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A Preliminary Hearing in Criminal Proceedings

A preliminary hearing is an independent stage of the criminal proceedings, with its own aim, tasks and final documents.

Determination of a date of a preliminary hearing is an obligatory prerequisite for the conduct of a hearing, which falls within the powers of a magistrate judge.

According to amendments made to the Criminal Procedure Code, a judge of a preliminary hearing shall on his/her own initiative verify the issue of leaving the remand detention.

Resolution of essential issues of a preliminary hearing, such as: admissibility of evidence; referring a case for a main hearing falls within the competence of a judge of a preliminary hearing. When making a decision on these issues, a judge of a preliminary hearing will take into account the high probability standard.

The legislation provides for the rule of appealing a judgement on termination of criminal prosecution, as well as on appealing the judgement on evidence recognized as inadmissible in the superior body.

Along with all above-mentioned issues, the article deals with controversial issues, provides analysis of the legislation and court practice and offers the author's opinion and proposals.

Key words: *preliminary hearing, a stage of the proceedings, terms, determination the identity of the accused, detention, the right to remain silent, evidence, assessment, fruit of poisonous tree, high probability, a ruling, termination of criminal prosecution, appeal.*

1. Introduction

The present work deals with controversial issues of a preliminary hearing in criminal proceedings. The relevance of the research is due to recent legislative changes related to matters discussed within the framework of a preliminary hearing and essentially non-homogeneous approach in the practice.

2. Preliminary Hearing in the System of Stages of Criminal Proceedings

A preliminary hearing[1] is an independent stage of criminal proceedings.

The term "stage" is often used in the scientific literature. A stage in the criminal proceedings may be any subsequent action performed after one action (e.g. the stage of application of measures of restraint, the stage of examination of evidence, etc.). In this regard, criminal proceedings are not characterized by division into stages. Division into stages is characteristic of criminal proceedings, where the term "stage" is used with a particular meaning, has definition as a concept, the number of stages and their sequence are officially recognized in criminal proceedings.

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1 See Federal Rules of Criminal Procedure, Rule 5.1, <https://www.law.cornell.edu/rules/frcrmp/title_II>.

The features characteristic of the stage of criminal proceedings are: 1. independent period of time; 2. particular tasks[2]; 3. circle of participants; 4. procedural form; 5. final document/decision. A preliminary hearing contains all above-mentioned signs: 1. A preliminary hearing is the second stage, which will be implemented in the criminal proceedings after the first stage-the investigation. A preliminary hearing is followed by the third stage-main hearing of the criminal case in the court of the first instance. An independent time period is allocated for a preliminary hearing in the criminal proceedings and it is not implemented simultaneously with any other stage; 2. A preliminary hearing has its specific objectives and tasks. The main purpose of a preliminary hearing is to deliver a decision on the admissibility of evidence and refer the criminal case for the main hearing; 3. A preliminary hearing is held by a judge[3] of a preliminary hearing, with the participation of parties; 4. The rule of a preliminary hearing is regulated by the legislation (the Criminal Procedure Code of Georgia (hereinafter referred to as CPCG) Article 219); 5. At the end of a preliminary hearing a final decision is delivered, a decision of the judge on referring the criminal case for the main hearing or termination of the criminal prosecution (so-called record of judgment is a wide-spread practice, when the judge announces the judgement verbally, which is reflected in writing in the records of a court hearing).

The system of stages of the criminal proceedings is characterized by a strict sequence of stages. In addition, the mandatory prerequisite for the implementation of each subsequent stage is the implementation of the previous stage. A preliminary hearing for the criminal case will be held only after the investigation of the case has been completed. The criminal case cannot be heard on merits before a preliminary hearing. A preliminary hearing will be held for all criminal cases, except when the criminal prosecution/investigation on the criminal case is ceased or the plea bargain is approved at the investigation stage.

3. Determining a Date for a Preliminary Hearing

3.1. The Rule of Determining a Date

Article 208 of the CPCG regulates the issue of determining by a magistrate judge of a date for a preliminary hearing on a criminal case. For its part, Article 208 of the CPCG is included in Chapter XX, which is devoted to the initial appearance and measures of restraint. It is obvious, that the issue of determining a date of a preliminary hearing, by its significance, is optional and integrated with the issue of the initial appearance and measures of restraint. This is confirmed by the fact that the CPCG does not provide for initiation/conduct of a hearing with the aim of determining a date for a preliminary hearing. At the same time, determining a date of a preliminary hearing is inevitable, as a prerequisite for the holding of a preliminary hearing.

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2 *Gogshelidze R.(ed.),* General Section of Criminal Law Proceedings. Tbilisi, 2008, 65 (in Georgian).

3 A magistrate judge or a judge of a district (city) court shall hold a preliminary hearing. In Tbilisi City Court, due to intensity of cases, a narrow specialization of judges is established and there is an investigatory and a preliminary hearing board. See resolution №1/85 of the High Council of Justice of February 19, 2016, <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202016/85-2016.pdf>.

As regards the above-mentioned issue, the court practice has not always been homogeneous. At the first stage of enactment of the current CPCG, in practice it was explained that part one of Article 196 of the CPCG inevitably obliged the prosecutor to file a motion with the court on all criminal cases on applying measures of restraint against the accused. After the completion of the review of the mentioned motion, the magistrate judge determined a date of a preliminary hearing.

The practice of demanding application of measures of restraint has gradually changed and Article 198(2) and Article 206(5) of the CPCG define that the prosecutor is not obliged to file a motion with the court on applying measures of restraint on all criminal cases and against all accused. Though, the practice of determining a date of a preliminary hearing remained the same and it was considered, that unless it was the first proceeding before the court, the basis for which was only the motion on applying the measures of restraint against the accused, no other rule for determining a date of a preliminary hearing could be applied. In this sense, in practice there were cases, when the prosecutor filed a motion in all criminal cases on applying measures of restraint against the accused. During the first proceeding before the court he/she filed a motion with the court, not to review the motion on applying measures of restraint and for the judge to consider only determining a date of a preliminary hearing.

Nowadays, it is established in the court practice that if the prosecutor considers that there are no grounds for applying measures of restraint against the accused, he/she will file a motion with the court, request the court to determine a date of a preliminary hearing and the court hearing will be conducted with the aim of review of this issue. This does not violate the law directly, though the aim of the law is not complied with. Today the procedural legislation does not recognize an independent rule for determining a date of a preliminary hearing. The term of filing a motion, the form of its review (without an oral hearing or with the participation of the parties) is not defined. Taking into account the court practice the procedural legislation must be improved/clarified and the procedure for determining a date of a preliminary hearing must be developed for the occasion when in the opinion of the prosecutor there is no basis for applying measures of restraint against the accused. In all other cases it is reasonable to integrate the issue of determining a date of a preliminary hearing with the initial appearance. The initial appearance is conducted with the participation of the parties, where the judge has the opportunity to take into account the positions of the parties when determining a date of a preliminary hearing. Also, by its content, determining a date of a preliminary hearing does not require the establishment and review of any material circumstances and the review of this issue at the end of the first proceeding before the court (without an independent hearing) ensures avoiding additional costs and saving resources of the judge.

3.2. Procedural Term

According to Article 208(3) of the CPCG preliminary hearing shall be held not later than 60 days after a person has been arrested or indicted (if the person has not been detained)[4]. This norm is consistent with Article 205(3) of the CPCG, according to which the term of the remand detention of the accused before a preliminary hearing shall not exceed 60 days after he/she has been arrested. The date of a

[4] As regards terms, for comparison, see, for example, USA practice 18. U.S. Code №3161 – Time Limits and Exclusions, <https://www.law.cornell.edu/uscode/text/18/3161>.

preliminary hearing is determined by the magistrate judge, who takes into account the positions of the parties, the complexity and volume of the case and is guided by the adversarial principle. A preliminary hearing is a post-investigation, court stage, which excludes conduct of an investigation during a preliminary hearing or after it. Accordingly, by the date of a preliminary hearing, the parties should have completed obtaining of evidence and be ready for convincing presentation of their positions before the court. Therefore, the magistrate judge shall allow the parties sufficient time and means to prepare the accusation and the defence[5].

According to Article 169(8) of the CPCG, before a preliminary hearing, a person may be indicted as a defendant due to a single episode of crime for not longer than 9 months. Furthermore, according to Article 8(2) of the CPCG the accused shall have the right to the expediency of justice within the time limits prescribed by this Code. A person may relinquish this right if so required for the appropriate preparation of the defence. Proceeding from the above, by a motion of the party (parties), the term defined for a preliminary hearing may be extended. The law does not define how many times the party (parties) can file a motion for the extending of the term, though in total this term should not exceed 9 months defined by Article 169(8) of the CPCG.

If a party (parties) prepares the position prior to the date of a preliminary hearing determined by the magistrate judge, the law provides for the change (reduction) [6] of the set term of a preliminary hearing by way of filing a motion with the magistrate judge.

3.3. Competence for Determining a Date

According to part one of Article 208 of the CPCG, the magistrate judge shall, after hearing the opinions of the parties, determine a date for a preliminary hearing. For its part, according to Article 196(1) of the Criminal Procedure Code of Georgia, the first proceeding before the court is conducted by the magistrate judge according to the place of investigation. According to Article 208(3) of the CPCG, the decision of the magistrate judge on defining/extending/reducing the date of a preliminary hearing may not be appealed.

Despite the fact, that the main reason of the initial appearance is a motion on measures of restraint against the accused and it is followed by determining a date of a preliminary hearing, both issues shall be

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5 See Article 208(2) of the Criminal Procedure Code of Georgia, <https://matsne.gov.ge/ka/document/view/90034>, [14.03.2017].

6 As to determining a date of a preliminary hearing it is interesting, for example, how this issue is regulated by the federal rules of criminal proceedings of USA: according to subparagraph "c" of rule 5.1. The magistrate judge must hold a preliminary hearing within a reasonable timeframe, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody. Subparagraph "d" of the same rule stipulates extending of this term, which means that the magistrate judge may extend the time limits one or more times with the defendant's consent, taking into account the public interest. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay. See Federal Rules of Criminal Procedure. < https://www.law.cornell.edu/rules/frcrmp/rule_5.1>.

resolved independently of each other. The rule of appealing the judgement on applying, change or termination of measures of restraint provided for by Article 207(1) of the CPCG, does not apply to the decision delivered on the date of a preliminary hearing. [7]

The magistrate judge is always obliged to determine a date of a preliminary hearing, except for the occasion when a plea bargain is entered into between parties (part one of Article 208 of the CPCG). If the decision of a plea bargain approved at the initial appearance, will be terminated according to Article 215 (5) of the CPCG, the case will be returned to the prosecutor and the investigation will continue. In this case, on the agenda there is determining a date of a preliminary hearing, which is again the competence of a magistrate judge according to the place of investigation and cannot be resolved by a higher instance court reviewing a claim on terminating a plea bargain.

4. Issues to be Considered at a Preliminary Hearing

4.1. Definition of the Essence of the Charge

One of the first actions of a judge of a preliminary hearing, is to inform the accused of the essence of the charges and the sentence stipulated for those charges. The legislator shall instruct a judge of a preliminary hearing to do so if, after the initial appearance, the charges have been altered (part one of Article 219 of the CPCG). Parts 2-5 of Article 169 of the CPCG defines the rule of indictment when the prosecutor, or upon his/her instructions, - an investigator, shall familiarise the accused and his/her defence lawyer with the indictment. The accused learns the essence of the charge for the first time at this stage. The prosecutor and the investigator represent the prosecution party in the criminal proceedings and in some cases the legislator imposes the judicial control of their actions. The opportunity of the first check by the court of proper understanding of the essence of the charge by the accused in the criminal proceedings arises on the initial appearance and is provided for by subparagraph "c" of part one of Article 197 of the CPCG. Receiving from the accused of an asserting answer by a judge of the initial appearance, as a "neutral arbitrator" in the adversarial process, that he/she understands the essence of the charge, serves and already fulfils the purpose of protecting the interests of the accused. After the initial appearance the investigation continues and the charge against the accused may be changed/specified. In this case, the need of the inspection of the issue arises again and the preliminary hearing is the first opportunity in case of change of the charge after the initial appearance, for the judge to find out proper definition/perception of the charge by the accused. The prerequisite defined by part one of Article 219 the CPCG and discussed above must be preconditioned by this. There is no doubt that if the charge has not changed and the judge of a preliminary hearing will still explain to the accused the essence of the charge, it cannot be considered violation of the law on his/her behalf, and in the opposite

[7] The court practice is interesting regarding this issue, for example, see decision of April 10, 2014 of the Investigatory Board of Tbilisi Court of Appeals, <http://library.court.ge/judgements/89862014-04-29.pdf> (in Georgian).

case, when the charge changes and the judge of a preliminary hearing will not explain the essence of the charge to the accused, the rights of the accused are violated and it is considered to be failure to define the rights and obligations to the accused. There is an opinion in the scientific literature that as the Law does not provide for any precondition in explaining the charge by the judge reviewing the case on merits, imposition of a precondition on the judge of the preliminary hearing is incorrect and vague.[8] The rule provided for by Article 230 of the CPCG, instructing the judge of the main hearing to explain to the accused the essence of the charge, must proceed from the significance of the main hearing for the criminal case, as the main stage of the criminal procedure. The main task of a hearing on merits is the delivery of a decision on the issues related to the charge and at this stage the legislator along with the essence of the charge will take into account the detailed explanation of all issues related to the charge on behalf of the judge-minimum and maximum of the sentence, mitigating and aggravating circumstances, etc.[9]

4.2. Clarification of the Possibility of Entering into a Plea Bargain

According to Article 219 (2) of the CPCG a judge at a preliminary hearing shall inquire whether the accused pleads guilty to the charges brought, and to what extent, and about the possibility of entering into a plea bargain. According to part one of Article 209 of the CPCG, the mandatory prerequisite of a plea bargain is the confession of guilt by the accused. Accordingly, if the accused does not pleads guilty at a preliminary hearing, the opportunity of a plea bargain will be excluded and it will no longer be reasonable on behalf of the judge to discuss a plea bargain. If the accused pleads guilty at least to a part of charge, the judge shall establish the possibility of a plea bargain. This should not be understood in a narrow sense and only within the framework, that the question related to the plea agreement put by the judge should concern only already achieved agreement, which the parties submit for approval at a preliminary hearing. There is a difference of opinions in this regard. For example, in the comments[10] to the CPCG there is an opinion, that establishing the opportunity for a plea bargain by the judge at a preliminary hearing should not mean the existence of the plea negotiations, it should concern already entered agreement. As an argument for this conclusion the comments indicate to the last sentence of Article 219 (2): "In that case, the provisions related to a plea bargain stipulated by this Code shall apply". In this case the legislator did not mention that only Articles 212-213 apply, which concern the review and resolution of a motion of the prosecutor on a plea agreement. Establishing the opportunity of a plea agreement by a judge of a preliminary hearing

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8 See *Giorgadze G.(Chief ed.)*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 653 (in Georgian).

9 The aim of the initial appearance and a preliminary hearing is not the determination of the guilt of the accused. Despite the fact that the law provides in both above instances the opportunity to approve a plea bargain, which will resolve the issue of the charge, the rule of approval of a plea bargain does not mean resolution of the issue of the charge through the main hearing. *I. Bokhashvili (hereinafter I.B.).*

10 See *Giorgadze G.(Chief ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi 2015, 654 (in Georgian).

facilitates, as a rule, defining the future perspective of the proceedings of the case. As a result of the mentioned procedure, at a preliminary hearing it may be established that the agreement has already been entered into, or it is still under negotiation or one of the parties expressed readiness for the plea negotiations, if the other party agreed. All the mentioned options are acceptable and admissible and don't contradict the law. One more argument spread among the lawyers, as to why a plea agreement should imply only already achieved agreement, is that if in clarification of the issue of a plea agreement, a judge of a preliminary hearing, will mean its future registration, he/she will express his/her attitude towards the case in advance and show to the parties, that he/she excludes the possibility of termination of the criminal prosecution from the beginning (in the court of the first instance-in determination of an acquittal). Once more, clarification of the possibility of a plea bargain facilitates only predicting the direction of the development of the process on this case, setting expectations. In case, if a judge of a preliminary hearing shows obvious actions related to the beginning of a plea agreement with the aim of persuasion of the defence or prosecution, the issue will be resolved easily by applying subparagraph "e" of part one of Article 59 of the CPCG.

4.3. Establishment of the Consent of the Accused to Have the Case Tried by the Jury

Article 219(3) of the CPCG stipulates the obligation of the judge, that if the accused is charged with the commission of a crime subject to a jury trial, the judge shall be obliged to explain to the accused the provisions of the jury trial and the related rights of the accused. Then the judge shall establish whether the accused agrees to have the case tried by the jury. The mentioned procedure requires active actions from the accused, by way of clearly stating the position. Based on the analysis of Article 219(3) and Article 226(2) of the CPCG a conclusion may be made that the accused's motion on waiver of jury trial must exist, otherwise a judge of a preliminary hearing will appoint a date of jury selection. For example, in case if the accused will exercise the right to silence and with relation to jury trial will not raise a demand to have his/her case tried without the participation of the jury, the case will be tried by the jury. Furthermore, the review of the issue at this stage should not be final. The right to waive jury trial may be used by the accused at the next stage of the process, despite the fact that he/she consented (did not refuse) while establishment of the issue at a preliminary hearing by the judge. The practice is accepted that the accused should have the right to waive jury trial at any time, until the jury swears an oath.

4.4. Reviewing the Necessity to Leave the Remand Detention

According to changes made on July 8, 2015, subparagraph "b" of Article 219(4) of the CPCG stipulates that if an accused person has been sentenced to remand detention, the judge shall, on his/her own initiative, review, at the first preliminary hearing, the necessity to leave the remand detention. The requirement of the Law to review the mentioned issue, if the accused is sentenced, should mean cases, when in relation to the accused/wanted the detention is applied in the form of a measure of restraint,

including, with the aim of securing the use of bail. The review of necessity of detention is obligatory for a judge of a preliminary hearing and he/she should review it on own initiative at the first preliminary hearing, notwithstanding the availability/non-availability of a motion of parties on a measure of restraint. According to the rule of continuous review of a motion on measures of restraint, after the opening of the first preliminary hearing its postponement for any reason cannot concern the issue of necessity of leaving the remand detention. An opinion cannot be shared that as the rule and standard of Article 206 of the CPCG are applied at the preliminary hearing while reviewing the issue of measures of restraint by the judge, the 24-hour term of review of a motion stipulated by parts 3 and 8 of this article must apply to a preliminary hearing. Article 206 of the CPCG regulates applying/altering/terminating measures of restraint, as an independent procedure, and the review of the issue of measures of restraint at the preliminary hearing must be considered one of current issues, which, as a rule (maybe for the moment of the first preliminary hearing a party will not file a motion about the measures of restraint and file it later (part one of Article 206 of the CPCG), will be reviewed at the first preliminary hearing taking into account the continuous character. In making a decision on a motion about measures of restraint raised at the preliminary hearing, part 5 of Article 93 of the CPCG should be taken into account, according to which, the motion should be reviewed and resolved immediately. As a result of the review of the issue, the judge shall make a decision within the powers envisaged by part 5 of Article 206 of the CPCG. In case if the judge no longer considers it to be necessary to leave the remand detention, he/she is authorized to apply less strict measures of restraint or refuse to apply them at all. As today in practice the problem (part 6, Article 200 of the CPCG) of detention with the aim of securing the application of bail is actively discussed, it should be noted in the form of definition, that with the aim of ensuring the application of bail against the accused in contrast to obligatory sentencing, as a result of the review of leaving the remand detention in force, the judge is authorized to replace detention by the bail so as not to apply its securing by detention, as by the moment of inspection of the necessity of detention, there may be no threats, which are assumed to exist in case of the arrested accused (accused will flee and so on). Taking into account the same argument, a judge of a preliminary hearing is authorized to terminate the detention of the accused, who was detained due to securing the bail, notwithstanding the condition of complete or partial deposition of the bail. According to subparagraph "b" of part 4 of Article 219 of the CPCG, after the first review of the issue, the court shall, on its own initiative, review, at least once in two months, the necessity to leave the remand detention in force. This obligation is imposed on a judge of a preliminary hearing only in case, if as a result of the first review of the issue the detention remains in force. In case of annulment of the detention, review by the court of the issue on its own initiative, will not result in more strict measures of restraint against the accused, especially the application of detention. If in 2 months the review of leaving the remand detention in force, is still on the agenda of a preliminary hearing (there is no particular term for a preliminary hearing and it can last longer than two months), its performance by the same judge shall not give rise to any imperfectness in the law. Re-inspection by the judge of a preliminary hearing of his/her decision shall not give rise to the threat of partiality on his/her behalf, as this procedure does not fall within the framework of appealing, it means repeated evaluation of

circumstances with a reasonable intervals and making a decision. A decision made as a result of necessity of leaving remand detention in force by a judge of a preliminary hearing cannot be appealed, this issue is reviewed according to Article 206 of the CPCG, but the rule for appealing established by Article 207 of the CPCG does not apply to it.

4.5. Admissibility of Evidence

Subparagraph "a" of part 4 of Article 219 of the CPCG stipulates one of the most important power of a judge of a preliminary hearing- review motions of the parties regarding the admissibility of evidence (*motions in limine*[11]*).* The mentioned procedure is the task and aim of a preliminary hearing. Establishing the issue of admissibility[12] of evidence at a preliminary hearing is a task for the achievement of the main aim-the resolution of the issue of referring the case for a main hearing. At the same time, the aim of resolution of the issue of admissibility of evidence is to avoid referring the case to the judge of the main hearing, which will result in making a decision about the guilt of a person by the trial judge only by assessing the admissible evidence. It is of particular significance, when the case is tried by the jury[13]. It is considered that checking the admissibility of evidence at a preliminary hearing in jury-triable case has preventive nature, in order not to mislead the jury. If the case is non jury-triable and the evidence is assessed by the trial judge, he/she has enough knowledge and skills not to take into account the evidence which has the signs of inadmissibility.

4.5.1. The Theory of Fruit of Poisonous Tree

Article 72 of the CPCG concerns inadmissible evidence, whose first part provides so-called "theory of poisonous tree". Its main essence is the protection of the accused, in order to base the judgement of conviction against him/her on incontrovertible evidence obtained lawfully. According to part one of Article 72 of the CPCG, "evidence obtained as a result of the substantial violation of this Code and any other evidence obtained based on such evidence, if it worsens the legal status of the accused, shall be considered inadmissible and shall have no legal effect". The following occasions are considered to be

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11 See for example, *Manela S.S.,* Motions in Limine: On the Threshold of Evidentiary Strategy, Arent Fox *Washington D.C.,* 2003, 1-10 , <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/ strategic. pdf>; *Montz C.L.,* Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials, 29 Pepp. L. Rev. Iss. 2 (2002), 13-15, <http://digitalcommons.pepperdine.edu/plr/vol29/iss2/1>.

12 Examination of evidence in terms of admissibility is the main approach, which the judge of a preliminary hearing uses, and not vice versa, inadmissibility of evidence. This is stipulated by the right of the parties in the adversarial process to obtain, submit and examine all relevant evidence (part 2 of Article 9 of the CPCG) and the role of the court, to create for the parties equal opportunities for this purpose (part one and pat two of Article 25 of the CPCG). The judge verifies the evidence in terms of its admissibility and if the evidence is not admissible, it is inadmissible. *I.B.*

13 See *Tumanishvili G.*, Review of General Section of Criminal Law Proceedings, Tbilisi, 2014, 241 (in Georgian).

exceptions from the theory of fruit of poisonous tree: 1. The existence of an independent source; 2. The circumstance of unavoidable discovery; 3. Mitigation[14]. The exceptions concern the evidence obtained on the basis of illegal evidence, except for the third occasion, which will be taken into account with both evidences. Despite the fact that the legislation of Georgia takes into account only the main theory of "the fruit of poisonous tree" and does not provide the above-mentioned exceptional cases, in practice, while deciding the admissibility of evidence the theory is taken into account, as well as its exceptions. One of the legal basis for the use of exceptional cases is the content of part one of Article 72 of the CPCG: "as a result of substantial violence…"

According to part one of Article 72 of the CPCG recognition of evidence as inadmissible by the judge requires establishment of several evaluative circumstances. One is that the judge must evaluate whether there is a substantial violation or it is a technical legal defect and the second is that the judge should determine whether the second evidence resulted from this evidence obtained in substantial violation. In determination of the substantial character of the violation the judge shall along with other circumstances evaluate the significance of the violation and take into account how the circumstance influenced the result. Therefore, in each particular case, the judge shall individually define the nature of the violation and establish whether the violation was substantial, except for the case, when according to the CPCG the nature of substantial violation will be assigned to the violation of the procedural requirement. For example, according to part 4 of Article 175 of the CPCG "Unless a person has been explained the rights stipulated by Article 174 of this Code and has been given a record of arrest,… the person deprived of liberty shall be immediately released". Here the legislator assigned the nature of substantial violation to non-fulfilment of the procedural requirement and imposed procedural sanction in the form of annulment of the result. Proceeding from the above considerations, violation of the same content may have the nature of a substantial violation in one case and be evaluated as a technical mistake of non-substantial nature in another case. Taking this into account, cases in the court practice are often paradoxical, if the circumstance to be evaluated will be considered independently from other circumstances of the case.

Several examples may be given: in one case O.P. was examined as a witness. Upon the examination he/she was detained as an accused and taken to verify the provided testimony as a witness on site. According to the protocol of verification of the testimony on site, prior to the investigative action O.P. was informed of his/her rights as a witness. The defence filed a motion on recognition of the protocol of examination of the testimony on site as inadmissible, as O.P. already had the status of an accused by the moment of verification of the testimony on site and his/her rights as an accused should have been explained to him/her. The motion was not satisfied, as this violation was evaluated as a technical mistake and not as a substantial violation. In the second case, there were protocols of examinations of witnesses in the case. The defence filed a motion about recognition as inadmissible of the protocols of examinations of two witnesses, as the time of beginning and completion of examinations indicated in the protocols intersected. Conditi-

[14] More information on the issue see *Chkheidze I.,* Issue of Evidence Admissibility at Criminal Law Proceedings, Tbilisi, 2010, 68-81 (in Georgian).

onally, according to one protocol of examination the examination started at 11:00AM and finished at 12:00PM, and according to the second protocol, the examination started at 11:30 AM and finished at 13:00 PM. In this case the judge evaluated the violation as a substantial violation and recognized the protocols of both examinations as inadmissible evidence.

In practice and literature they often misinterpret, that part one of Article 72 of the CPCG recognizes as admissible evidence obtained by the defence with substantial violation and evidence lawfully obtained on its basis. On behalf of the defence, even in considering the issue of admissibility of evidence obtained in substantial violation is inconsistent with part one of Article 72 of the CPCG, as this norm does not regulate the issue of evidence obtained in favour of the accused. It concerns only the evidence, which worsens the legal condition of the accused, that is, it is contrary to the position of the accused in this particular criminal case. Consequently, part one of Article 72 of the CPCG, concerns only evidence obtained by the prosecution, proving the charge. This norm does not determine the fate of the evidence of the defendant. This does not mean, that evidence obtained by defence in substantial violation is admissible.[15] According to part 3 of Article 72 of the CPCG, the burden of proving admissibility of evidence of the prosecution and of inadmissibility of evidence of the defence shall lie with the prosecutor. Also, according to part 7 of Article 42 of the Constitution of Georgia, "evidence obtained in contravention of law shall have no legal force". This record equally concerns the evidence of the prosecution, as well as of the defence.

4.5.2. Judicial Notice

Article 73 of the CPCG provides for circumstances, which can be accepted as evidence without any examination. Here one of the disputable issues of the judicial notice must be considered. In particular, according to subparagraph "d" of part one of Article 73 of the CPCG, „any other circumstance or fact on which the parties agree" can be introduced into evidence without any examination. This content is defined by scientist and practicing lawyers in different ways. Some lawyers consider that when deciding the issue of admissibility of evidence at a preliminary hearing, the judge is prohibited from examining at his/her own initiative the admissibility of the evidence accepted as undisputable by the parties and recognizing it as inadmissible.[16] Others believe that the judge is not bound by the position of the parties

[15] See for example, Decision of February 27, 2017 of the Investigatory Board of Tbilisi Appeal Court on inadmissibility of evidence of the defence and admissibility of evidence obtained on its basis, <http://library.court.ge/judgements/35582017-03-07.pdf> (in Georgian).

[16] In general, when it is disputed whether a judge of a preliminary hearing has the powers to consider on his/her own initiative the issue of admissibility of evidence if the party did not request it, the circumstance should be taken into account that based on part 4 of Article 83 of the CPCG, when sending the materials of the case to the court the parties attach a request to the court to consider and recognize as admissible the evidence submitted in the case. Accordingly, a motion on admissibility of evidence exists in certain form and it is not correct to define the consideration of admissibility by the court of any particular evidence, as consideration of the issue by the court on its own initiative contrary to the will of the party. *I.B.*

and is authorized to recognize as inadmissible the evidence obtained in substantial violation of the law, even the evidence considered as undisputable by the parties.[17]

A circumstance or a fact recognized as undisputable by the parties will be accepted as evidence without examination and may become the basis for the court decision only in case, if it passes the admissibility stage at a preliminary hearing. Article 73 of the CPCG stipulates the admissibility of a circumstance as evidence without examination at main hearing and not without examining its admissibility at a preliminary hearing. Thus, judicial notice does not protect one or another fact or circumstance from examining the admissibility at a preliminary hearing, on which the parties agree. To ensure procedural economy, by the agreement of the parties, the aim of the norm is to provide an opportunity to the trial judge, to take into account evidence while justifying the judgment, which was not examined at main hearing (exceptional case from part 3 of Article 259 of the CPCG). In wide notion of the adversarial principle, the aim of the norm is not granting rights to the parties to make a decision at their discretion on the issue of admissibility of the evidence obtained illegally. When granting to the parties the right to obtain/submit/examine evidence on equal basis, the adversarial principle itself, takes into account its implementation only according to the rule established by the legislation (part 2 of Article 9 of the CPCG). Rendering a judgement by the judge (delivery of a verdict by the jury) is a process of administration of justice, which occurs based on adversarial principle of parties, but relying on the principles of independence of the court, the rule of law and other principles. Admissibility of evidence and agreement on undisputed evidence shall be determined gradually. The admissibility of evidence submitted by the parties is discussed at a preliminary hearing and then, at the end of the session, at the stage of preparation for the main hearing of the case, the judge of a preliminary hearing, with the participation of the parties shall approve a list of evidence received form parties, which they do not contest (subparagraph "c" of Article 220 of the CPCG). It is logical, that this list may not contain evidence, which the judge of a preliminary hearing recognized as inadmissible (except for the case, if according to part 7 of Article 219, this evidence is recognized as admissible by the judge of investigatory board of the Court of Appeals).

With regard to judicial notice in practice several issues often become disputable. One of them concerns defining subparagraph "d" of part one of Article 73 of the CPCG. The court hearing the case on merits may consider that there is a circumstance or a fact, on which the parties agreed and accept this circumstance or fact without examination only when the evidence relevant to this circumstance or fact is included in the list of evidence approved by the judge of a preliminary hearing, which is not contested by the parties (subparagraph "c" of Article 220 of the CPCG. In all other cases, notwithstanding whether there has been active discussion with regard to this evidence at a preliminary hearing, while hearing the case on merits the party must examine (has the right to examine) according to the rule stipulated by the

[17] See for example, Decision of September 16, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/38692015-09-18.pdf> (in Georgian); Decision of April 22, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/68312016-10-27.pdf> (in Georgian).

CPCG any evidence included in the list of evidence to be submitted (except for the case, when the parties agree on this while hearing the case on merits), otherwise this evidence cannot become the basis for the judgement (part 3 of Article 259 of the CPCG). For example, any document introduced at a preliminary hearing, which is admissible for the main hearing, but at the same time, is not included in the list of undisputable evidence, for the main hearing of the case must be examined according to the requirements of part one of Article 78 of the CPCG and for this purpose the party must take relevant measures in advance (in the list of evidence indicate the relevant person/persons for examination as a witness/witnesses). The approach is incorrect when a case is compared to subparagraph "d" of part one of Article 73 of the CPCG, when the opposing party does not contest the evidence submitted by the party. The case, when there is a circumstance or a fact, on which the parties agreed and this circumstance or fact is accepted as confirmed (without examination), exists only when both parties agree on it. If the party submitting the evidence wishes to examine this evidence while hearing the case on merits, despite the fact that the opposing party does not contest this evidence, the party submitting evidence has the right to freely decide on the issue of examination of this evidence while hearing the case on merits. For example, if at a preliminary hearing a protocol of interview of the witness is submitted and the opposing party does not contest it, the submitting party shall choose whether the protocol of interview should be taken as a judicial notice or while hearing the case on merits based on this protocol, examine the interviewed person as a witness.[18]

4.5.3. Inadmissibility of Testimony (testimonies) in Substantial Discrepancy:

According to part 2 of Article 75 of the CPCG, if there is substantial discrepancy between the information provided by a person during the interview and his/her testimony or between the testimonies of a witness, a party may file a motion with the judge requesting recognition of the testimony (testimonies) as inadmissible". Prior to the review of the problem of inadmissibility of testimony/ testimonies, a brief explanation should be made for several issues. This rule applies only to the information submitted by one and the same person and concerns testimony/testimonies and does not regulate a case, when information submitted by two or more different persons or testimony/testimonies contradict each other, as it is often considered. Also, the belief that direct examination and cross-examination are the testimonies given by one person, is incorrect. The witness is initially examined by the party, who summoned the witness (direct examination), then by the opposing party (cross-examination) and this may be followed by re-direct examination and re-cross-examination. This whole process is one testimony of the witness and its division into testimonies is not correct. We can talk about testimonies, for example, when there is testimony given by one witness during investigation, the

[18] With regard to this issue there used to be inhomogeneous practice, which has recently established into a joint approach and today in most cases, the court shares the experience, that the party has the right to make an independent decision on the examination of evidence, notwithstanding whether the opposing party will contest the evidence to be examined or not. *I.B.*

testimony given by the same witness while hearing the case on merits, testimony given while reviewing the case according to the rule of appeal. We also cannot share the view that part 2 of Article 75 of the CPCG concerns mutually exclusive answers about one and the same circumstance within the framework of one testimony. For example, if during a free narration and answering questions, a witness gives testimony of substantially different content about one and the same circumstance, this is not the basis for demanding by the opposite party to recognize the testimony as inadmissible indicating to part 2 of Article 75 of the CPCG. As to the information and testimony or discrepancy between testimonies and recognition of testimony/testimonies as inadmissible on this basis, here the problematic issue is when the party should file the mentioned motion. According to subparagraph "a" of part 4 of Article 219 of the CPCG, the issue of admissibility of evidence will be resolved at the stage of a preliminary hearing, and while hearing the case on merits, the judge will resolve the issue of admissibility of evidence only within the framework of part 2 of Article 239 of the CPCG, if the party submits additional evidence. In practice, if while hearing the case on merits, after giving testimony by the examined witness, a party requests recognition as inadmissible due to substantial discrepancy between this testimony and information or testimony provided by the witness earlier, the judge of the main hearing based on subparagraph "a" of part 4 of Article 219 of the CPCG, shall refuse to satisfy the motion.[19] At the same time, filing the mentioned motion with the preliminary hearing is out of question, as there is no testimony given by the witness at the main hearing.[20] According to current legislation, the correct action of the party is to apply in such situation the rule of witness impeachment[21] and also draw the attention of the judge to discrepancy in the closing arguments and request the testimony/testimonies not to be taken into account when the judge renders the judgement. There are various opinions concerning this problematic issue. Some lawyers consider it possible, based on Article 93 of the CPCG, to discuss the issue of admissibility of evidence by the judge hearing the case on merits, because they misinterpret the indicated article, as if the party, at any stage has an unlimited right to file motions. Also, in 2013 recommendations were worked out as a result of research[22] conducted by "Article 42 of the Constitution", according to which the authors of the research offered the following amendments: "Part 1 of Article 93 of the CPCG shall be formulated as follows: "at any stage of criminal proceedings, the parties may file a motion". Subpa-

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19 On this topic and, in general, on the admissibility of evidence see *Chomakhashvili K., Tomashvili T., Dzebniauri G., Osepashvili S., Pataridze M.,* Evidences at Criminal Law Proceedings. Tbilisi, 2016, 28-41 (in Georgian).

20 There are cases in the court practice, when at a preliminary hearing the judge applies in advance the reservation stipulated by part 3 of Article 75 of the CPCG. For example, by the decision of Investigatory Board of Tbilisi Court of Appeals on case №1ბ/429, the judge fully shared justification of the judge of a preliminary hearing related to exclusion of the representative of the person affected from the list of witness of the prosecution on the basis of part 3 of Article 75 of the CPCG. See <http://library.court.ge/judgements/97162016-03-23.pdf>.

21 *Mamatsashvili M., Matiashvili M., Loria A., Chelidze T.,* Direct Examination, Cross Examination (Manual for Lawyers), Tbilisi, 2013, 145-150 (in Georgian).

22 The effectiveness of the right of defence in the criminal procedure: the right to file a motion on the recognition of evidence as inadmissible at any stage of the court hearing, "Article 42 of the Constitution", 2013 (in Georgian).

ragraph "a" of part 4 of Article 219 of the CPCG must be formulated as follows: "The judge of a preliminary hearing: a) shall consider the motions of the parties regarding admissibility of evidence. Such motions can be filed by the parties during hearing the case on merits". We cannot agree on it due to the following circumstances: the condition stipulated by part one of Article 93 of the CPCG, stating that at any stage of criminal proceedings, the parties may file a motion only in cases directly defined by this Code, and in the manner prescribed by this Code-is an essential condition and its annulment directly contradicts the established institute of the procedural form (part 3 of Article 12 of the CPCG); as to making amendments[23] to Article 219 of the CPCG, this Article concerns directly the preliminary hearing and it is not expedient to impose regulations of main hearing of the case within its framework. If the legislator wishes to grant to the parties the right to file a motion while hearing the case on merits about recognition of the testimony/testimonies as inadmissible due to discrepancy, its simple resolution is to make amendments to part 2 of Article 75 of the CPCG and specify, that a party is authorized to file a motion with the judge hearing the case on merits.

4.5.4. Appealing a Decision about Recognition of Evidence as Inadmissible[24]:

According to amendments made on February 19, 2015, the decision of the judge of the preliminary hearing on the recognition of evidence as inadmissible may be appealed only once to the investigatory board of the Court of Appeals. This amendment was preceded by long debates as to where and how to regulate the issue of appealing the decision. According to one of the opinions, it was possible to appeal according to the rules of appeal along with the judgement received as a result of hearing on merits. Regulation of this issue by the rule of appeal along with the judgement would have been inefficient in

[23] As of today, Constitutional claim №821 has been submitted to the Constitutional Court of Georgia with the demand to recognize Article 219 as unconstitutional, where the plaintiff uses as the main argument of the claim, the view that at the stage of the main hearing restriction of the rights of the parties to file a motion about the admissibility of evidence-undermines the adversarial principle in the criminal procedure, See Constitutional claim №821, <http://constcourt.ge/ge/court/sarchelebi> (in Georgian).

[24] It should be noted, that the practice of the European Court of Human Rights does not recognize directly review of the issue of inadmissibility of evidence, as its direct competence, though within the framework of the right recognized by Article 6 of European Convention on Human Rights-the right to fair trial, implies review/making a decision on the case on the basis of lawfully obtained evidence. See for example: *Shestakova L.A.*, Legal analysis of practice of European Court of Human Rights in criminal matters related with violation of principle of a fair trial, Journal "Basis of economics, management and law", 2012, № 1(1), 172-179, <http://cyberleninka.ru/article/n/pravovoy-analiz-praktiki-evropeyskogo-suda-po-pravam-cheloveka-po-ugolovnym-delam-svyazannym-s-narusheniem-printsipa-spravedlivogo#ixzz4cbuy4t5j> (in Russian); *Trubnikova T.V.,* Rules of evidence and decision-making in criminal procedure within the mechanism of granting every person the right to legal defense, Journal "Bulletin of the Tomsk State University", 2012, № 354, 143-149, <http://cyberleninka.ru/article/n/ pravila-dokazyvaniya-i-prinyatiya-resheniy-v-ugolovnom-protsesse-v-mehanizme-garantirovaniya-kazhdomu-prava-na-sudebnuyu-zaschitu#ixzz4cbyp3HoW> (in Russian). also, the research conducted in 2003, which concerns the experience of EU member states regarding the issue of the use of unlawfully obtained evidence in the criminal procedure: Opinion on the Status of Illegally Obtained Evidence in Criminal Procedures in the Member States of the European Union, <http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf _opinion3_2003_en.pdf>.

terms of procedural economy and the right to submit/examine the evidence of the parties. According to the results of the preliminary hearing, the parties would examine the evidence at the main hearing, and as a result of appealing according to the rule of appeal, the limit of evidence might change. Also, based on the sum of evidence remaining as a result of the issue of admissibility of evidence, the judge of a preliminary hearing would discuss referring the case for hearing on merits and if a decision was made regarding termination of criminal prosecution, the party lost the right to appeal the decision on the inadmissible evidence or it should have implemented along with the right to appeal the decision on termination of criminal prosecution, which would cause non-homogenous approach of appealing the decision on the recognition of evidence as inadmissible. One possible option of appealing the decision on the inadmissible evidence, could be at the initial stage of main hearing of the case, on the threshold of the trial, a motion of the party about review of the issue of admissibility of evidence recognized as inadmissible. Here we might receive duplication of the issue of admissibility at the main hearing. The party would always try to apply this right regardless of the substantiation of the motion, which would cause unjustified delay of the court hearing. Therefore, resolution of the issue of appealing the decision about inadmissibility of evidence should have taken place prior to main hearing of the case and the best opportunity for it was the appealing of the decision in the investigatory board of the Court of Appeals. Here the law already envisaged this way of appealing the decision on termination of criminal prosecution and these two issues are so closely linked to each other, that the unified rule of appealing is the most efficient means to ensure adversarial principles and interests of justice.

The prosecution, as well as the defence may exercise the right envisaged by part 7 of Article 219 of the CPCG. While reviewing the appeal, it is the competence of the investigatory board, to uphold or terminate the decision of the judge of the preliminary hearing about recognition of evidence as inadmissible. The ruling of the judge of a preliminary hearing may concern recognition as inadmissible of several evidences and while appealing the ruling, a party may request recognition of the inadmissible evidences (part of evidences) as admissible. The judge of the investigatory board, may as a result of review of the appeal, partly terminate the ruling in relation to separate evidence and leave unchanged in the remaining part. In case of terminating the ruling the judge of the investigatory board will accept himself/herself the admissibility of the evidence for examination at the main hearing.[25]

4.6. Final Decision of the Preliminary Hearing

The final decision of the preliminary hearing concerns the main task of the mentioned stage of criminal procedure-making a decision on referring the case for main hearing (subparagraph "e" of part 4 of Article 219 of the CPCG). The judge of the preliminary hearing will apply various standards of proof in order to make a decision on the issues falling within his/her competence. For example, while making a decision on the application, change or annulment of a measure of restraint, the judge will make a

[25] See for example, Decision of October 20, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/98182016-10-24.pdf> (in Georgian).

decision according to the standard of probable cause (part 11 of Article 3 of the CPCG); while approving the plea bargain the judge of a preliminary hearing will use evidence sufficient for delivering a judgement of conviction without hearing a case on the merits (part 11^1 of Article 3 of the CPCG). But the main guiding standard of a judge of a preliminary hearing, based on which he/she will make a final decision, is the standard of High Probability (part 12 of Article 3 of the CPCG). The signs determining the mentioned high probability standard are: the totality of evidence submitted at the preliminary hearing; the convincing character and mutual compatibility of this evidence; sufficiency of evidence. Today many people argue regarding the stage when the evidence is being assessed. Assessment of evidence in its classical sense takes place with the purpose of resolution of the main task of the criminal proceedings-the issue of guilt/innocence of the accused. This falls within the competence of the trial judge and the main and final assessment of evidence is performed by the judge (court) hearing the case on merits when rendering the judgement on the case (court deliberations). In case of jury trial, accordingly, based on the assessment of evidence, the jury will deliver a verdict. As to the preliminary assessment of evidence (where the assessment of evidence is not meant, as a final stage of the assertion), it is done, for example, by parties, with the aim of planning the strategy of their position. Of particular significance is the preliminary assessment of evidence (at the stage of investigation it bears the status of information, potential evidence) by the prosecutor, which enables him/her to determine correctly the initiation, waiver of initiate, termination, renewal, continuation, change of the framework of the charge of the criminal prosecution. As to the judge of the preliminary hearing, while making a decision on admissibility of evidence he/she shall verify[26] the lawfulness of the origin of evidence, including observation of rules provided for by Article 83 of the CPCG (part one of Article 72 of the CPCG), authenticity (part 2 of Article 72 of the CPCG; part one of Article 78) and make a decision on the issue of admissibility of this evidence for its further examination/assessment or suppress it. In other words, the judge of the preliminary hearing shall conduct the analysis of the evidence and decide whether the evidence is valid or not, in order to assess the fitness of evidence. As a rule, the judge will abstain from recognizing the evidence as inadmissible at a preliminary hearing due to irrelevance of evidence, which he/she will explain by the fact that evidence is not examined at this stage of the process, that is, its content-related review is not performed and entrust this issue to the judge of main hearing.[27] In general, the relevance, as the sign determining admissibility, really goes beyond determination of tangibility of the case by means of examination and undoubtedly contains determination of significance of this evidence for the criminal case by taking the circumstances into account, which is the issue of assessment

[26] See *Akubardia I.,* The Art of Defence, Tbilisi, 2011, 158-166 (in Georgian).

[27] There are cases in the court practice, when leaving in force the decision on recognition of evidence as inadmissible the investigatory board of the Court of Appeals discussed the relevance and other features of assessment of evidence, though in this particular case the basis for recognition of evidence as inadmissible is the substantial violation of law. See Decision of November 02, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/49452015-11-06.pdf> (in Georgian).

of evidence and the prerogative of the judge hearing the case on merits *(weight vs. admissibility of the evidence[28]).*[29]

While making a decision on referring the case for the main hearing the judge of the preliminary hearing will consider the admissible evidences in aggregate in terms of compatibility and sufficiency. It should be noted, that legislative regulation of the judge of preliminary hearing leaves an impression of deeper, evaluative process, than is required and is happening in fact. The majority of features envisaged by this standard (aggregate, convincing character, compliance, sufficiency) coincide with the criteria (admissibility, trustworthiness, a sum of agreed and required evidences) of assessment of evidence provided for by part 13 of Article 3 and Article 82 of the CPCG. This has a logic explanation. The standard of a judge of a preliminary hearing, as a component part of the process of proof, is directed towards the person's guilt, conviction (part 12 of Article 3 of the CPCG; part 5 of Article 219 of the CPCG), in the same way as a standard beyond reasonable doubt. The difference between them is that the judge of the preliminary hearing "predicts" with high degree of probability culpability of the person and a judgement of conviction. And the judge of the main hearing decides upon this issue beyond a reasonable doubt. As a result of the discussion it is obvious that the competence of the judge of the preliminary hearing in making a decision for the main hearing of the case, goes beyond examination and contains certain components of assessment, which constitutes preliminary assessment of evidence.

Now several words about compatibility and sufficiency: one of the signs of high degree of probability -compatibility should not be understood as scrupulous comparison of evidence and determination of its admissibility on this basis. When receiving the materials of the case, the judge of the preliminary hearing, of course, will familiarize himself/herself with them (the requirement of part 6 of Article 83 of the CPCG, that not later than five working days before the preliminary hearing, the parties shall submit to the court the complete information), though the content of this evidence is not examined at the hearing with the participation of the parties. For the case there may be different in content, contrary evidence about one and the same circumstance, but it can be admissible for examination. For example, the protocols of examination of witnesses, the experts opinions[30] given in the result of expertises conducted by the parties, etc. The competence of the trial judge while assessing evidence, is determining its compatibility, accepting one evidence and rejecting another (part 3 of Article 82 of the CPCG; part one of Article 273 of the CPCG). Thus, due to incompatibility of evidence at the preliminary hearing, the criminal prosecution should be terminated only in case if this feature is obviously expressed, which excludes the ability of the judge of the preliminary hearing to make sure with high degree of

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28 See US v. Nadeau (2010), <http://federalevidence.com/pdf/2010/03-Mar/US_v._Nadeau.pdf>.

29 For example, USA Federal rules on evidence impose general requirements of relevance while considering the admissibility prior to main hearing of the case, which most of states apply. See Federal Rules of Evidence, Rule 401. Test for Relevant Evidence, <https://www.law.cornell.edu/rules/fre/rule_401>; Massachusetts Guide to Evidence, 2017 Edition, Article IV, Section 401, <http://www. mass.gov/courts/docs/sjc/guide-to-evidence/massguidetoevidence.pdf>.

30 Modern approaches with relation to the expert opinion, see for example, *Beety V.,* Changing the Culture of Disclosure and Forensics, 73 Wash. & Lee L. Rev. Online 580, 2017, 580-594, <http://scholarly commons.law.wlu.edu/wlulr-online/vol73/iss2/3>.

probability[31], that a judgement of conviction shall be delivered for this case. As to the sufficiency, it is related to the subject of proof (framework). First of all, the framework of the process of proof at a preliminary hearing and at a main hearing of the case should be distinguished. When delivering a judgement by the judge who conducts the main hearing of the case, Article 260 of the CPCG shall define the list of issues, related to the guilt of a person (subparagraphs "a"-"c" of part one of the same article) and determine the punishment (accordingly subparagraphs "d"-"f"). The definition of evidence also contains the issues of guilt and punishment, when determining the aims of evidence for the court directly (part 23 of Article 3 of the CPCG). As to the preliminary hearing, at this stage the framework of proof should be understood more narrowly and determine only the circumstances, which are sufficient for making a conclusion about the guilt of a person with high degree of probability (delivery of a judgement of conviction). The judge of a preliminary hearing while making a decision about referring the case for the main hearing shall not consider the issue of qualification and determination of punishment.[32] Accordingly, the sufficient combination of evidence defined by part 12 of Article 3 of the CPCG and the required combination of evidence defined by part 13 of the same Article is of different volume.

4.6.1. The Ruling of a Judge of a Preliminary Hearing about Termination of Criminal Prosecution and the Rule of its Appealing

According to part 6 of Article 219 of the CPCG, "if the evidence provided by the prosecutor does not provide grounds to believe with high probability that the crime has been committed by that person, the judge of the preliminary hearing shall terminate the criminal prosecution by a ruling". It has already been mentioned above, that the guiding standard of the judge of the preliminary hearing is directed at the guilt of the person[33] and accordingly, the focus is made on the integrity of evidence submitted by the prosecuting party, which is preconditioned, generally, by the aims of process of proof, the prosecutor's burden of proof, etc. As it is made clear from the legislative regulation under review, the judge of the preliminary hearing delivers a ruling on the termination of criminal prosecution. The law does not stipulate the form of the ruling-written or oral. One of the norms of the general provisions on court hearing, Article 192 of the CPCG, concerns the rule of delivering a ruling at the hearing, which also does not mention written or oral ruling. Therefore, the ruling of the judge of the preliminary hearing regarding termination of criminal prosecution may be written or oral. In practice the so-called "protocol decision" is often used, when the ruling on the termination of the criminal prosecution is delivered by the judge of the preliminary hearing verbally, which is recorded in the protocol of the court hearing and if requested, an extract from this protocol is prepared-a protocol decision. This practice must be conditioned by the reason that besides procedural economy, which is achieved by recording oral decision directly in the

31 See Federal Rules of Criminal Procedure of USA. Rule 5.1.(f),(g), <https://www.law.cornell. edu/rules/ frcrmp/rule_5.1.>.

32 *Giorgadze G.(Chief ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 657-658 (in Georgian).

33 See Sub-Chapter 4.6.

protocol of the hearing instead of drawing up an independent written document, the judge of the preliminary hearing avoids the obligation of detailed justification of the decision made. While announcing oral ruling and its reflection in the protocol of the court hearing, the decision made by the ruling factually does not contain the consistent, full justification of the circumstances and is often limited to the indication of legal norms, based on which the decision has been made. This practice is not justified: a) the ruling of a judge of a preliminary hearing about the termination of the criminal prosecution is not a document of a particular stage, it is a final document of the whole process and by its significance, it requires to be drawn up in written; b) the rule for appealing the judgement delivered by the judge of the preliminary hearing is stipulated by part 6 of Article 219 of the CPCG and accordingly, the ruling must be substantially justified, which ensures the guarantees of realization of the right to appeal by the person: according to the justification the participant shall make a decision whether to exercise or not his/her right to appeal and in case of appealing, draw up an appeal according to the justification; c) for the court reviewing the appeal, while examining the appealed ruling it is important to know, what it is based on, what the judgement of a judge of a preliminary hearing is justified by[34]. The ruling of a judge of a preliminary hearing about termination of the criminal prosecution must be made in written and justified. Also according to subparagraph "e" of part 4 of Article 219 of the CPCG, a judge of a preliminary hearing by the ruling shall refer the case for the main hearing or refuse to refer the case for the main hearing. In the latter case, the process ends and accordingly, the criminal prosecution is terminated. Therefore, if there is no grounds stipulated by the legislation, that this person has committed the offence, the judge of the preliminary hearing shall by the ruling refuse to refer the case for the main hearing and terminate the criminal prosecution. As a summary, the proposal of part 6 of Article 219 of the CPCG is better to be formulated in the following form: "if the evidence submitted by the prosecution does not provide basis to assume with high degree of probability, that this person has committed an offence, the judge of the preliminary hearing by a written ruling shall refuse to refer the case of this person for the main hearing and terminate the criminal prosecution. The ruling must be justified. …".

The case where there are multiple accused has certain features. In this case the judge of the preliminary hearing shall consistently consider and make a decision on the issue of a particular accused on referring the case for the main hearing in the part of his/her accusation or refusal and on termination of criminal prosecution against the particular accused.[35] It is very important. The judge of the preliminary hearing may consider on multi-accused case that there is basis towards one accused to refer the case for the main hearing and there is no such basis for other accusation. In this case the case will be referred for the main hearing only within the indictment of one accused, and towards other accused a

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34 With regard to the mentioned see, for example, decisions of the investigatory board of Tbilisi Court of Appeals, where judges indicate the significance of justification of the ruling: Decision of February 27, 2017 of the Investigatory Board of Tbilisi Appeal Court (in Georgian), <http://library.court.ge/ judgements/35582017-03-07.pdf >, decision of May 07, 2015 of the Investigatory Board of Tbilisi Appeal Court (in Georgian), <http://library.court.ge/judgements/92312015-05-07.pdf>.

35 *Giorgadze G. (Chief ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 657-658 (in Georgian).

decision on termination of criminal prosecution will be made (separately for all accused). While appealing the mentioned ruling (see the procedure of appeal in the next paragraph) the prosecutor must indicate whose (accused) issue is appealed. Satisfaction of the appeal by the investigatory board of the Court of Appeals and termination of the ruling of the judge of the preliminary hearing will cause referring for the main hearing of the part of the case, which concerns the accused indicated in the appeal. In multi-accused case making various decisions on the accused does not require separation of one criminal case from another.

The ruling of the judge of the preliminary hearing about termination of the criminal prosecution may be appealed once to the investigatory board of the Court of Appeals. In this case the appellant is the prosecutor (part one of Article 107 of the CPCG). It is in the interests of the prosecutor to overcome the stage of the preliminary hearing, achieve substantial hearing of the case and as a result of examination of the evidence convince the court hearing the case on merits in the guilt of the accused (burden of proof). The decision contrary to this interest is the ruling of the judge of the preliminary hearing based on the assumption of high degree of probability about the termination of the criminal prosecution. With regard to the procedures of appeal, the competence of the investigatory board of the Court of Appeals is actively considered. According to part 6 of Article 219 of the CPCG: "If the investigatory board of the Court of Appeals annuls the ruling of the judge of the preliminary hearing, it shall return the case to the chairperson of the district (city) court that delivered the appealed decision. The chairperson shall ensure the holding of a preliminary hearing to solve the issues stipulated by Article 220 of this Code". In this case, the guiding standard of the investigatory board of the Court of Appeals should be high degree of probability stipulated by part 12 of Article 3 of the CPCG. In making a decision on overruling the appealed decision or its upholding, the judge of the investigatory board of the Court of Appeals must rely on the sum of evidence, which was recognized as admissible evidence as a result of a preliminary hearing and the evidence submitted at the preliminary hearing, but recognized as inadmissible by the judge of the preliminary hearing, should not be taken into account. A different case is when the court reviews by joint appeal(s) the issues regarding the recognition of evidence as inadmissible and termination of criminal prosecution. Here the court should judge consistently, first on admissibility of inadmissible evidence, and then on the basis of the sum of evidence recognized as admissible, make a decision on the issue of overruling or upholding the ruling about termination of criminal prosecution. A ruling delivered by the investigatory board of the Court of Appeals with respect to the appeal is final and may not be appealed (part 3 of Article 107 of the CPCG). The decision of the investigatory board of the Court of Appeals about annulment of appealed ruling of the preliminary hearing includes and means, that the case should be referred for the main hearing. Therefore, in case of annulment of the ruling of the district (city) court, when returning the case to the chairman of the court for resolving the issues envisaged by Article 220 of the CPCG, the judge of the renewed preliminary hearing shall resolve only the issue of preparation of the case for the main hearing, but does not envisage referring the case for the main hearing. Accordingly, there is no need, to refer the case for renewed preliminary hearing to another judge (for example, as it is regulated with regard to the prosecutor-part one of Article 108 of the CPCG).

A renewed preliminary hearing may be conducted by the same or other judge. Though to all judges (secretaries of the court session) who were even somehow involved in the case at the stage of the preliminary hearing (preliminary hearing, the review of the appeal of the ruling, renewed preliminary hearing) the rule envisaged by part 2 of Article 59 of the CPCG, which excludes further participation of the mentioned judge (secretary of the court session) in this case, must apply.

5. Conclusion

As a result of the analysis of problematic issues related to the preliminary hearing, it is obvious that legislation requires improvement of certain issues and the court practice should be generalized ensuring its homogeneous character. The opinions and proposals given in the work are intended to facilitate the improvement of the legislation and practice.

Bibliography

1. Constitution of Georgia, 24/08/1995.
2. Human Rights of European Convention, 04/11/1950.
3. Criminal Procedure Code of Georgia, 09/10/2009.
4. Federal Rules of Criminal Procedure, <https://www.law.cornell.edu/rules/frcrmp>.
5. Federal Rules of Evidence, <https://www.law.cornell.edu/rules/fre>.
6. Massachusetts Guide to Evidence, 2017 Edition, <http://www.mass.gov/courts/docs/sjc/guide-to-evidence/massguidetoevidence.pdf>.
7. U.S. Code №3161 – Time Limits and Exclusions, <https://www.law.cornell.edu/uscode/text/18/3161>.
8. The effectiveness of the right of defence in the criminal procedure: the right to file a motion on the recognition of evidence as inadmissible at any stage of the court hearing, "Article 42 of the Constitution", 2013 (in Georgian).
9. *Akubardia I.,* The Art of Defence, Tbilisi, 2011, 158-166 (in Georgian).
10. *Beety V.,* Changing the Culture of Disclosure and Forensics, 73 Wash. & Lee L. Rev. Online 580, 2017, 580-594, <http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss2/3>.
11. *Chkheidze I.,* Issue of Evidence Admissibility at Criminal Law Proceedings, Tbilisi, 2010, 68-81 (in Georgian).
12. *Chomakhashvili K., Tomashvili T., Dzebniauri G., Osepashvili S., Pataridze M.,* Evidences at Criminal Law Proceedings. Tbilisi, 2016, 28-41 (in Georgian).
13. *Giorgadze G. (Chief ed.),* Commentary on the Criminal Procedure Code of Georgia. Tbilisi, 2015, 653, 654, 657-658 (in Georgian).
14. *Gogshelidze R.(ed.)*, General Section of Criminal Law Proceedings, Tbilisi, 2008, 65 (in Georgian).
15. *Mamatsashvili M., Matiashvili M., Loria A., Chelidze T.,* Direct Examination, Cross Examination (Manual for Lawyers), Tbilisi, 2013, 145-150 (in Georgian).
16. *Manela S. S.*, Motions in Limine: On the Threshold of Evidentiary Strategy, Arent Fox Washington, D.C., 2003, 1-10 , <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/strategic.pdf>.

17. *Montz C.L.,* Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials, 29 Pepp. L. Rev. Iss. 2 (2002), 13-15, <http://digitalcommons.pepperdine.edu/plr/vol29/iss2/1>.
18. Opinion on the Status of Illegally Obtained Evidence in Criminal Procedures in the Member States of the European Union, <http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion3_2003_en.pdf>.
19. *Shestakova L.A.*, Legal Analysis of Practice of European Court of Human Rights in Criminal Matters Related with Violation of Principle of a Fair Trial, Journal "Basis of Economics, Management and Law", 2012, No 1(1), 172-179, <http://cyberleninka.ru/article/n/pravovoy-analiz-praktiki-evropeyskogo-suda-po-pravam-cheloveka-po-ugolovnym-delam-svyazannym-s-narusheniem-printsipa-spravedlivogo#ixzz4cbuy4t5j> (in Russian).
20. *Trubnikova T.V.,* Rules of Evidence and Decision-making in Criminal Procedure within the Mechanism of Granting every Person the Right to Legal Defence, Journal "Bulletin of the Tomsk State University", 2012, № 354, 143-149, <http://cyberleninka.ru/article/n/pravila-dokazyvaniya-i-prinyatiya-resheniy-v-ugolovnom-protsesse-v-mehanizme-garantirovaniya-kazhdomu-prava-na-sudebnuyu-zaschitu#ixzz4cbyp3HoW> (in Russian).
21. *Tumanishvili G.*, Review of General Section of Criminal Law Proceedings, Tbilisi, 2014, 241 (in Georgian).
22. Decision of February 27, 2017 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/35582017-03-07.pdf> (in Georgian).
23. Decision of October 20, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/98182016-10-24.pdf> (in Georgian).
24. Constitutional Claim №821 <http://constcourt.ge/ge/court/sarchelebi> (in Georgian).
25. Decision of April 22, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/68312016-10-27.pdf> (in Georgian).
26. Decision of March 18, 2016 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/97162016-03-23.pdf> (in Georgian).
27. Decision of February 19, 2016, №1/85 of High Council of Justice, <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202016/85-2016.pdf> (in Georgian).
28. Decision of November 02, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/49452015-11-06.pdf> (in Georgian).
29. Decision of September 16, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/38692015-09-18.pdf> (in Georgian).
30. Decision of May 07, 2015 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/92312015-05-07.pdf> (in Georgian).
31. Decision of April 10, 2014 of the Investigatory Board of Tbilisi Appeal Court, <http://library.court.ge/judgements/89862014-04-29.pdf> (in Georgian).
32. US v. Nadeau (2010), <http://federalevidence.com/pdf/2010/03-Mar/US_v._Nadeau.pdf>.