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COMMENT ON THE JUDGMENT OF THE SUPREME COURT OF 20 JUNE 2023, I KS 15/23

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Abstract

This study focuses on the issue of evidentiary proceedings before the appellate court in Polish criminal procedure. As a result of the considerations undertaken, the author expresses approval of the position of the Supreme Court, according to which the appellate court, upon finding specific content deficiencies in certain personal and non-personal evidence, is not only authorised but also obliged to conduct evidentiary proceedings autonomously. The provision of Article 452 of the Code of Criminal Procedure serves as the fundamental criterion for assessing the validity of this view. The application of the historical method in the interpretation process indicates that the repeal of the first section of Article 452 of the Code of Criminal Procedure, which previously stated that 'the appellate court may not conduct evidentiary proceedings as to the substance of the case,' contributed to establishing the principle of the appellate court conducting evidence hearings on the merits. The argumentation in this regard is enriched by the joint interpretation of Article 427 § 3 of the Code of Criminal Procedure in connection with Article 452 § 2 and 3 of the Code of Criminal Procedure.

Keywords: appellate court, evidentiary proceedings, model of appellate proceedings, evidence, principle

ARGUMENT

Upon finding specific content deficiencies in certain personal and non-personal evidence, the Court of Second Instance was both authorised and obliged to conduct the evidentiary proceedings autonomously, as the current regulations governing

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appellate proceedings, including those arising from Article 452 of the Code of Criminal Procedure, allow significant scope for the reformative court of appeal to adjudicate, based also on evidence taken exclusively at this stage of the proceedings. Changing the judgment of the court of first instance, including upholding it, is precluded only if the entire judicial process had to be conducted in the appeal proceedings, such that all the evidence had to be heard anew.

GLOSS

The thesis of the judgment under discussion concerns the issue of the appellate court conducting evidentiary proceedings on the merits of a case. It thus resolves an important issue from both theoretical and practical perspectives, warranting a more in-depth analysis. The matter raised focuses on the interpretation of Article 452 of the Code of Criminal Procedure. Applying the historical method in the interpretation process is crucial, as only through this approach can the current model of appellate proceedings in Polish criminal procedure be accurately presented. The implications of this analysis are important, as they provide a basis for endorsing the judgment's thesis.

The aforementioned historical method, applied as a priority in this analysis, relates to the normative change introduced by Article 452 of the Code of Criminal Procedure. The first section of this provision, which stated that 'the appellate court may not conduct evidentiary proceedings on the merits of the case,'[1] was repealed by Article 1(159)(a) of the Act of 27 September 2013 amending the Code of Criminal Procedure and Certain Other Acts.[2] The Supreme Court, therefore, rightly concluded, based on the change outlined above, that the appellate court is now not only authorised but also obliged to conduct evidentiary proceedings. The principle of the appellate court conducting evidentiary proceedings on the merits, established as a result of this change, was also affirmed in the Supreme Court's judgment of 4 July 2019, V KS 18/19,[3] which expressed the following view:

> '[…] the court of appeal itself hears the evidence and, not in order to hear it, sets aside the contested judgment and refers the case to the court of first instance for reconsideration.'

An analogous position, which serves as the basis for inferring the validity of the rule regarding evidence on the merits of the case by the court of second instance, arises from the use of a mandatory formula indicating an obligation. This position is also reflected in the judgment of the Supreme Court of 16 January 2024, II KS 59/23,[4] in which it was stated:

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1 Journal of Laws of 1997, No. 89, item 555.
2 Journal of Laws of 2013, item 1247.
3 Judgment of the Supreme Court of 4 July 2019, V KS 18/19, LEX No. 2691651.
4 Judgment of the Supreme Court of 16 January 2024, II KS 59/23, LEX No. 3656091.

> 'Currently, the rule is to conduct supplementary evidentiary proceedings before the court of second instance and to issue a reformatory ruling, while the setting aside of the judgment of the court of first instance, based on the premise of Article 437 § 2 *in fine* of the Code of Criminal Procedure , should only occur in exceptional circumstances, where it is impossible to issue an accurate decision without renewing all the evidence.'

In connection with the above, the question arises as to whether the normative change presented at the outset – namely, the repeal of § 1 of Article 452 of the Code of Criminal Procedure – constitutes the sole legal argument supporting the reasoning adopted in the commented judgment. Specifically, does it establish not only the possibility but, more importantly, the obligation for the appellate court to take evidence? In fact, the conclusion in this matter stems from the research focused on the legislative process, which began with the Act of 27 September 2013 amending the Code of Criminal Procedure and Certain Other Acts,[5] continued with the Act of 11 March 2016 amending the Code of Criminal Procedure and certain other acts,[6] and concluded with the Act of 19 July 2019 amending the Code of Criminal Procedure and Certain Other Acts.[7] These acts are fundamental to the question of the admissibility of evidence on the merits of the case by the appellate court, as they contain provisions crucial to the scope of evidentiary proceedings at the appellate level. They implicitly deserve consideration when analysing the issues addressed in the commented judgment. Before presenting a detailed account of the normative modifications in question, it is important to emphasise that the quantitative changes, as reflected in these three amendments, provide a basis for addressing the question posed above. The aforementioned amendments to the 1997 Code of Criminal Procedure allow for the conclusion that the obligation of the appellate court to hear evidence does not stem solely from the repeal of the prohibition against conducting evidentiary proceedings on the merits of the case by the appellate court, a change effected by the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and Certain Other Acts.[8] Rather, it is also the result of the interpretation and assessment of further normative changes introduced between 2016 and 2019. Although the lifting of the ban on conducting evidentiary proceedings on the merits of the case by the appellate court is a fundamental change and justifies the thesis discussed, further analysis of subsequent normative changes is necessary for two reasons. First, it confirms the validity of the rule requiring the appellate court to conduct evidentiary proceedings and demonstrates its practical applicability, thereby assessing the second aspect not only from a theoretical legal perspective but also from the viewpoint of its practical implementation. Second, the legislative changes undertaken and subsequently made more realistic by their implementation allow for the determination of the extent to which this principle has been realised. This is connected to defining the scope of permissible evidence on the merits of the case in appellate proceedings.

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5 Journal of Laws of 2013, item 1247.

6 Journal of Laws of 2016, item 437.

7 Journal of Laws of 2019, item 1694.

8 Article 56 of the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and Certain Other Acts: 'The act enters into force on 1 July 2015, with the exception of […].'

The process of deduction regarding the established principle of conducting evidentiary proceedings on the merits of the case, as confirmed by the thesis of the judgment under consideration, requires deeper analysis. This analysis should be based on an assessment of the issues through the prism of appellate proceedings models, which are fundamental in this respect. The core of the subject matter stems from a view expressed in the doctrine, according to which 'it is the scope of admissible evidence that determines the model, and not the model that determines the scope of evidence.'[9] In the context of this view, a further question arises: how have the normative changes, particularly the abolition of the ban on conducting evidentiary proceedings on the merits of the case, and subsequent modifications within Article 452 of the Code of Criminal Procedure, influenced the shape of the appellate proceedings model? A correct analysis of the legal provisions regulating evidentiary proceedings before the appellate court cannot be made without considering the normative conditions within which – according to the legislator's assumption – appellate review should occur. To answer the above question correctly, it is necessary to present the scope and meaning of the term 'appeal proceedings model', identify its types, and characterise the fundamental assumptions of these models. In this respect, the views expressed in the literature are indispensable, as they clarify the fundamental issues relevant to this analysis. The term 'model', which serves as the starting point, is defined by S. Waltoś as 'a set of basic elements of a certain system, allowing it to be distinguished from other systems'.[10] Another linguistic approach to this term offers the view that 'the concept of a (theoretical) model, in an abstract sense, should be understood as a hypothetical construction that maps a given type of reality in a simplified way, reducing its features to the most important connections […] the term model refers to both a set of important variables and specific functional connections between them.'[11] These views form the basis for distinguishing a narrower concept: the 'appeal proceedings model', defined as 'a set of statements characterising and distinguishing the essential features of a specific appeal procedure'.[12] According to Z. Doda, this constitutes the totality of the powers and limitations of the court of appeal concerning the scope of the examination and resolution of the case.[13] The basic criterion for dividing models of appeal proceedings is whether the court of appeal is entitled to

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[9] Hofmański, P., Zabłocki, S., 'Dowodzenie w postępowaniu apelacyjnym i kasacyjnym – kwestie modelowe', in: Grzegorczyk, T. (ed.), *Funkcje procesu karnego. Księga Jubileuszowa Profesora Janusza Tylmana*, Warszawa, 2011, p. 468. See also Świecki, D., *Bezpośredniość czy pośredniość w polskim procesie karnym. Analiza dogmatycznoprawna*, Warszawa, 2013, p. 254; Kwiatkowski, Z., 'Evidentiary proceedings before an appellate court in the Polish criminal trial', *Ius Novum*, 2016, No. 2, p. 112.

[10] Waltoś, S., *Model postępowania przygotowawczego na tle prawnoporównawczym*, Warszawa, 1968, p. 9.

[11] Fingas, M., *Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym*, Warszawa, 2016, p. 22.

[12] Kaftal, A., 'W sprawie modelu środków odwoławczych', *Państwo i Prawo*, 1973, No. 8–9, p. 181.

[13] Doda, Z., Gaberle, A., *Kontrola odwoławcza w procesie karnym. Orzecznictwo Sądu Najwyższego. Komentarz*, Warszawa, 1997, p. 58.

examine the contested judgment from a legal or factual perspective. The doctrine[14] distinguishes three basic models of appeal proceedings: appellate, cassation and revision. The essence of the appellate model lies in the assumption that the court of appeal, as a substantive court, reconsiders the case. Implicitly, within the appellate proceedings, the evidentiary proceedings are repeated in line with the model of proceedings before the court of first instance.[15] In the revision model, where the appeal proceedings are two-tiered, the court of appeal does not, in principle, conduct evidentiary proceedings on the merits of the case; only in exceptional circumstances does it supplement the judicial proceedings.[16] This model typically operates under a scheme where the prohibition on conducting evidentiary proceedings on the merits of the case by the court of appeal is the rule, with exceptions limited to the possibility of hearing individual pieces of evidence. In the literature on the cassation model, it is stated that: 'In the cassation model of appeal proceedings, the ruling is subject to review only in legal terms (substantive law and procedural law). Therefore, the court of cassation does not examine the correctness of factual findings and does not make such findings independently. Accordingly, it does not hear evidence on the merits of the case either. The court of cassation does not conduct evidentiary proceedings at all.'[17] This summary of the main assumptions of the classical models of appeal proceedings provides the foundation for drawing conclusions about the current shape of Polish criminal procedure. Such conclusions should be based on a joint analysis of Article 427 § 3 of the Code of Criminal Procedure in conjunction with Article 452 of the Code of Criminal Procedure, as these provisions are fundamental to the issue of evidentiary proceedings on the merits of the case, determining its actual scope. The first key issue concerns the abolition of the ban on conducting evidentiary proceedings on the merits of the case by the court of appeal. This represented a fundamental change. The principle in question, as can be seen from the above list, characterised the revision model. Its abolition should therefore be assessed as an expression of the desire to enhance the appellate nature of the appeal proceedings. However, this is not the only change that supports such a belief. The reasoning in this area is also based on the joint analysis of Article 427 § 3 of the Code of Criminal Procedure and Article 452 §§ 2 and 3 of the Code of Criminal Procedure. While Article 427 § 3, which establishes the institution of evidentiary preclusion, may *prima facie* impose significant limitations on the scope of conducting evidentiary proceedings *in concreto*, the interpretative rule that decodes the *ratio legis* of this provision is set out in Article 452 § 3 of the Code of Criminal Procedure.[18]

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[14] Kotowski, A., 'Skarga nadzwyczajna na tle modeli kontroli odwoławczej', *Prokuratura i Prawo*, 2018, No. 9, pp. 51–85; Świecki, D., *Apelacja w postępowaniu karnym*, Warszawa, 2012, pp. 16–17.

[15] Świecki, D., *Konstrukcja apelacji jako środka odwoławczego w procesie karnym*, Warszawa, 2023, p. 30.

[16] Ibidem, p. 31.

[17] Świecki, D., 'Zakres postępowania dowodowego w instancji odwoławczej', in: Steinborn, S. (ed.), *Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań*, Warszawa, 2016, p. 277.

[18] Article 452 § 3 added by Act of 19 July 2019 amending the Act – Code of Criminal Procedure and Certain Other Acts (Journal of Laws of 2019, item 1694).

The internal reference in Article 452 § 3 to Article 452 § 2(2) should be interpreted in such a way that, even if the condition for applying the legal consequences of evidentiary preclusion is met ('The court of appeal shall also dismiss the evidentiary motion if: […] the evidence was not adduced before the court of first instance, despite the fact that the applicant could have adduced it at that time, or the circumstance to be proven concerns a new fact that was not the subject of the proceedings before the court of first instance, and the applicant could have indicated it at that time' – Article 452 § 2(2)), the court of appeal may not dismiss the evidentiary motion 'if the circumstance to be proven, within the limits of the examination of the case by the court of appeal, is of significant importance for determining whether a prohibited act was committed, whether it constitutes an offence and what kind of offence, whether the prohibited act was committed under the conditions referred to in Article 64 or Article 65 of the Penal Code, or whether there are conditions for ordering a stay in a psychiatric facility under Article 93g of the Penal Code' (Article 452 § 3). Implicitly, this prohibition is activated in every procedural arrangement where a circumstance significant to the accused's guilt or commission of the act is subject to proof. In interpreting Article 452 § 2(2), particular attention should be drawn to the linguistic coherence and the identical approach to evidentiary preclusion based on Article 427 § 3. A joint reading of the above-quoted legal norms, enriched by reasoning based on the historical method, which lifted the prohibition of proof on the merits by the appellate court, leads to the conclusion that the Supreme Court rightly found in the commented judgment that the appellate court is currently not only authorised, but also obliged to conduct evidentiary proceedings where deficiencies in the evidence are revealed at the appellate review stage.

The content of the glossed thesis also compels us to consider the type of evidence that the appellate court is competent to conduct. The Supreme Court's distinction between the right and, at the same time, the obligation of the second-instance court to conduct both personal and non-personal evidence is correct. The issue of evidentiary proceedings before the appellate court, due to its significant importance for the practice of law application, should focus not only on the correct determination of the scope of admissible evidence as to the substance of the case but also on establishing what evidence the appellate court is competent and obliged to conduct. These elements are legally interrelated – the substantive interdependence of these two issues necessitates emphasising that, for the issue to be addressed in a manner that allows for the *in concreto* application of the principle of conducting evidentiary proceedings as to the substance of the case, it requires not only the indication of the appropriate legal basis that permits evidentiary proceedings at the appellate level and determines its extent but also a determination of whether there are any generic limitations to the scope of evidence conducted in a higher instance. These outlined issues have been subject to judicial analysis since the application of Article 452 § 2 of the Code of Criminal Procedure in its original form as given by the legislator. The clause established by Article 452 § 2 of the Code of Criminal Procedure, which at that time stated, 'The appellate court may, however, in exceptional cases, recognising the need to supplement the judicial proceedings, hear evidence at a hearing if this will contribute to the acceleration of the proceedings, and it is not necessary to

conduct the proceedings anew in whole or in significant part. Evidence may also be admitted before the hearing,'[19] served as a basis for reasoning on its application, despite the existing ban on conducting evidentiary proceedings on the merits of the case (Article 452 § 1 of the Code of Criminal Procedure).[20] Therefore, given that this subject was of significant importance under conditions where there was a ban on evidentiary proceedings on the merits of the case, alongside the clause on supplementing judicial proceedings – i.e., within a model of appeal proceedings that allowed for limited evidence-taking by the appellate court – its importance is even greater under the current rule permitting evidentiary proceedings on the merits of the case by the appellate court. The interpretative direction established in case law under the original wording of Article 452 of the Code of Criminal Procedure should, for these reasons, be adopted into the interpretation and application process of the principle of conducting evidentiary proceedings on the merits of the case, following changes to the appeal proceedings model.

The perspective presented in the thesis under discussion – that the court of appeal should, if necessary under specific procedural circumstances, hear evidence of both a personal and non-personal nature – is, in effect, a reflection of views expressed regarding the type of evidence that may be heard in appeal proceedings conducted in the spirit of revision. This assertion is supported by the Supreme Court's decision of 2 February 2006, file reference II KK 284/05,[21] wherein the Supreme Court stated:

> 'The decision of the appellate court to conduct additional evidentiary proceedings or to refrain from conducting them should always be preceded by a detailed analysis and, if necessary, verification of the premises underlying it, and an attempt to specify the circumstances to be proven by the requested evidence or evidence conducted *ex officio*. This may involve new evidence or the repetition of evidence, whether from a personal or material source.'

The relevance of the view is expressed by the idea of equality between personal and material evidence accepted on this basis, which may be conducted by the appellate court and, in this part, does not require modification for its use as an interpretative guide in the process of determining the method of realising the currently permissible scope of evidence by the appellate court. Moreover, it should be noted that 'material' evidence refers to 'non-personal' evidence, as mentioned in the glossed thesis. Verification of the position expressed in the judgment quoted above, and its adjustment to the current legal reality, requires considering that the appellate court now conducts evidentiary proceedings on the merits of the case and does not merely supplement them under conditions of a ban on such evidence.

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19 Journal of Laws of 1997, No. 89, item 555.

20 Ibidem.

21 Order of the Supreme Court of 2 February 2006, II KK 284/05, LEX No. 176040.

It should also be noted that the doctrine[22] and case law[23] recognise evidence that may be conducted in appeal proceedings, including: witness testimony, expert opinions, the explanations of the accused, and documentary evidence.

In light of the considerations presented thus far, the view expressed by the Court of Appeal in Szczecin, based on its judgment of 12 July 2018, II AKa 92/18,[24] which holds the following position, is also worthy of acceptance:

> '[…] In appeal proceedings there are no restrictions on the use of sources of evidence, and the court *ad quem*, when taking evidence at the appeal hearing, acts primarily as a substantive court.'

To conclude the above considerations, and taking into account the content of selected judgments illustrating the types of evidence that may be taken by the court of appeal, it should be noted that the Supreme Court rightly stated in the glossed judgment:

> 'In the event of finding specific content deficiencies in some of the personal and non-personal evidence, the court of second instance was both entitled and obliged to conduct evidentiary activities autonomously, since the currently applicable regulations of the appeal proceedings, including those resulting from Article 452 of the Code of Criminal Procedure, indicate significant possibilities for rulings by the reformative court of appeal, also based on evidence taken exclusively at this stage of the proceedings.'

The principle of conducting evidentiary proceedings on the merits of the case, confirmed by the thesis of the glossed judgment and the conclusion about the substantive nature of the appeal proceedings, has sparked a discussion on the compliance of the rule allowing the second-instance court to conduct evidence with the principle of two-instance proceedings, as established by normative changes. Against the background of the glossed thesis, a question arises as to whether the broad evidentiary powers granted to the appellate court by the criminal procedure act, linked with the obligation to conclude the appeal proceedings on the merits, generally reflect respect for the constitutional principle of two-instance court proceedings. This aspect relates to Article 176(1) of the Constitution of the Republic of Poland, which states, 'Court proceedings shall have at least two instances,'[25] thereby designating its source. The reasoning presented in the case law of the Constitutional Tribunal is fundamental for determining how the principle of

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[22] Marszał, K., 'Glosa do uchwały SN z dnia 24 stycznia 2001 r., I KZP 47/2000', *Państwo i Prawo*, 2001, No. 10, p. 115; Świecki, D., 'Glosa do postanowienia SN z dnia 15 października 2003 r., III KK 271/02', *Orzecznictwo Sądów Polskich*, 2004, No. 9; Klejnowska, M., 'Glosa do postanowienia SN z dnia 15 października 2003 r., III KK 271/02', *Państwo i Prawo*, 2004, No. 9; Woźniewski, K., 'Glosa do postanowienia SN z dnia 4 stycznia 2005 r., V KK 388/04', *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*, 2005, No. 3, pp. 91–96.

[23] Judgment of the Supreme Court of 17 June 2003, V KK 162/02, Legalis No. 58097; judgment of the Supreme Court of 18 June 2003, IV KKN 272/00, LEX No. 80289.

[24] Judgment of the Administrative Court in Szczecin of 12 July 2018, II AKa 92/18, LEX No. 2544933.

[25] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

two-instance proceedings is respected within the appellate procedure model that predominantly features appellate elements.

In this regard, the position presented by the Constitutional Tribunal in its judgment of 13 July 2009, SK 46/08,[26] is especially noteworthy, as it provides the following interpretation of the principle of two-instance proceedings from the perspective of appeal proceedings akin to the appellate:

> 'The Constitutional Tribunal states that Article 176(1) of the Constitution establishes the principle of two-instance court proceedings, which entails: (1) access to a second instance (granting the parties a means of appeal); (2) entrusting the examination of the second-instance case to a higher court. According to the Tribunal's case law, the principle of two-instance proceedings ensures the review of the decision made by the first-instance court through a double assessment of the factual and legal state of the case and an evaluation of the correctness of the position adopted by the first-instance court.'

The acceptance of the above view by the Constitutional Tribunal is reflected in the Supreme Court's case law.[27] In the context of the view presented, the perspective offered in the doctrine of criminal procedural law is also notable,[28] in light of which:

> '[…] the principle of two-instance court proceedings is perceived formally, not substantively.'

This view deserves approval, as it aligns with the constitutional approach to the principle of two-instance proceedings. Article 176(1) of the Constitution of the Republic of Poland expresses only the obligation to create legal regulations that establish the right to appeal a judgment. However, the normative provision does not outline a specific model of appellate proceedings that would inherently implement the principle. Therefore, it can be concluded that the thesis of the glossed judgment respects both the current legal regulations of the Code of Criminal Procedure of 1997 concerning evidentiary proceedings before the appellate court in Polish criminal proceedings and the constitutional principle of two-instance proceedings.

To summarise the above considerations, it should be stated that the Supreme Court rightly indicated that the court of appeal is currently obliged to conduct evidentiary proceedings when deficiencies in the evidentiary material of the case are disclosed. This obligation is determined by the nature of the current model of appeal proceedings, which, through the absence of a ban on evidence relating to the substance of the case and significant limitations on the application of evidentiary preclusion (Article 427 § 3 and Article 452 § 2(2) of the Code of Criminal Procedure), underscores its appellate character.

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[26] Judgment of the Constitutional Tribunal of 13 July 2009, SK 46/08, OTK-A 2009, No. 7, item 109.

[27] For example, judgment of the Supreme Court of 15 November 2017, IV KS 5/17, LEX No. 2410631.

[28] Mierzejewski, Z., 'Reguły *ne peius* z art. 454 k.p.k. po zmianie modelu postępowania odwoławczego w sprawach karnych – uwagi *de lege lata* oraz *de lege ferenda*', *Przegląd Sądowy*, 2019, No. 9, p. 56.

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