

Facilitating the Escape in the Romanian Law

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Abstract: This research aimed to examine the offense of facilitating escape, taking into consideration the newly introduced provisions in Romanian legislation. Since this deed was also included in the older law, the research extended to the constitutive content, the elements of difference and resemblance, as well as the case law adopted by Romanian courts in which the previous regulation was considered. At the same time, I also intended to emphasize the continuity of incrimination of these deeds in Romanian law. The novelty elements consist in examining the offense by comparison to previous law, both useful in the individualization process. The work can also be useful to researchers, as well as to students or practitioners in the field.

Keywords: Offense; material element; guilt; transitory situations

1. Introduction

As part of the group of offenses against the fulfillment of justice, the offense of facilitating escape mentioned in the provisions of art. 286 par. (1) C. pen. consists in the deed of a person of facilitating, through any means, the escape of another person.

The deed is considered to be more severe being sanctioned as such, if the escape is committed by using violence, weapons, radioactive or paralyzing substances; by two or several persons in the same circumstance or when the facilitation of escape is committed in favor of a person in custody or arrested for an offense sanctioned by the law with the penalty of life imprisonment or with the penalty of imprisonment of 10 years or more.

Also, the deeds are considered to be more severe, if they are committed by a person that had the duty of guarding the person that is in custody or arrested.

Unlike other offenses, in the case of the one examined, both the fault and the attempt are punished.

As noticed, the deeds described in the incrimination text do not represent anything else than complicity to escape.

The doctrine of the second half of the past century claimed that “the degree of social danger represented by the deed of facilitating escape is higher than that represented

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by the deed of escape, because while the person that is legally in a state of custody or arrest is motivated by the natural human drive to regain freedom even through an illicit action (which explains why, in the past, the simple escape was not incriminated), the persons that facilitate escape do not even have this excuse, devoid of juridical effect, but real.

The offense of facilitating escape constitutes, thus, an obvious lack of respect for judiciary institutions and, so, a manifestation meant to impeach the fulfillment of justice.

The facilitation of escape is characterized by higher social danger than the deed of escape because without this deed, most of the times, escape would not have been possible.

The higher degree of social danger of facilitating escape justifies the incrimination of this deed, differently than the incrimination of escape and its more severe sanctioning” (Nicoleta Iliescu in, Dongoroz et alli., 1972, pp. 265-266).

In recent doctrine it was claimed that “Normally, complicity in a deed mentioned by the criminal law is punished within the same sanction limits as those applied to the author, without the necessity of another legal provision besides the General part of the Criminal Code. However, exceptionally, the law maker chooses to sanction different forms of complicity distinctly, that either do not refer to deeds mentioned in the criminal law [for example, determining or facilitating suicide– art. 191 Criminal Code procuring – art. 213 par. (1) C. pen.], or they represent, in fact, “posterior complicity” (for example, favoring the perpetrator– art. 269 Criminal Code abetting – art. 270 C. pen.). Facilitating escape also represents a sanction of actual complicity that the law maker chose to punish, on one hand, more severely than it would normally be punished and, on the other hand, when it is committed by fault. The justification of such a distinct sanctioning consists in the fact that, many times, without the aid of another person, the escape would not exist; moreover, if the wish of a person to escape can somehow be understood, the deed of the facilitator cannot benefit from such a “justification” that mitigate responsibility” (Andra – Roxana Trandafir, in Rotaru, Trandafir, & Cioclei, 2016, p. 183).

2. The Criminal Code in Force Compared to the Previous Law

The examined offense, with the same marginal name was mentioned in the 1969 Criminal Code at art. 270.

The comparative examination of the two incriminations allows us to identify some resemblance elements as well as differences, with direct effects regarding the application of the more favorable criminal law.

The differentiating elements are the following:

- in the new law, at par. (1) of art. 286 Criminal Code the law maker mentioned only one typical normative modality, not including an aggravated normative modality that was mentioned in the previous law (retained if the offense was committed by a person that had the duty of guarding the person who escaped;

- at par. (2) of art. 286 three aggravated normative modalities have been introduced, without reference to the provisions that regulate escape, having as novelty the action of committing the offense by using narcotic or paralyzing substances;

- the offense of facilitating escape committed by a person that had the duty to guard the prisoner or the person in custody, is mentioned as aggravated normative modality, distinctly, without any connection to other similar modalities.

Among the resemblances we mention keeping the marginal title, the penalty limits mentioned in the typical normative modality, the sanctioning of the offense by fault and the attempt.

3. Preexisting Elements

3.1. Legal Matter

The main legal matter consists in the social relations regarding the activity of performance of justice that also involves compliance with the legal state of custody or detention of a natural person.

The secondary legal matter consists in the social relations regarding the physical integrity or the health of a person or the social relations regarding the performance of work by the staff ensuring the guard of the retained or detained persons in normal conditions [only in the case of par. (2) and par. (3) of art. 286 C. pen.].

3.2. Material Object

In the case the offense was committed in its typical modality mentioned at par. (1), there will be no *material object*, while in the case of the aggravated normative modality mentioned at par. (2), *the material object* is represented by the body of the person.

3.3. Offense Subjects

In the case of the typical normative modality mentioned at par. (1) and par. (2) *the active subject* of the offense may be any natural or legal person that complies with the general conditions of the law.

In the aggravated normative modality mentioned at par. (3) and the attenuated normative modality at par. (4), *the active subject* is qualified, its qualification consisting in its quality of the person with the duty to guard the retained or detained person.

According to the doctrine, the person that had the duty to guard the escaped “is the person officially charged with the guard of the legally retained or detained person. This person may be one that actually guards, supervises and escorts the prisoners or a person that oversees discipline or work, or moral conduct, training and professional qualification or hygiene; *the duty to guard* thus has the meaning of special obligation precisely determined imposed on some categories of persons and not the general guard obligation that belongs to all those working in a detention place (...).

The person who has the guard duty may facilitate escape from inside the detention place or from outside the detention place (from under escort) or on the occasion of work outside the detention place.

The convicted persons who, upon solid proof of rehabilitation and resilience in work and discipline, are used to supervise other convicted persons at their workplaces are not considered persons with the duty to guard” (Nicoleta Iliescu in, Dongoroz et alli., 1972, p. 267).

In this context, we appreciate that the active subject of this offense may be the staff with actual prisoner guard duties, employees of the National Penitentiary Administration, policemen at custody centers inside central and territorial police headquarters, penitentiary or police staff ensuring the guard of the arrested upon their presence before judiciary institutions (criminal investigation institutions, the rights and freedoms judge, the preliminary chamber or court judge).

Criminal participation is possible in all its forms, more precisely, co-authorship, instigation and complicity.

The main passive subject is the state in its position of holder of protected social value, and the *secondary passive subject* is represented by the victim of the violence committed on the occasion of facilitating escape, who can be the person with guard duties or another person.

Concerning the *place and the time* of committing the offense, we appreciate that this offense is committed in the period (during the time) in which a person is in a state of custody or detention and for the existence of the offense the place does not present any juridical relevance.

4. Judicial Structure and Content of the Offense

4.1. Prerequisite

The prerequisite consists in the preexistence of a legal state of retention or detention in which there is another person than the active subject.

4.2. Constitutive Content

4.2.1. Objective Aspect

The material object of the objective aspect [in the case of the typical normative modality mentioned at par. (1)], consists in the deed of facilitating through any means the escape of another person.

Through the action or inaction of facilitating escape we understand any support given to a legally retained or detained person, in order for that person to escape.

According to the doctrine “The action of facilitating escape entails that the retained or detained person had previously decided or accepted the call to escape. The call may come even from the person that will facilitate the escape.

Facilitating escape may consist in a material contribution (physical), like for example offering or preparing the means that will serve the escape, offering the money to buy such means, creating favorable conditions for the escape or removing some obstacles, either through an immaterial contribution (moral), like for example giving instructions, offering information for the orientation of the perpetrator, taking precautions to favor the author after committing the escape etc.

The action of facilitating escape can be made either by commissive acts or by an omissive attitude; in the latest case, the omission is committed most frequently by a person with the duty of guarding rhea escaped.

The facilitating action may be prior to or concurrent with the escape” (Nicoleta Iliescu in, Vintilă Dongoroz (Vintilă Dongoroz (scientific consultant: title VII; final provisions; leader and coordinator of the entire volume), Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, 1972, pp. 268-269).

Another author appreciates that “the actions of aiding must be prior or concurrent with the escape, they must have an effective character and they must be useful for the escaped person; in this sense, specialty literature (Udroiu, 2017, p. 432) has shown that it is necessary that the aid given by the perpetrator has actually contributed to the escape; it is not necessary that the escape has exclusively succeeded due to the facilitation granted; each time it is acknowledged that the facilitation actions could not have contributed in any way to the success of the escape, the deed will not constitute this offense”. (Udroiu, 2017, p. 432)

If “the same person that facilitates the escape of a third party escapes too afterwards, the offense of facilitating escape along with the offense of escaping will be retained in conjuncture” (Udroiu, 2017, p. 432) or “if a person determines the person deprived of liberty to escape, and then helps him by actual actions to execute the decision made, the offense of instigation to escape in conjuncture with facilitating escape will be retained”. (Udroiu, 2017, p. 432)

If the „aid actions are performed after the escape took place, only the offense of favoring the perpetrator will be retained; if the aid is given before committing the escape, as well as after the escape, the offense of facilitating escape in conjuncture with the offense of favoring the perpetrator will be retained”. (Udroiu, 2017, p. 432)

Another opinion appreciates that “The offense of facilitating escape is retained if the aid is given to the convicted person in order not to appear unjustifiably at the detention place, at the expiry of the period in which he was in a legal state of freedom, as well as the convicted person to leave the workplace outside the detention place.

The offense subsists only when the facilitation of the escape is effective and it represents a contribution to the escape. This facilitation may be material, when proving the person that will escape certain goods, such as: clothes, documents, removing some material obstacles, providing money to buy some means to be used in order to escape etc.

Also, there can be some immaterial contribution (moral), like, for example, providing information, giving indications or instructions, setting connections with other persons to be given to the prisoner in order to guide him and to set the escape plan etc.” (Vasile Dobrinouiu in, Dobrinouiu, et. alli., 2016, pp. 489-490).

Essential requirements. To complete the objective aspect it is necessary to fulfill two essential requirements.

The first essential requirement entails that the given aid is able to effectively help the person escape, and it is not legally relevant if the person escaped or not.

This requirement will not be fulfilled if the given aid consisted in calls to action or in other material actions that could not be effectively used in the illegal activity of escaping.

The second essential requirement regards the necessity that the person is legally retained or detained, in compliance with the provisions of the law.

Thus the aid given to a person who is illegally retained or detained does not fulfill the objective typical aspects of the offense of facilitating escape.

The immediate consequence consists in the creation of a state of danger for the normal performance of justice.

The causal connection results from the materiality of the deed (ex re).

In the case of the aggravated normative modality mentioned at par. (2) of art. 286 Criminal Code *the material element* consists in facilitating the escape committed by using violence, weapons, narcotic or paralyzing substances, in facilitating the escape of two or more persons at the same time or in facilitating the escape of a person retained or arrested for a crime sanctioned by the law with life imprisonment or with an imprisonment conviction of 10 years or more.

The first aggravated normative modality is mentioned in the provisions of art. 286 par. (2) let. a) Criminal Code to be retained if the action of facilitating escape is committed by *using violence, weapons, narcotic or paralyzing substances*.

The doctrine has shown that “these means must be used by the person escaping, irrespective of the fact that the facilitator of the escape used them or not.” (Nicoleta Iliescu in, Vintilă Dongoroz (scientific consultant: title VII; final provisions; leader and coordinator of the entire volume),, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roșca, 1972, p. 269).

Another opinion claims that “The aggravated modality is retained both in the case in which the escape of a person is facilitated, knowing that the person will use violence, weapons, narcotic or paralyzing substances, as well as if these instruments or means are used by the person facilitating the escape.” (Vasile Dobrinou in, Dobrinou et. alli., 2016, p. 490).

We also appreciate that this aggravated modality will be retained both if the usage of violence, weapons, narcotic or paralyzing substances is performed by the facilitator of the escape, as well as if the facilitator knows that the escaping person will use violence, weapons, narcotic or paralyzing substances.

The offense of hitting or using other types of violence mentioned in the provisions of art. 193 Criminal Code is absorbed in the content of the examined offense, as well as the offense of threat (included in the provisions of art. 206 C. pen.), when the threat is performed with a weapon (Udroiu, 2017, 433).

Also, the examined offense in its aggravated modality will be retained in conjuncture with the offenses of bodily injury (art. 194 C. pen.), common assault or battery resulting in death (art. 195 C. pen.), insult (art. 257 C. pen), noncompliance with the regulations of weapons and ammunitions (art. 342 C. pen.) or judiciary insult (art. 279 C. pen. – if the incriminated action is performed against a judge or a prosecutor who is performing his work attributions or a lawyer in connection with his profession.

In doctrine it was retained that if the “violence was not committed on third parties, but on goods in the process of escaping, the offense in its basic form will be retained and not the aggravated variant in conjuncture with destruction” (Udroiu, 2017, p. 433).

If when committing the offense “through the actual usage of weapons we will refer both to actual weapons, as well assimilated ones; it is not sufficient that the person escaping or facilitating the escape was armed” (Udroiu, 2017, p. 433).

The narcotic or paralyzing substance „is that chemical product that produces a reduction of reflexes, losing consciousness, unconscious state etc. (for instance, paralyzing spray, chloroform, CS gas etc.)” (Udroiu, 2017, p. 433).

The second aggravated normative modality will be retained if the facilitation of escape was performed in relation to two or more persons at the same time.

“In the doctrine (Loghin & Toader, 1997, p. 417) it was appreciated that it is not relevant if some of the aided persons have managed to escape and others have not, the aggravated modality will be retained if the aid is *granted for at least two persons at the same time*; this remark, correct in its essence, imposes however additional clarifications in order to emphasize all nuances, sometimes vague, of the incrimination norm, as follows:

- a) the aggravated variant refers to the *uniqueness of the fulfillment of the material element* of the offense consisting in the facilitation of escape, and not the uniqueness of circumstance of the performance of the actions of escape by two or more persons deprived of liberty; the lack of the requirement of the circumstance unity regarding the acts of facilitating escape mentioned at art. 286 par. (1) NCP committed repeatedly, if the deed is committed based on the same criminal resolution or of a conjuncture of offenses of facilitating escape if criminal resolution unity is missing; when, upon different occasions, the escape of two or more persons is facilitated each time, the repeated offense of facilitating escape will be retained in its aggravated form or a conjuncture of offenses of facilitating escape in its aggravated form depending on whether or not there is unity of crime resolution;
- b) if the uniqueness of the occasion in which the facilitation actions have been performed is retained, it is not important for retaining the aggravated form if the persons deprived of liberty escape at the same time or at different times;
- c) it is not essential for retaining the aggravated form that all aided persons have managed to escape; this aggravated variant can be retained in consummated form even when all persons deprived of liberty whose escape was facilitated at the same time only accomplish an attempt to escape, none of those managing to escape;
- d) it is not essential for retaining the aggravated form that all aided persons manage to escape at the same time or at different times; irrespective of the date of escape, in this case, one facilitation of escape in aggravated form will be retained”(Udroiu, 2017, pp. 433-434).

Another aggravated normative modality will be retained if the active subject facilitates the escape of a detained or arrested person for a crime sanctioned by the law with the penalty of life imprisonment or with the penalty of imprisonment from 10 or more years [art. 286 par. (2) lit. c) C. pen.].

According to the doctrine, „*the first hypothesis* mentioned at art. 286 par. (2) lit c) NCP regards the facilitation of escape of the person deprived of liberty through the measure of detainment or preemptive arrest when the grounds for the deprivation of liberty concern the existence of evidence that indicate a reasonable suspicion regarding offenses for which the law provides (in relation to the consummated form)

the penalty of life imprisonment or imprisonment for 10 years or more” (Udroiu, 2017, p. 434).

Concerning the *second hypothesis* mentioned in the provisions of art. 286 par. (2) let. c) Criminal Code that mentions the facilitation of escape of a person convicted to life imprisonment or imprisonment for 10 years or more, the doctrine makes the following remarks:

“(i) the imprisonment penalty can be set as basic penalty or as resulting penalty (including through the application of a penalty increase);

(ii) in principle, we will consider the penalty mentioned in the penalty execution order of the actual penalty; we appreciate that it is possible to retain this aggravated form and, if several imprisonment penalty execution orders have been issued set/applied for conjuncture of offenses, if one of them mentions imprisonment for 10 years or more, even if the merge operation was not performed or if this order was not effectively executed because another order containing a lower penalty had already been executed;

(iii) we cannot consider the duration of the penalty to be effectively executed in detention, after the exemption of the duration of detention or of preemptive measures to which the convicted person was submitted prior to the announcement of the final court decision or the duration of the imprisonment penalty left to be executed until the fulfillment of the fraction that would have led to the ascertainment of the vocation for conditional release, that is the full execution of the penalty” (Udroiu, 2017, p. 434).

The last aggravated normative modality is mentioned in the provisions of art. 286 par. and this will be retained if the facilitation of escape is committed by a person that had the duty to guard the person who escaped.

4.2.2. Subjective Aspect

The guilt form with which the active subject acts is *intent* that may be *direct* or *indirect* as well as *guilt*.

Concerning guilt, we mention that this is retained only if the active subject is a person who had the duty to guard the person that escaped.

For the existence of the offense the *mobile* or *the purpose* has no legal relevance.

5. Conclusions

In its essence, the facilitation of escape actually represents complicity to the offense of escape.

In the case of complicity to any offense, the penalty mentioned by the law is situated within the same limits as in the case of authorship.

However, exceptionally, the law maker chose to distinctly sanction this form of complicity, choice justified mainly by the seriousness of the offense.

Also, the distinct incrimination of such an offense may be justified also by judicial practice where it is ascertained that, many times, without the aid of another person, the escape would not succeed.

The comparative analysis of the differentiating elements as well as of the resemblance elements allows the identification and the application of the more favorable criminal law in the current transitory situation.

As a general conclusion, we emphasize the utility of incriminating such a deed, as well as the additions and amendments made in the incrimination text that are in full agreement with the evolution of criminality in the field.

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