

New Exploration of “Full Review” in Trial of Second Instance in People’s Republic of China

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Abstract—China implements the system of the court of second instance being the court of last instance, and the trial of second instance undertakes the important task of correcting errors in the procedure first instance and the application of law, and safeguarding the legitimate rights and interests of the parties. In view of the special features of the function and procedure of the trial of second instance, it is not a review system in a strict sense. Therefore, the principle of "full review" can be understood from two aspects: the court shall focus on the trial of the objection declared by the party, and in order to ensure the correctness of the effective judgment, it shall also conduct a second review of the recognition other than the grounds for appeal, and shall not be subject to the limitation of appeal or protest.

Keywords—*trial of second instance; full review; procedural structure*

I. INTRODUCTION

Article 231 of the Criminal Procedure Law of the People's Republic of China (hereinafter referred as "The Law")¹ only briefly stipulates that the trial procedure of a second-instance case shall be conducted "with reference to" the procedure of first instance, but "with reference to" is not "completely followed". The second instance has its own particularity, so the specific procedure of the first instance is not fully applicable in the second instance. It is necessary to investigate the difference between the procedure of first instance and that of second instance and clarify the unique attribute of the procedure of second instance to put forward a specific application plan for the reform of the second instance procedure, and fill in the system blank. Specifically, the trial of second instance has the following characteristics compared with the first trial:

First, the second criminal trial takes into account the functions of correction, relief and uniform application of law, which is different from that of the first instance. The first instance is to investigate the evidence submitted by the prosecution and defense parties at the opening of the court session and to listen to the opinions of both parties so as to form the first judgment document. It also serves as the first

judicial judgment on the facts of the case and the first application of the law. On the basis of the judgment of the first instance, the second instance shall try the case a second time to correct the errors in the judgment of the first instance. In addition, The Law endows the defendant the right to appeal. As long as the defendant refuses to accept the judgment of the first instance, he can file an appeal and get another chance to stand trial. At the same time, due to the abstract and generality of the legal provisions, it is difficult to ensure that every judge has a unified understanding and application of the same legal provisions. In order to ensure the same sentence, the trial of second instance also takes into account the task of unifying the application of law.

Second, a case is brought because of the disobedience of one or more parties. The initiation of criminal procedure of first instance can only be submitted to the court of first instance by the prosecution initiated by the procuratorate or by the private prosecutor, hoping that the court will give legal recognition to the relevant acts of the defendant. However, in the case of the first instance judgment, the second criminal trial is submitted to the court of the second instance because one or more parties disagree with the judgment of the first instance and have objections to it. It is hoped that the court of the second instance will re-judge the relevant objection issues and make a determination.

Third, for the case, the second-instance judge has more information than the first-instance judge, and has the judgment result of the first instance as a reference. To sum up, criminal cases of first instance are originated from the public prosecution (private prosecution) initiated by the procuratorate or private prosecutor. At this point, the judge contact with related evidence and make a judgment for the first time. They have no judgment documents for reference or examination and can only judge the facts of the case and make a judgment based on the claims made by the public prosecutor (or private prosecutor) and the defense opinions put forward by the defendant and his defenders, and then judge the facts of the case and make a judgment by law. The procedure of the trial of second instance is as follows: after the trial by the lower judicial body, one party is dissatisfied with the judgment result and brings a lawsuit, and the higher court tries the case again. At this point, the presiding judge of the second instance has already taken the original judgment of the first instance as the basis. By reviewing and

¹ Article 231 of The Law: A People's Court of second instance shall try cases of appeal or protest with reference to the procedure of first instance, in addition to applying the provisions in this Chapter.

judging the appeals of the party appealing (or protesting), the judge shall conduct a second trial on the facts or legal findings of the first instance, and make the judgment to be maintained, changed or remand. In addition, the presiding judge of the second instance should also analyze the court records of the first trial, understand the basic information of the case and focus on the objections and reasons raised by the disagreeing party, so as to form the basic framework of the trial process. At the same time, in consideration of various circumstances that may affect the process of the trial, they should make corresponding plans in advance to ensure the continuous and smooth progress of the criminal trial. From the function of the trial of second instance, it bears the heavy responsibility of checking the judgment of the first trial. The presiding judge of the second instance must know in advance the process of the first instance, the reasons of the judgment and the judgment result, and make an independent analysis based on relevant evidentiary materials to judge whether the judgment of the first instance is correct and make an independent determination. Before the second trial, for the conviction and sentencing of the defendant, the undertaking judge has already had relevant judgment documents as a reference for the charges and penalties involved in the defendant. On the one hand, it shall respect the judgment of the first instance, understand and analyze the fact finding of the original judgment, the judgment reasons and the judgment results; On the other hand, it is also necessary to maintain an objective and neutral attitude, determine the key points of the examination, objectively determine the facts of the case in combination with the trial process, follow the principle of evidence judgment, and make an independent judgment.

Fourth, judges are free to weigh the trial. *Article 181 of The Law* stipulates that after a People's Court has examined a case in which public prosecution was initiated, it shall decide to open the court session and try the case, if the bill of prosecution contains clear facts of the crime accused and, in addition, there are a list of evidence and a list of witnesses as well as duplicates or photos of major evidence attached to it. In criminal first-instance procedures, in any case, a full court session should be held to ensure that the evidence is presented in court. The facts of the case are ascertained in court, the opinions of the prosecution are expressed in court, and the judgment results are formed in court. The trial procedure of second instance is less strict than that of the first trial. For cases that are not required to be heard in court, as long as the second instance judge considers the case "the facts are clear", he can directly decide to hear the case in writing. Even if the case is heard in court, for the sake of the efficiency of the proceedings, it can simplify the procedure of some procedural matters or matters that both parties have no objection to, and the second-instance judge has the right to decide the trial mode on his own.

Above all, the procedure of second instance has a unique function in the whole process of criminal proceedings and is more flexible than that of first instance. The specific procedure of the trial should be controlled flexibly according to the authority, and the key issues in dispute should be investigated in detail, while the trial procedure of the

undisputed part could be simplified. Since the judgment of the first instance has already been taken as the basis of the judgment of the second instance, from the perspective of evidence, the "evidence" in the procedure of the second criminal trial can be divided into two categories. The first is the original evidence, that is, the evidence that has been presented in the first instance and cross-examined by the prosecution and defense parties. The second is new evidence, that is, evidence that has not been produced or has not been transferred in the first instance. Before further discussing the investigation of evidence in the second instance, the position of the second instance in the whole process of criminal proceedings in China needs to be clarified, and the litigation mode of the second instance in China needs to be analyzed. Only by thinking about this can people combine the design of specific evidence investigation rules with the special attributes of the second instance.

II. THE LITIGATION MODE OF CRIMINAL TRIAL OF SECOND INSTANCE

All the evidence investigation related to the second instance depends on the weight distribution of the legislator to the first instance and the second instance procedure in fact investigation, which is based on the basic procedure structure of the second criminal trial procedure. Specifically, there are three litigation modes of criminal trial of second instance:

A. Review System

That is, the second first instance. The court of second instance will repeat the case in full accordance with the mode of first instance, and by restoring all the procedures of the criminal procedure, it will once again find out the truth of the matter and make a second legal judgment. Under the mode of review system, the original judgment of first instance has no too much reference value, and the principle of complaint, direct trial and orality must be fully implemented. The judge of second instance makes the corresponding judgment by reviewing all evidence materials. The advantage of this system is that it can fully protect the litigant's right of action, aiming to explore the absolute truth of the case, which is an "ideal state" to pursue absolute justice. However, the requirement of sufficient judicial resources is very high, regardless of cost and judicial efficiency, which does not meet the requirement of the principle of litigation efficiency.

B. Post-review System

The court of the second instance only examines whether the original judgment is legally inappropriate and will not examine the facts on the basis of respect for the power of ascertaining the facts of the original judgment. The second instance judge checks the legality, correctness and rationality of the original trial on the basis of the reasons for appeal or protest.

C. Continue-trial System

Continue to try new facts or evidence on the basis of fully respecting the investigation results of the original instance. In this mode, the second-instance judge takes the

evidential materials and opinions obtained in the first instance as the basis, fully examines the new evidence and the new opinions of the prosecution and the defense during the second instance, infusing a number of "new" factors into the original judgment and revising it.

In strict accordance with the written text of *Article 222 of The Law*², China has inherited the practice of the countries of the civil law system and adheres to the "continue-trial system". Whenever a case is referred to the court of appeal, regardless of the grounds for appeal or protest, the court shall, by way of sitting, conduct a "re-hearing" of the facts, evidence and application of law, and no matter what the preceding order is, the second-instance judge can form an independent opinion according to his own investigation and make an independent judgment. However, after examining the current situation of judicial practice in China and the basic legal principles of litigation, the author believes that China has not implemented the feasibility of strict comprehensive "review", and the "full review" should be reinterpreted.

III. A REINTERPRETATION OF THE "FULL REVIEW" IN CHINA'S CRIMINAL TRIAL OF SECOND INSTANCE

First, the second instance judge has an obvious concept of authoritarianism in his heart. By consulting the case files of first instance before the court session, the trial idea will be formed. The author once witnessed the second instance trial of C court in S province, and found that the second instance judge's decision on the relevant trial matters was subjective. For example, in this case, the defendant submitted new evidence in court, but the collegial panel did not consider this evidence as the key evidence, which did not affect the determination of the basic facts of the case, and could not change or overturn the judgment of the original first instance. Therefore, this evidence was only submitted to the prosecutor's counsel for review. This detail indicates that the formation of new evidence by the second instance collegial panel comes from its own investigation of some facts of the case according to its authority. If they believe that the reasons for the original judgment of first instance are sufficient and logical, they subjectively believe that there is no problem with the case, and there is no need to reinvestigate certain matters fixed in the judgment of first instance. They will still respect appeals and the submission of new evidence, but the fact that the defendant and his counsel "fight hard" will not affect their decision. It can be seen from this that the second instance judges in China tend to adopt the "continue-trial system" for the second instance procedure, focusing more on the new evidence and new opinions put forward by the prosecution and defense parties, and taking it as the focus of the second instance examination. In judicial practice, judges of the second instance will refer to the files of the first instance before the hearing, make clear the opinions of both sides of the prosecution and defense, and determine the key subjects of the second instance.

² *Article 222 of The Law* stipulates that A People's Court of second instance shall conduct a complete review of the facts determined and the application of law in the judgment of first instance and shall not be limited by the scope of appeal or protest.

However, they generally do not restore the procedure of the first instance, focusing on the controversial points and key points.

Second, China's second instance is still subject to the influence of "adjudication based on the investigation files". The Law only requires specific cases to be heard in court.³ If the case does not fall into the circumstances explicitly stipulated in the law, the collegial panel of the second instance shall decide whether to hear the case in court or not. Due to the surge of caseload in the court system in recent years, the workload of judges is relatively large. In addition, the reform of the staffing system of judges has led to a shortage of people to handle cases, which has made matters worse. If the case of the second instance should be held in full session for "review", it will be restricted by the assessment of the case settlement rate, judicial efficiency and other factors. At the same time, the judge of the second instance did not pay enough attention to the hearing of the second instance, believing that the investigation files, the trial files, the closing report and the judgment of the first instance had been completely transferred to the second instance, and hold that the second instance is mainly to study the case volume and the judgment documents and reports of the first. Even if the two sides have new opinions, they can directly submit their statements in written materials. The court session is a meaningless formalized process. At this time, the second instance judge is more inclined to the written trial, that is, "try to avoid the trial". Although demanding a strict trial will inevitably increase the working pressure of the court of second instance, if the trial procedure of second instance can be standardized and the trial principles of "trial with controversial points and key points as the focus" can be established, it will be avoided to completely "start over" the procedure already started in the first instance. Then the trial time of the second instance will not delay too much, nor will it increase the workload of handling cases for the judges. Therefore, the second instance litigation mode of "continuing-trial system", on the one hand, is conducive to the formal way of trial to ensure the standardized trial of cases, to ensure the presence of judges, to ensure the open trial, and to get rid of the influence of "case-volume centralism" on judicial justice; On the other hand, the second instance is mainly to try the opinions and new problems of the case proposed by the prosecution and defense parties, which is also a feasible measure to solve the workload of the judge and the requirements of the procedure standardization of second instance.

Third, the appeal (protest) procedure is designed to give both parties the right and the opportunity to make a declaration of disobedience. The collegial panel of the second instance clarified the dispute between the prosecution and the defense through examining the appeal (protest)

³ *Article 223 of The Law*: A People's Court of second instance shall form a collegial panel and open a court session to hear a case of appeal: (1) An appeal case in which the defendant, the private prosecutor and his legal representative object to the facts and evidence ascertained at first instance, which may affect the conviction and sentencing of a sentence; (2) A case in which the defendant is sentenced to death; (3) Case protested by a People's Procuratorate; (4) Other cases that should be tried in court.

reasons, and took it as the object to be settled in the second instance procedure, which is also the embodiment of the correction and relief function of the second instance. If a party in the prosecution and defense refuses to accept a certain part of the original judgment and appeals, it is impossible for the second instance to only try this part due to the indivisible nature of the trial, and it will inevitably involve the part related to the appeal (protest). The formation of the judicial judgment must have a strict chain of evidence and the logic of the whole case. In hearing the dispute of appeal or protest, it is necessary to connect with other established basic facts. Therefore, when focusing on the focus of the dispute, the second-instance judge will inevitably come into contact with the established facts in the first instance (that is, the part of the prosecution and defense that has not been appealed). The specific scope of review is not limited to a point of appeal or protest, but will inevitably form complete judgment logic through the combination of disputed points and undisputed points. Trial means "trial and judgment", through court investigation, court debate and other trial procedures, the judge can find out the facts of the case and correctly apply the law, and make the corresponding judgment. Therefore, the "full review" stipulated in The Law should not be understood as a comprehensive "repeated trial". Of course, if the defendant proposes in the second instance that "no criminal act was committed", which is a reversal of the facts found in the whole case of the first instance, a new court investigation should be conducted. At this point, the second instance should conduct a comprehensive "repeated trial". But in this case, "repeated trial" is caused by the appellant's appeal request. The appeal request and the appeal reason put forward the stricter request to the second instance's hearing scope, instead of simply carrying out a "full and repeated trial" according to the provisions of The Law on the second instance. A clearer example: if the accused pleads guilty but appeals against the sentence, there is no need for the second instance court to repeat the part of the conviction. In the second instance only the sentence of the first instance shall be tried again at the request of the appellant. Therefore, as for the parts that can be separated in the judgment, such as conviction and sentencing, a person commits several felonies, and the relationship between the appeal part and the no appeal part is not closely linked, the author believe that it is not necessary to retry all the issues, only the focus.

Fourth, from the requirements of trial level system, if the second instance must insist on "review", the fact investigation function of the first instance is easy to be ignored. The Fourth Plenary Session of the 18th Central Committee put forward the main objectives of the trial level system: the first instance focuses on solving the problem of fact finding and law application, while the second instance focuses on solving the dispute of fact finding and law application of the first trial. The first and second instances bear different tasks in the whole process of criminal procedure. The criminal trial of second instance focuses on solving the disputes in the investigation of evidence and the application of law, that is, "if the judgment is determined in the first instance, the two parties shall check and amend the judgment in the first instance according to the reasons of the

prosecution and defense." From the perspective of evidence investigation, the evidence provided in the first instance is reliable, clean and comprehensive compared with the subsequent trial procedure, and has the conditions to ensure accurate identification of the facts of the case. Effective trial of the second instance should be based on the substantive court trial of the first instance. The second instance shall ensure and strengthen the important function of fact-finding in the first trial procedure, respect the part of the judgment identified in the first trial that is not disputed by the prosecution and the defense parties, fully try the disputed points, correct or change the disputed issues in the first trial, and form an effective judgment.

IV. CONCLUSION

To sum up, although The Law stipulates the principle of full review, it is found that China's actual judicial practice of second instance is flexible based on relevant laws and judicial interpretations.⁴ That is, the second instance shall focus on the matters of objection raised by the party appealing (protesting). At the same time, in order to ensure the correctness of the effective judgment, the court of second instance shall also conduct a second review of the facts found in the first instance and the application of law other than the reasons for appeal, and shall not be restricted by appeals or protests. The "full review" of China's criminal trial of second instance should be understood as follows: If the party to the appeal (protest) claims to be dissatisfied, the case shall be tried, but due to the indivisibility of the trial, the matters related to the appeal (protest) shall also be examined. The subject of the "full review" shall be the appeal request and the matters to which it relates.

Therefore, it can be learned that the second instance mainly focuses on the controversial points of the prosecution and defense, as well as the new evidence and new opinions to carry out continue trial and targeted trial. At the same time, in order to ensure the correctness of the judgment and give play to the functions of preventing, correcting, protecting and relieving the rights of the parties in the second instance, the court of the second instance should conduct post-review of the judgment of the first instance. Such a "hybrid system" mode combining continuing-trial system and post-review system can effectively give consideration to justice and efficiency, and achieve effective relief for the rights and interests of the defendant. In the judicial practice of the second criminal trial, the second instance judge shoulders the

⁴ Interpretation of the supreme people's court on the implementation of The Law (iv) makes specific provisions for the appeal, protest cases should be examined the following main content: (1) Whether the facts found in the judgment of first instance are clear, whether the evidence is true and sufficient, and whether there are contradictions between the evidence; (2) Whether the judgment of first instance applies the law correctly and whether the punishment is appropriate; (3) In the procedure of investigation, prosecution and first instance, there is no violation of the procedure prescribed by law; (4) Whether the appeal or protest presents new facts and evidence; (5) The confessions and arguments of the defendant; (6) Counsel's advice and adoption; (7) Whether the judgment or written order with the civil part is appropriate or not; (8) Opinions discussed by the collegial panel and judicial committee of the court of first instance.

"dual task": On the one hand, through the examination of new evidence and new opinions put forward by the judgment and prosecution, they carry out a key trial on the disputed matters and new situations, and makes a final judgment, thus realizing the continuing-trial function of the second instance; On the other hand, on the premise that the evidence of the first trial has the priority of proving value, the legitimacy of the first instance procedure and the correctness of the judgment should be checked to realize the supervision and relief function of the second instance.

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