proceeding. Fourthly, the amended provision of Article 452 § 2 CPC used the Polish term 'evidence' as a plural noun instead of the former singular noun form. This kind of normative approach might have constituted grounds for limiting the scope of the evidentiary proceeding before the appellate court. Therefore, after the amendment, the scope of the evidentiary proceeding before the court *ad quem* is very broad and the only restriction is, as it was pointed out earlier, the ban on conducting the whole proceeding again.

The first problem that appeared in connection with Article 452 § 2 CPC concerned the evidentiary initiative in the appellate proceeding. In other words, the problem concerned the question of the relationship between Article 167 § 1 CPC and Article 452 § 2 CPC. Analysing the above-mentioned issue, it must be noticed that the bill developed by the Criminal Law Codification Committee and then the original governmental bill proposed

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[29] D. Świecki, Apelacja obrońcy i pełnomocnika po zmianach [Counsel's and proxy' appeal after the amendment], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal trial after 1 July 2015: Guide to the amendments],* (ed.) P. Wiliński, Warszawa 2015, p. 441.

[30] S. Steinborn, Postępowanie dowodowe w instancji apelacyjnej w świetle nowelizacji Kodeksu postępowania karnego [Evidentiary proceeding in the appellate-instance in the light of the Criminal Procedure Code amendment], *Prokuratura i Prawo* 2015, no. 1–2, p. 150.

the following wording of § 2 of article 452 CPC: "Recognising the need to complete a court proceeding, the appellate court shall conduct the evidentiary proceeding in the course of its proceeding also ex officio if it contributes to the acceleration of the proceeding and there is no necessity to conduct the whole proceeding again"[31].

This normative approach was supposed to enable the court *ad quem* to conduct the evidentiary proceeding if it were not duplication of the whole trial before the court *meriti* but only a repetition of its major part. Eventually, however, the decision was not to adopt the provision of Article 452 § 2 CPC in the above-presented form, which as a result means that the legislator did not intend to regulate the issue by introducing the evidentiary initiative rule different from Article 167 CPC[32].

Interpreting the provision of Article 452 § 2 CPC in its wording after the amendment of the Act of 27 2013 amending Act – Criminal Procedure Code and some other acts, one might conclude that it allowed for the evidentiary proceeding ex officio with no further restrictions except for those laid down[33]. It would be difficult to accept such interpretation of the provision of Article 452 § 2 CPC due to a lack of system coherence and being in conflict with criminal procedure reform *ratio legis*[34]. Thus, it is rightly highlighted in jurisprudence[35] that the provision of Article 452 § 2 CPC after the amendment did not normalise the evidentiary initiative in the appellate proceeding but regulated only the issue of admissibility of the evidentiary proceeding in the appellate proceeding while the issue of the evidentiary initiative remained totally outside its scope.

The discussion of conditions for admissibility of the evidentiary proceeding in the appellate proceeding laid down in Article 452 § 2 CPC raises a question in what situations this kind of need might occur. It must be emphasised that in the proceeding before the court *a quo* the evidentiary proceeding is one of the most essential procedural actions. It is so because it is exploratory in character. And the condition for the evidentiary proceeding in it is the evidentiary initiative of the party who files a motion to conduct it. The proceeding organ is obliged to decide whether the evidence is admissible after establishing that circumstances laid down in Article 170 § 1 (1)–(5) CPC do not take place. In extraordinary situations, justified by special circumstances, the court may admit evidence and conduct the evidentiary proceeding *ex officio* (*argumentum ex* Article 167

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[31] T. Grzegorczyk, *Podstawowe kierunki projektowanych zmian [Basic directions of planned amendments]*, p. 28.

[32] For more on the topic see S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 151.

[33] A. Sakowicz, Postępowanie dowodowe w postępowaniu apelacyjnym. Zarys problematyki [Evidentiary proceeding in appellate proceeding], [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015 r. Przewodnik po zmianach [Counsel for the defence and proxy in the criminal proceeding after 1 July 2015: Guide to amendments]*, (ed.) P. Wiliński, Warszawa 2015, p. 457 and jurisprudence opinions indicated there.

[34] P. Mirek, Nowy model postępowania dowodowego przed sądem II instancji – aspekty praktyczne nowelizacji art. 452 k.p.k. [New model of evidentiary proceeding before second-instance court – practical aspects of amending Article 452 CPC], *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 2014, no. 2, p. 52; S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 152.

[35] S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, pp. 152–153.

§ 1 *in fine* CPC). Then, the decision on admissibility of evidence is sufficient. The rules are not changed in the appellate proceeding because Article 167 CPC is included in Part V of the Criminal Procedure Code entitled "Evidence", thus it refers to all stages of the proceeding before the court, also the appellate proceeding and not just the proceeding before the first-instance court[36].

It must be remembered, however, that on 1 July 2015 the character of the appellate proceeding changed and it was developed in a way different from the first-instance proceeding. Undoubtedly, it influenced the conditions for the evidentiary proceeding in the appellate proceeding. In this context, Article 433 § 1 CPC was really important. Pursuant to it, "The Appellate Court shall hear the case within the limits of the appellate measure and brought charges, taking into account the content of Article 447 § 1–3, and to a greater extent only if so prescribed in Article 435, Article 439 § 1, Article 440 and Article 455". As a result, it meant that the most important things for the judgement were only the evidence and circumstances connected with the appellate charges the grounds for which the appellate court was to examine or which were issues subject to adjudication ex officio. Thus, evidentiary motions not connected with charges brought in the appellate measure should be dismissed because they were unimportant for the judgement in the appellate proceeding.

Thus, the appellant was obliged to formulate charges in the appellate measure that he files (Article 427 § 1 CPC) and the court *ad quem* examined the case within the limits of the appeal and charges brought (Article 433 § 1 CPC). As a result, this meant that issues that parties did not formulate remained outside the scope of cognition of the appellate court unless there are situations requiring adjudicating *ex officio*. Thus, if the appellant does not bring a charge of the contempt of the procedure law regulations consisting in groundless dismissal of an evidentiary motion with respect to the hearing of a witness, but does it during the appellate proceeding, then the court *ad quem* cannot conduct such an evidentiary proceeding because the appellate measure lacks an adequate charge formulation. Therefore, the discussion so far leads to the conclusion that the condition *sine qua non* for admissibility of a party's evidentiary motion in the appellate proceeding and its conduction before the court *ad quem* was in connection with charges formulated in the appellate measure[37].

It is worth paying attention to the fact that not only a party filing an appeal has the right to the evidentiary initiative in the appellate proceeding but also the party that did not file this appellate measure. Because of the relation between an evidentiary motion and an appeal charge, the party did not have complete freedom to file evidentiary motions[38]. The appellate court could also admit evidence ex officio if it had decided that it was an exceptional case justified by special circumstances (argumentum ex Article 167 § 1 *in fine* CPC). Thus, it is rightly stated in literature[39], that it might be new evidence as well as the evidentiary proceeding conducted before the first-instance court or evidence known in that proceeding but not examined. The appellate court

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[36] *Ibid*., p. 152 and jurisprudence opinions indicated there.

[37] Also S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, pp. 154–155.

[38] *Ibid*., p. 156 and literature indicated there.

[39] *Ibid*.

could also admit new evidence provided by a party in the event of a decision that the condition laid down in Article 167 § 1 *in fine* CPC was met[40].

Discussing the evidentiary proceeding before the appellate court, it must be pointed out that in the light of the former normative state, there was an opinion in jurisprudence[41] that "the evidentiary proceeding before the court *ad quem* due to its nature should be extraordinary in character. Although the legislator eliminated the scope of the evidentiary proceeding conducted by the appellate court with respect to the case matter, it was not deprived of the character of supplementary proceeding. This is why the appellate court [after 1 July 2015 – Z. K.] will still be only entitled to complete the judicial trial and not to substitute for the first-instance court". The quoted opinion does not deserve approval. It must be noticed that the normative form of the amended provision of Article 452 § 2 CPC did not give grounds for its interpretation as indicated above. Quite the contrary, it must be stated that repealing § 1 of Article 452 CPC and new wording of § 2 of Article 452 CPC constituted a clear basis for the evidentiary proceeding with respect to the case matter in the appellate proceeding[42]. Also a grammatical interpretation of Article 437 § 1 *in principio* CPC justified this point of view because it stipulated: "After examining the appellate measure, the court shall decide whether the decision subject to review shall be sustained, amended or reversed as a whole or in part". The quoted provision treated the judgement's amendment and reversal equally. On he other hand, the amend judgement was mentioned in § 2 of Article 437 CPC before the cassation decision and the only condition for passing the amend judgement was that the assembled evidence warranted it. The provision of Article 437 § 2 CPC did not require that the assembled evidence be examined only before the first-instance court[43]. S. Steinborn[44] rightly noticed that "in the amended provisions governing the appellate proceeding and general regulations with regard to the appellate proceeding, there was no provision resulting in a ban on examining evidence by the appellate court in order to eliminate a lack or default in the evidentiary proceeding before the first-instance court". The provision of Article 458 CPC *expressis verbis* stipulates: "The provisions with respect to proceedings before a court of the first instance shall be applied to proceedings before an appellate court accordingly (…)". It also applies to the provisions governing the examination of evidence.

In the light of the former discussion, it must be stated that P. Mirek's opinion that the appellate proceeding conducted after 1 July 2015 was of review character only does not find sufficient grounds. To tell the truth, the appellate proceeding was not exploratory in character because the legislator did not adopt a complete appeal model. But it was not only of a review nature either as evidence as to the case matter might also be examined in it.

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[40] *Ibid*., p. 157 and literature indicated there.

[41] P. Mirek, *Nowy model postępowania dowodowego przed sądem II instancji [New model of evidentiary proceeding before second-instance court]*, p. 50.

[42] T. Grzegorczyk, *Ku usprawnieniu postępowania apelacyjnego [In order to improve appellate proceeding]*, p. 154; S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 160.

[43] S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 160 and literature indicated there.

[44] *Ibid*.

The above discussion leads to the conclusion that appellate proceedings after the amendment of the Criminal Procedure Code by the Act of 27 September 2013 amending the Act – Criminal Procedure Code and some other acts was mixed: reviewing and exploratory in character[45]. As a result, it meant that if the conditions laid down in Article 452 § 2 CPC were met, a party before the court *ad quem* would examine evidence in the course of the appellate proceeding under the same conditions as before the court *ad quo*, but in the appellate proceeding there were some time restrictions with regard to the provision of new facts or evidence in the event the appellant could not have indicated them before the court of the first instance, which results from the content of Article 427 § 3 CPC. After the evidentiary proceeding in the course of the appellate one before the court *ad quem*, it was also admissible to pass an amend judgement.

Presenting the evidentiary proceeding conducted before the court *ad quem*, it is necessary to mention that the governmental Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016[46] proposes the maintenance of the most basic foundations of the mixed appeal-amend model of the appellate proceeding[47]. The author of the proposal to make the evidentiary proceeding conducted by the first-instance court possess inquisitorial features, manifested in the possibility of admitting and examining evidence by the court *ex officio* and in a court's activeness in the course of the evidentiary proceeding, directly translates into solutions adopted in the appellate proceeding in the sense that the principles of evidentiary activeness of the court *a quo* should be also applied to the court *ad quem* examining evidence in the appellate proceeding. Thus, the inquisitorial, within the scope of the evidentiary initiative, character of the evidentiary proceeding before the court *a quo* from the appellate perspective means that potential defaults within the evidentiary proceeding resulting not only from the insufficient activeness of the parties to the proceeding but also resulting from defaults of the first-instance court because of the lack of its activeness in the course of the evidentiary proceeding should be amended in the course of adequate actions of the appellate court, which is fully authorised to examine evidence and pass an amend judgement based on that.

Summing up the discussion, it must be stated that the mixed model of the appellate proceeding maintained in the above-mentioned Bill to amend the Criminal Procedure Code obliges the court *ad quem* to examine evidence in the course of the appellate proceeding in the same scope as a court of the first instance and to pass an amend judgement. In the event of filing an appeal by non-professional entities that are not obliged to formulate objections against the resolution (*argumentum ex* Article 427 § 1 CPC), an appellate court is obliged to check the resolution appealed against in its full scope and decide whether to sustain, amend or reverse the decision subject to review as a whole or in part (*argumentum ex* Article 437 § 1 *in principio* CPC). However, should it occur that it is necessary to conduct the whole trial again, the appellate court should not conduct the evidentiary proceeding but should reverse the decision appealed

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45 *Ibid*., p. 161.

46 See the Sejm Paper No. 207.

47 See Statement of reasons for the governmental Bill to amend the Act – Criminal Procedure Code and some other acts of 8 January 2016, the Sejm Paper No. 207, pp. 45–46.

against and refer the case to the first-instance court for re-examination (*argumentum ex a contrario* Article 452 § 2 CPC).

What also requires discussing is an issue that can be expressed in the following way: does the inquisitorial character of evidentiary proceeding before the first instance court, which also translates into the proceeding before the court *ad quem* and admissibility of amend judgement by the court, match the constitutional principle of the two-instance court proceeding system?[48]. Analysing this issue, it is necessary to highlight that the rulings of the Constitutional Tribunal[49] indicate that the principle of two-instance court proceedings results in the necessity to fulfil three conditions:

1) access to the second instance, i.e. the right to appeal;
2) examination of the appeal by a court of a higher level;
3) development of an adequate form of the proceeding before the second-instance court so that the court could examine the case and pass a well-grounded judgement.

Jurisprudence[50] and the rulings of the Constitutional Tribunal[51] indicate that the essence of the two-instance proceeding is to ensure the review of decisions made by the first-instance courts via double assessment of facts and the legal aspects of the case (double examination of the case). The two-instance court proceeding does not mean, however, a necessity of examining each finding and each change made by the court in the course of the proceeding twice, especially the findings of the appellate court. In its ruling of 11 March 2003, SK 8/02[52], the Constitutional Tribunal stated that the judgement of the appellate court based on the findings that are different from the finding of the lower-instance court is not a first-instance judgment because of that. Assuming that the appellate court becomes to some extent a court of the first instance would result in the creation of a kind of three-instance proceeding because there should be the right to appeal against its decision – an appeal against an appellate judgement.

In the light of the above discussion, it is easy to notice that the principle of the two-instance court proceeding is perceived in the Constitutional Tribunal rulings as the right to appeal to the appellate instance against the decisions of organs acting as the first instance in the formal meaning of the terms, which refers to the issue of ensuring an instance-structured review of the passed judgements and not every issue or particular issues constituting grounds for its issue[53].

Thus, in the light of the rulings of the Constitutional Tribunal, it is necessary to differentiate the constitutional guarantee of the two-instance court proceeding from statutorily established limits to appellate court judgements. As a result, this means that

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[48] The issue is only signalled here, as its importance requires a separate work.

[49] D. Świecki, *Konstytucyjna zasada dwuinstancyjności postępowania sądowego [Constitutional principle of two-instance judicial proceeding]*, pp. 219–220 and rulings of the Constitutional Tribunal quoted there.

[50] *Ibid*., p. 220 and jurisprudence opinions indicated there.

[51] See ruling of the Constitutional Tribunal of 13 July 2009, SK 46/08, OTK-A 2009, no. 7, item 109; ruling of the Constitutional Tribunal of 31 March 2009, SK 19/08, OTK-A 2009, no. 3, item 20; ruling of the Constitutional Tribunal of 16 November 1999, SK 11/99, OTK-A 1999, no. 7, item 158; ruling of the Constitutional of 12 June 2002, P 13/01, OTK-A 2002, no. 4, item 42.

[52] OTK-A 2003, no. 3, item 20.

[53] D. Świecki, *Konstytucyjna zasada dwuinstancyjności postępowania sądowego [Constitutional principle of two-instance judicial proceeding]*, p. 222.

the court *ad quem* rendering a different judgement as to the case matter, following the will of the legislator, overtakes the entitlements of the first-instance court. Although, in such a situation, the appellate court judgement is not subject to review via standard appellate measures, it constitutes a decision of the second-instance court, which was given such competence[54].

The above-presented discussion leads to the conclusion that the constitutional principle of the two-instance court proceeding is not an obstacle to authorise the appellate court to find different facts and render a decision based on both evidence indicated during the first instance proceeding and wrongly assessed and evidence indicated in the course of the appellate proceeding[55]. Thus, it does not violate the constitutional standard resulting from the provisions of Article 78 and Article 176 (1) of the Constitution of the Republic of Poland because the constitutional principle of the two-instance proceeding must be interpreted formally, not substantively[56].

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[54] *Ibid*., p. 223 and literature indicated there

[55] *Ibid*.

[56] S. Steinborn, *Postępowanie dowodowe w instancji apelacyjnej [Evidentiary proceeding in the appellate-instance]*, p. 165 and literature indicated there.

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EVIDENTIARY PROCEEDINGS BEFORE AN APPELLATE COURT IN THE POLISH CRIMINAL TRIAL

Summary

The article presents the evidentiary proceeding before the appellate court. The analysis of the issue shows that the model of the appellate proceeding determines the scope of the evidentiary proceeding conducted before the court *ad quem*. In the appeal model of the appellate proceeding, the examination of the decision appealed against covers the default as to the scope of the law and the erroneous assessment of facts as well as an inappropriate judgement. Within this model the appellate court re-examines evidence and renders a new judgement, with no possibility of reversing the judgement appealed against and remanding the case to the first-instance court for re-hearing.

The review model of the appellate proceeding is a two-instance proceeding process. In this model, the court *ad quem* does not conduct the evidentiary proceeding as to the case matter but finds the truth based on the examination of the case files.

The mixed model of appellate proceeding contains the elements of appeal, cassation and review. This allows for broader amend judgements by the appellate court and limits cassation decisions by the court *ad quem*.

Key words: *appellate court*, *appellate proceeding*, *evidentiary proceeding*

POSTĘPOWANIE DOWODOWE PRZED SĄDEM ODWOŁAWCZYM W POLSKIM PROCESIE KARNYM

Streszczenie

W artykule przedstawiono postępowanie dowodowe przed sądem odwoławczym. Analizując tę problematykę wskazano, iż zakres postępowania dowodowego prowadzonego przed sądem *ad quem* determinuje model postępowania odwoławczego. W apelacyjnym modelu postępowania odwoławczego kontrola zaskarżonego orzeczenia obejmuje uchybienia zarówno w zakresie prawa, jak i błędną ocenę ustaleń faktycznych oraz błędy przy wymiarze kary. W tym modelu sąd apelacyjny ponownie przeprowadza dowody i wydaje zupełnie nowy wyrok, bez możliwości uchylenia zaskarżonego wyroku i przekazania sprawy sądowi pierwszej instancji do ponownego rozpoznania. Rewizyjny model postępowania odwoławczego charakteryzuje się dwuinstancyjnością postępowania. W tym modelu sąd *ad quem* nie przeprowadza postępowania dowodowego co do istoty sprawy, lecz poznaje prawdę na podstawie akt sprawy. Mieszany model postępowania odwoławczego zawiera w sobie elementy apelacyjności, kasatoryjności i rewizyjności. To sprawia, iż umożliwia on szersze orzekanie reformatoryjne przez sąd odwoławczy oraz ogranicza orzekanie kasatoryjne przez sąd *ad quem*.

Słowa kluczowe: *sąd odwoławczy*, *postępowanie odwoławcze*, *postępowanie dowodowe*