Translation from Romanian language:

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R O M A N I A

THE COURT OF THE FOURTH DISTRICT OF BUCHAREST - THE CRIMINAL DIVISION

CASE NO. 27918/4/2016

DECISION NO. 2847 dated 23 November 2016
HEARING OF 23 November 2016
FILTERING COURT COMPOSED OF:
PRESIDING JUDGE: Şimon Raluca Oana
COURT CLERK: Geană Ludeanu Costiana

THE PUBLIC MINISTRY - Prosecutors' Office under the High Court of Justice – the National Anticorruption Directorate was represented by the Prosecutor Cojocaru Daniel.

On the dockets the render of the cause of the petitioner Adamescu G. Grigore Dan, having as object the release on probation (Art. 587 of the New Code of Civil Procedure).

On the roll call made in public hearing the petitioner was absent, being represented by the named lawyer Cătălin Breazu, duly empowered (page 20).

The summoning procedure is legally fulfilled.

The Court Clerk refereed that is the second hearing term, previously the cause being postponed in order to be present the petitioner, and for this hearing term was filed an application for judgment in absentia of the petitioner, following which,

The court makes a record of the petitioner`s application for judgement in default and that the administration of the penitentiary answered to the letter of the court.

The lawyer of the petitioner files documents, holograph countersigned by the petitioner, in order to request the judgment in absentia, as well as a document attesting that he agrees to be heard by videoconference if it is technically possible, and in case the security of the transmission cannot be ensured he will be judged in absentia.

The representative of the Public Ministry notes that he does not know the technical possibilities of the court to conduct a videoconference and does not want to take note of the documents filed.

The court notes that the hearing by videoconference would be possible only if the petitioner would be in a penitentiary hospital or in a penitentiary unit, but considering he is in a private hospital, where he will be for a period, cannot be conducted a transmission in order to be heard. The court also notes that the hearing by videoconference cannot be conducted as this technical facility may be realized only between the court and penitentiary and not with other place and therefore, notes the application of the judgment in absentia of the petitioner.

The representative of the Public Ministry and the lawyer of the petitioner agree with the judgment of the cause in absentia of the petitioner.

Not being other applications to be filed or evidences to be evidences to administrate, the court shall give the floor to debates on the merits.

The defendant of the petitioner requests its release on probation from the sentence of 4 years and 4 months of imprisonment applied by sentence no. 17/2015 of the Bucharest Court of Appeal, based on the provisions of Art. 60 paras. 1 and 2 of the former Code of Procedure, as the offense is committed under the former Code of Procedure, this being the favorable criminal law. The minutes of the release on probation commission within the penitentiary is negative, but is not motivated accordingly because it is not specified what the petitioner has to do in the future in order to obtain a favorable opinion, meaning which of the release on probation conditions are not fulfilled. The postponement was also justified in the light of the insufficient time spend in the penitentiary, but the law determines the necessary time, by establishing one third of fraction for the petitioner who exceed the age of 60 years, the fraction mentioned above being exceeded. The law determines and clarifies which is sufficient or not. With respect to the evidences of correction, this is an aspect which should be discussed for each individual, should be said what is missing to the behavior in order to receive a favorable opinion. A particular concern is the extremely bad health condition of the petitioner. Starting with 13 September 2016 the petitioner was repeatedly hospitalized in various hospitals for serious illness. On that date he was hospitalized in Floreasca Emergency Hospital in sepsis, unconscious, with fever to be reanimated (swallowed the tongue). Because the immobilization in a wheelchair took an inguinal infection which worsened in the penitentiary. He would like to know what he can do in the next 4 months, if the request would be rejected, in order not to be again postponed for lack of evidences of correction. It notes that the petitionary cannot participate to activities and cannot obtain recompenses because he is bedridden. The petitioner succeeded to accomplish the fraction in the penitentiary although he was faced with incontinence and the execution of the punishment represents a physical and mental torture for him. The petitioner is 68 years old, higher education, and his detention equate with torture and ill-treatment application. Although he is listed that executes the sentence in a semi-open regime, the security measures applied in the hospital are those specific to closed regime, he has no phone and received visits only from his sister. He accomplished the obligations related to the payment of legal costs, but the expenses accumulated with respect to complaints on preventive measures (a total of RN 16,500). He had a faultless behavior and, although he is bedridden, he took part in educational programs and psychogical assistance, and the medical absences were due to health condition.

He suffered accidental falls, which caused ecchymosis, because of obesity. His cell colleagues were away, for work, during the day, and in his unsuccessful attempt to reach the toilet, he felt in the toilet and cried out 2 hours for help, without being able to raise. One day for a man in his condition is equivalent to a week or a month of imprisonment for a health person. He has no antecedents, is old, and could no anything against the law in his health condition.

The representative of the Public Ministry filed conclusions to reject the complaint filed by the petitioner. He notes that, according to the jurisprudence, the release on probation is just a vocation of a convicted and not a right. In order to obtain it, is mentioned the compliance with the conditions stipulated by law and even if all of them are accomplished, the release on probation is not mandatory. The minutes of the release on probation commission in Jilava refers to the situation of execution of the punishment and real participation to the activities conducted in the penitentiary. There are no clear evidences of correction, being required by the legal text, and the time spent in imprisonment is not enough to achieve the purpose of punishment. From the information received from the penitentiary results that the period spent in detention is too low, considering that the petitioner did not stay effectively in the penitentiary, neither even appreciate the behavior of the prisoner, nor give evidences of correction and, therefore, the educative function of the punishment cannot be evaluated and either what the society aimed by applying the punishment, namely whether the petitioner had formed other behavior compared to the one before incarceration. We should start from here, the conviction premise: offered

money to the judges in order to obtain favorable decisions in various causes for solving the personal financial problems. The sentence was meant to prove that money cannot buy anything just because he can. His behavior in penitentiary cannot be discussed because it is inexistent, being detained only during the period 27 May – 13 September 2016, as for the rest of the period he stayed only in private or state hospitals. Only the medical documents should be considered and not the references of the lawyer with respect to the living modality of the petitioner in prison because, in this moment, he is in a private hospital, having a knee surgery, and is in that place since September. He could appeal to the postponement of the punishment`s execution and not request the release on probation, as the first de jure institution concerns the medical impediments in executing the punishment and not the institution of release on probation. Due to the short period of time spent in detention, we cannot talk about the real correction of the petitioner reported to the effective activities performed in the penitentiary.

The defender of the petitioner notes, in its response, that he cannot make reference to the reasons of conviction as this would mean to be judged once again the petitioner or his punishment was established for a specific amount. We have to analyze what he made after sentence, but he cannot prove that we will not try to buy various favors. He notes that the petitioner is not in a balneal-climatic health resort, but led to the hospital by SMURD as his health condition was a required this intervention. He also notes that the petitioner is seriously ill and his return in penitentiary would led to his death. He indicates that the could request the interruption of the execution of punishment, but this request is not necessary given that the condition on release on probation are accomplished. Whatever would be the solution, it is necessary to explain what he would have to do in the following 4 months of postponement until the next evaluation in the Commission, what he could have done and did not. The judicial practice on release on probations cannot be invoked as this is a personal, individual institution. He notes that the conditions on release on probation of the petitioner are fulfilled.

The representative of the Public Ministry notes, in its response, that he did not request that the petitioner should be judged again, but to consider the decision taken with respect to the sentence, based on Art. 52 of the Code of Procedure, the need to prove that he will not commit the offenses for which he was convicted. On the postponement of the execution of punishment, was taken into account the situation from September, when he was hospitalized, when he appealed to this institution, although at that moment was not fulfilled the fraction of the punishment specified by law in order to be analyzed within the release on probation commission. He also considered the medical documents submitted in the file and the fact that he was hospitalized with a diagnosis of gonarthrosis in order to be subject to a knee surgery. The fact that the petitioner is in a private or state hospital or all the other references to other diseases as he is operated to a knee.

The court considering that all de jure and de facto circumstances of the cause have been determined, declares closed the debates on the merits and postpones the ruling.

THE COURT:

Deliberating on the criminal case, acknowledges the following:

By the application pending with this court under no. 27918/4/2016, on the date of 25 October 2016, the convicted petitioner Adamescu Grigore Dan challenged the minutes of the release on probation commission within Jilava Penitentiary in Bucharest, through which was proposed the postponement of the release on probation, requesting his release on probation.

On the date of 25 October 2016 the convicted petitioner filed an application for release on probation from the execution of the punishment of 4 years and 4 months of imprisonment imposed by the criminal sentence no. 17/02.02.2015 rendered in the case no. 4153/2/2014 of the Bucharest Court of Appeal, maintained by the criminal decision no. 234/2016 dated 27 May 2016 of the High Court of Cassation and Justice.

The petitioner noted on the merits, on the grounds of the case that the former law is favorable to his situation by reference to the date of committing the offense; he executes the punishment in a semi-opened regime, executed the fraction of 1/3 of the total punishment of imprisonment, namely 534 days of imprisonment of a total of 1467 days.

The petitioner stated that during the execution of the punishment he had a good behavior and was not sanctioned during the period of detention. He also mentioned that he had not the possibility to participate in several programs and activities due to his health condition extremely precarious, being immobilized in a wheelchair and suffering of numerous other diseases. He pointed that a big part of his punishment was executed in the penitentiary hospital and hospitals in the public health system.

The petitioner underlined that are fulfilled the conditions for release on probation, showing that he has 68 years old and suffers of many diseases, detailing his medical condition, prior and subsequent to the imprisonment moment. His health situation made him unable to be observed during the execution of the punishment.

The characterization of the petitioner and the minutes drafted by the committee for proposal of the release on probation were filed to the case file.

The convict was defended during the judgment of the case by the named defendant, Cătălin Breazu, duly empowered.

The lawyer of the petitioner filed medical documents and the receipt no. TS701 no. 20100240716 dated 8 November 2016 at the case file, at the hearing term dated 9 November 2016 (pages 22-25).

The petitioner was not present and any application for judgment in absentia was not filed at the hearing term dated 9 November 2016 and therefore the court postponed the ruling for the date of 23 November 2016.

Documents attesting the impossibility due to health reasons of the petitioner to be present were filed to the case by Jilava Penitentiary in Bucharest, on the date of 9 November 2016, at 12.00 hours, after calling the case (pages 26-27).

At the case file were also submitted: criminal decision no. 17/2015 of the Bucharest Court of Appeal (pages 30-64); medical documents (pages 75-83).

The petitioner files an application for judgment in absentia, as well as conclusions on the merits of the case for the hearing term dated 23 November 2016 (page 75).

The court noted the impossibility to hear the petitioner by videoconference considering that he is in a hospital outside the penitentiary system, namely in a private hospital.

Analyzing the documents and works of the case, the court acknowledges the following:

De facto, by the criminal sentence no. 17/2015 of the Bucharest Court of Appeal, final by the criminal decision no. 234/A/27.05.2016 of the High Court of Cassation and Justice, the petitioner received the punishment of 4 years and 4 months of imprisonment for committing

the offense specified by Law no. 78/2000, being issued the warrant for execution of imprisonment no. 28/2016.

According to the minutes no. 43 dated 20 October 2016 drafted by the commission for proposals of release on probation within Jilava Penitentiary in Bucharest, the petitioner started to execute the punishment on the date of 27 May 2016 and will expire on the date of 9 September 2019. (because the preventive arrest of 383 days will be reduced). The punishment transformed in days of punishment is equal with 1548 days and in order to become opposable regarding the release on probation the convict must perform 1/3 of the punishment, respectively 528 days.

The committee considered that the convict cannot be probated and proposed the adjournment for a period of 4 months, as the petitioner did not have solid evidences of correction, the time spent in detention being insufficient for achieving the purpose of the sentence. The petitioner is at the first analysis.

De jure, regarding the applicable criminal law, considering the succession of criminal laws determined by the entering into force, on the date of 1 February 2014, after the convict Adamescu Grigore Dan committed the offense, respectively in the year 2013, of the Law no. 286/2009 on the New Criminal Code, regulating in a more restrictive manner, subject to the granting conditions and subsequent obligations, the institution of release on probation, the court considers that under Art. 5 para. 1 of the New Criminal Code "if starting with the moment of committing the offense and until the final judgment of the case intervene one or more criminal laws, the most favorable law will be applied".

In this respect the Constitutional Court also states in the decision no. 214/17.06.1997 according to which the incidence of the provisions of the New Criminal Code in relation to facts and people, is governed by the provisions of Art. 15 para. 2 of the Constitution, confirming the rule that the law disposes only for the future, admits as sole exception the favorable criminal law. The transitional situation in the succession of the criminal law arises if, starting with the date of the offense, when the criminal legal report of the conflict incurred, and until the termination or settlement of this report by execution or consideration as executed of the punishment applied, and sometimes until the elimination of conviction`s consequences by rehabilitation, intervened one or more criminal laws. The applicable law is always the most favorable one. If the institution of release on probation, the transitory situation is created also, *on the date of offense* and lasts until the execution or consideration as being executed the punishment of life imprisonment or imprisonment. The intervention, in this interval, of a criminal law that modifies the institution of release on probation, as in the case of Law no. 286/2009, determines the applicable law to be performed according to the regulations stipulated in Art. 15 para. 2 of the Romanian Constitution and in Art. 5 of the New Criminal Code, irrespective of the date on which the conviction sentence was final.

Analyzing the conditions imposed by the two successive criminal laws for granting the benefit of release on probation, the court notes that the more favorable criminal law is that of the Criminal Code of the year 1969, this law having more permissive provisions both on imperative requirements got granting the release on probation and on the supervision modality of the petitioner after he had been probated. Therefore, the court will analyze the situation of the petitioner convicted based on the provisions of the former Criminal Code.

Therefore, the court finds that, according to Art. 59 of the former Criminal Code, may be probated the convict who executed the fraction of the punishment mandatory specified by law,

is disciplined, persistent in work and gives solid evidences of correction, considering also its criminal antecedents.

In this case, considering the age of the convicted petitioner, the court notes the applicability of the provisions of Art. 60 para. 2 of the former Criminal Code, stipulating that: *„those convicted during the minority, when reach the age of 18 years, as well as the convicted aged over 60 years for men and over 55 years for women, may be probated, after executing one third of the length of the punishment in case of the imprisonment not exceeding 10 years or a half in case imprisonment exceeding 10 years, if they meet all the others conditions provided in Art. 59 paras. 1."*

According to the provisions cited above, is noted that, for granting the release on probation is necessary that, in addition *to executing the factual fraction of the punishment,* established by law, the *convicted has been diligently at work, disciplined and have given solid reason of correction, considering also it criminal antecedents*. The court observes that the execution of the fraction specified by law offers the convicted petitioner just a vocation to the release on probation, there being no obligation instituted by the legislator in this respect.

Regarding the *execution of fraction from the punishment established by law,* the court observes that, from the minutes no. 43 fated 20 October 2016, the punishment of the convict is of 1584 days, and in order to become opposable in order to be probated, the convict has to execute the fraction of 1/3 of the punishment, namely 528 days of imprisonment. As the convict executed, starting with the date of 27 May 2016 until the date of 20 October=2016, 147 days of imprisonment, to which are added 383 days executed under preventive arrest, namely house arrest, resulting a total of 530 days of imprisonment, the courts notes that is the fulfilled I *the condition on the execution of fraction of punishment established obligatory by the legislator,* which confers the convict the release on probation.

The fact that the petitioner executed the mandatory obligation specified by the legislator does not confer a right, but only **a vocation** when grating the benefit of release on probation, the opportunity of granting the release on probation being at the discretion of the court, requiring him to give solid evidence of correction in order to be disposed the release on probation.

In this regard, the court notes that the release on probation represents the measure which may be disposed by the court ascertaining the liberation of the convicted person, before the entire execution of the imprisonment or life imprisonment, if the strict and restrictive conditions provided by law are fulfilled. The measure is optional and does not represent a right, but just a general vocation of the convict, in the same sense rendering also the European Court of Human Rights, which stated that Art. 5 para. 1 item a) of the Convention does not guarantee the right of a prisoner to benefit of an amnesty or to be liberated, conditional or definitely, before the execution of the punishment (CEDO, cause Kalan vs. Turkey, application no .73561/01, decision dated 2 October 2001).

Analyzing of the other criteria that the convict has to fulfil in order to benefit of the release on probation, the court notes that he *has not given solid evidences of correction*, making no evidence that the period spent in detention led to the his re-education and full understanding of the need to observe the social values protected by law. Thus, the court notes from the characterization filed in the case - page 5, that, starting with his presence in the penitentiary, he had *a good behavior*. The petitioner was not subject to disciplinary sanction, but neither was awarded during detention, aspects that are not in the court`s opinion, reasonable data that he had an attitude which confirms the awareness of the purpose of the punishment applied, correlated also with the remaining period to be executed from the applied punishment.

However, the court finds that his participation in programs and educative activities at the detention place is normal, not special, compared with the effective period spent within the detention place. From the characterization submitted results that the petitioner participated in a number of 10 educational programs. Therefore, the efforts made by the petitioner were minimal and cannot led to the conclusion of existence of solid evidence of correction. Thus, it is obvious that the petitioner did not succeed to realize the seriousness of its acts and to comply with the legal provisions.

By reference to these issues, the court notes that the purpose of reintegration of the punishment was not accomplished, the convict making no efforts for the social reintegration, but adopting a conduct according to the detention regulations.

The court, considering the above mentioned aspects, finds *in agreement* with the commission for proposals within Jilava Penitentiary in Bucharest that the time spent by the petitioner is not sufficient in order to probate him, not being satisfied the duties of the sentence provided by Art. 52 of the former Criminal Code.

Indeed, according to Art. 60 para. 1 of the former Criminal Code: „the convict who, due to his health condition or by other causes, has never been used in work or is no longer used, may be released on probation after the execution of the fractions of punishment stipulated in Art. 59 or, where appropriate, in Art. 59^1, *if it gives solid evidences of discipline and correction*".

The solid evidences of correction may result from an active involvement in educative, moral-religious, cultural, therapeutic, psychological and social assistance activities, school and professional training carried out within the penitentiary, in case of the convicted petitioner who due to the health condition cannot be used to work.

The court does not deny the petitioner convict's precarious health, which is evidenced in the medical documents submitted to the case file, but appreciates that the grounds for granting release on probation should not be the health condition, but the petitioner convict's behavior, who should convince the court that he understood the purpose of the sentence and the consequences of his criminal behavior.

In this context, the court reminds that the petitioner convict's health condition might justify a potential interruption of the prison sentence, provided that the conditions stipulated by art. 592 by reference to Art. 589 par. 1 item a of the Code of Criminal Procedures are met, and not the request for release on probation, considering the different conditions which must be analyzed for each of the two juridical institutions.

The court retains that the simple passing of time in the penitentiary cannot in any situation justify a potential release on probation, a juridical institution which, for that matter, should guarantee, at least theoretically, that, once released, the petitioner convict will not continue his criminal behavior, a guarantee which should be obvious from the fact that inside the penitentiary he had a behavior which at least generates a presumption in this respect. Or, as it has been show, the petitioner's behavior inside the penitentiary was not in this direction. The court considers that the petitioner should prove with more certainty of clarity that the purpose of the sentence is achieved with respect to his person, through a behavior which is obvious. Even if his health is precarious, it does not prevent him from participating in the activities performed in the penitentiary, which do not involve an effort which would affect his health.

Therefore, the court appreciate that at this moment, the convict is not eligible for release on probation and, as a consequence, in view of the aspects retained above, shall reject his request for release on probation as groundless.

The court, based on Art. 587 para. 2 of the Code of Criminal Procedures, shall establish a term for re-issuing an application for the date of *19 February 2017*, a term which the court deems as adequate for the behavior shown by the petitioner up to this moment, an interval in which the petitioner can reflect on his behavior and make efforts to justify his release. Contrary to the petitioner's claims, the court appreciates that during this interval, he will be able to make efforts to participate in educational and cultural activities and to increase his efforts of integrating in the society.

Considering the solution which shall b given in the case, based on Art. 275 para. 2 of the Code of Criminal Procedures, the petitioner convict shall be bound to pay the amount of RON 100, representing legal expenses advanced by the state.

FOR THESE REASONS

IN THE NAME OF THE LAW

THE COURT DECIDES:

Based on Art. 587 of the Code of Criminal Procedures by reference to Art. 59 of the Criminal Code dated 1969 and Art. 5 of the Criminal Code, **rejects the application for release on probation** filed by the convicted petitioner Adamescu Grigore Dan, son of Grigore and Eugenia, born on the date of 20 September 1948, currently detained in Jilava Penitentiary in Bucharest, **as ungrounded**.

Based on Art.: 587 para. 2 of the Code of Criminal Procedures, establishes a term for re-issuing an application on the date of 19 February 2017.

Based on Art. 275 para. 2 of the Code of Criminal Procedures, obliges the petitioner – sentenced to pay the amount of RON 100, as legal expenses to the state.

With the right to appeal within 3 days since communication.

Rendered in public hearing today, 23 November 2016

PRESIDING JUDGE **COURT CLERK**

Red/tehn/SRO/GLC/4 counterparts/5 December 2016

The undersigned, **CODICĂ CLAUDIA ELENA**, Interpreter and Translator for English and French languages, based on authorization no. 16556, from the date of 14/06/2006, issued by Ministry of Justice from Romania, hereby certify the accuracy of the translation made from English language into Romanian language, also certify that the submitted document was translated completely, without omissions, and that, by translation the content and the meaning of the document were not distorted.

INTERPRETER AND AUTHORISED TRANSLATOR