SOME REFLECTIONS ON THE COMPLIANCE WITH THE BASIC RULE OF FINDING THE TRUTH IN CRIMINAL TRIAL IN CASE OF SEVERAL RESEARCH HYPOTHESES WHEN THE BODY WAS NOT FOUND

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Abstract

The article addresses the issue of compliance with the basic rule of finding the truth in a criminal trial in case of murder, when components of criminal prosecution didn't, in spite of all efforts, find the body, the most important material sample. The author advocates for a solution of conciliation between retelling with regard to the importance of sample materials or their denial by decreasing their importance, in principle, in a possible criminal proceeding, finding out the truth can be carried out in accordance with the conditions of existence of other means of evidence sufficient to find out the truth.

Keywords: *find out the truth, criminal trial, murder, material evidence, undiscovered body.*

1. Preliminary explanation

Criminal justice can't be designed without full knowledge of the truth relating to the case that is the subject of the criminal trial, which is to say the truth on the existence or lack of the offense charged, like the person's guilt or innocence, as well as on all circumstances which serve to put in to the light the truth[1]. The truth isn't revealed spontaneously, even at the time when a charitable deed is performed, but always must be discovered and proved, in all its aspects, only in this way can be considered that the truth has been found. The insurance of finding the truth involves necessarily to urgently take care of the judiciary part namely the discovery and management of samples, which must be carried out under such conditions that lead to find out actual and useful data for discovering the truth. Judicial authorities must know accurately and completely the criminal deed and the circumstances that identify the suspect, having the duty to take all what it's possible to find out the truth, in every possible criminal prosecution. Carrying out this requirements depends on the efforts made, on the professionalism of those who carry out investigations and in what processes are used.

2. Correlations between finding the truth and compliance with other basic rules of trial in case of missing persons

Basic rule of finding truth is having efficiency because of those correlations is based with other basic rules, such as federal official and active role.

Components of criminal prosecution, with a certain frequency, are sensed about the disappearance of persons, without that this will mean that, in all cases, murder is the cause of

[1] See V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *Explicații teoretice ale Codului de procedură penală român. Partea generală*, vol. I, Academiei Publishing House, Bucharest, 1975, p. 44.

disappearance. To reach the conclusion that murder is the cause of disappearance, components of criminal prosecution must carry out verification activities to clarify, in the first place, the circumstances of disappearance. As an example, components of criminal prosecution should determine who's the missing person, psycho-behavioral features of it's order, the environment from which it's derived, the last residence and home or previous homes, occupation, place of employment, how has fulfilled the obligations and professional - including the matters on which they have been on the line of service, the behavior in the family and society, vices, the circles of friends or acquaintances of questionable morality. These problems can be explained by listening to obedience, relatives knowledge, coworkers knowledge, with special emphasis placed on highlighting conflicts of family order, the nature and cause, their frequency, as well as their degeneration molestation, expulsion from home. Other times, the testimony of these witnesses may result conflicts and other persons with whom he had, the way of life, morality - extramarital affair, frequenting seedy places, leaving home and maintenance of cohabiting relationships, if has disappeared and on other occasions, after a while returned, whether expressed willingness to undertake any journey - where, with whom, for what purpose and for how long. Of investigations on the last place of employment should be pursued, in addition to the above, and other aspects: if the contract of employment has been opened and for what reason, if it had management and it's status, the amount shortcomings in management, disputes envisaged and the reasons for them. Also, it should also be established psychological and physical condition of the person before disappearing, when he was seen last time, if he said to a friend of his intention to leave his residence and the place or the intention to commit suicide. Last, but not least the checks should focus on the one who noticed the disappearance and defining actions and behaviour - both before and after the announcement of disappearance - to highlight any contradictions between his statements and the rest of the evidence given in cause.

Secondly, components of criminal prosecution should clarify whether disappearance is due to several hypotheses or to other causes. For example, settling path of the missing person, after statements by those who have seen her last time, based on individual characteristics of vitals and clothing attire, it will be identified and listen to other witnesses who confirm the presence on it's itinerary, indicated actions, accompanying persons or their vitals, physical and mental condition of the person concerned, other circumstances that may contribute to elucidating the timing and causes of disappearance.

In conjunction with the carrying out of investigations and hearing witnesses should proceed to thorough research of the places where it might be lost person's corps - cellars, lakes, woods, shrubs, holes - especially when there are indications that this could have been the victim of rape or robber. The more it requires thorough research of the land surrounding the road passing through a forest road or through the wilderness.

Same attention must be paid to research the residence of lost person, with special emphasis placed on identifying objects, values and documents proving identity and on which it should have, in the normal course to take, if departure from home they had done under conditions of stress or would willingly have left the building. On this occasion it is necessary to carry out the discovery, meet, mounting and lifting some signs that denotes committing the murder (traces of blood, recent changes the floor, interior walls, fresh painting operation), the absence of basic necessities (carpets and rugs mats, curtains etc.), transformations made to land topography surrounding (plugging holes, the movement of building materials from one place to another, fencing of areas)[2].

3. Finding out the truth by means of evidence with reference to several research hypotheses when the body was not found

Basic rule relating to find out the truth, laid down in article 3 Criminal Procedure Code, enshrines the fundamental principle according to which truth is utterly may achieve by any means

[2] See V. Berchesan, I. N. Dumitrașcu, *Cercetarea omorului,* section III and section IV point 1 in „ Tratat de metodică criminalistică" by C. Aionițoaie, V. Berchesan ș. a., Carpați Publishing House, Craiova, 1994, pp. 74-76.

of proof - legally through which samples should be administered in criminal process[3]; this shall carry with the obligation to judiciary to search and investigate all evidence regarding the deed which is the subject criminal process, the facts and circumstances of the individual offender.

Observance of basic procedural establish the truth in the activity must be based on the evidence in the files of every criminal trial material that serves to verify the validity of the solution given in that criminal case[4].

The judiciary shall be bound, in the probation conducted to find out the truth on the subject of probation, which usually involves a logic operation restoration and appreciation of past deeds. The judiciary take note of past deeds but not directly, but indirectly as a result of a process that consists in comparing the combination of isolated facts procured by the evidence used in making evidential and a conclusion from these facts. From the elements of fact known it's arrives at a beneficent fact unknown. Prospective dynamism process by which is reached from elements of fact known to the facts unknown shall be based, in the first place, on an analysis and summary of samples, namely dissecting each sample, and then drawing a conclusion may be drawn from the assembly of samples; secondly, on the way inductive (start up of a private company with a view to reaching general) and on the deductive (starting from general to arrive from the particular), between analysis (decomposition it's entire in parts) and summary (taking into account and explain whole using its parts) there is a line. In the same way, induction and deduction are great way to research, but are not exclusive, they are not used isolated from each other, but also prospective dynamism., both tending to find out truth, so that complement each other. In other words, judiciary must consider any interrelationship and the connections between the various facts and circumstances of the subject matter of samples results[5].

The means of proof

The means of proof, as provided in the Code of criminal procedure, contains the material of the sample, together with the declarations of the accused person or the defendant, declarations of the party injured, civil party and the civil responsible party, witnesses' declarations, documents, audio or video recordings, photographs, technical and scientific findings, the medico-legal findings and expert reports[6]. The evidence referred to in Article 64 (1) of the Criminal Procedure Code are regulated separately, except photos[7], in Title III - the samples and evidence of general part of the Code of criminal procedure in use[8].

Material evidences

Material evidence are those objects or things of any kind which contain or bears a trace of the offense committed or which, because of the link with this fact, with people who have done it, or circumstances in which the offense was performed, can provide necessary evidence to resolve the criminal case[9].

In the category of material evidences itself enters articles which contain traces of any kind of offense was committed (for instance the body, the bullet, poison, objects destroyed), as well and objects bearing traces on offense or the offender (e.g. traces of hands, fingers, feet, the teeth, traces left by the instruments used for committing an offense, debris or patches of various substances such as blood stains, various lost or forgotten objects from the scene of one of the perpetrators[10].

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[3] See N. Volonciu, A. Barbu, *Codul de procedură penală comentat. Art. 62-135. Probele,* Hamangiu Publishing House, Bucharest, 2007, p. 11.

[4] See V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *op. cit.*, pp. 45-46.

[5] *Ibidem*, pp. 178-179.

[6] See art. 64 align. (1) Criminal Procedure Code in use.

[7] The price to be falsified by editing mixing, retouching (to avoid running dedicated software for this), and photographs can be submitted technical expertise, aiming to confirm or refute the reality of the image (see Gr. Theodoru, *Tratat de Drept procesual penal,* 2nd edition, Hamangiu Publishing House, Bucharest, 2008, p. 402).

[8] See N. Volonciu, A. Barbu, *op. cit.*, p. 11.

[9] See art. 94 Criminal Procedure Code.

[10] See V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *op. cit.*, p. 230.

Traces left of the offense and the offender can be a valuable, sometimes unique to the knowledge of truth and fair settlement of the criminal case.

Objects that contains or bears traces of the offense or that may serve to reveal the truth, in terms of their relationship to the subject of probation may be concrete evidence of the circumstances of the offense or the people who committed it, serving generally to establish the guilt or innocence of the person or the circumstances in which the offense was committed.

Material evidence occupies a preeminent place among the means of the sample due the possibilities of learning and tightness of their own, as well as specific inputs to find out the truth because criminal proceedings, especially where other means of sample are missing or insufficient. This means carefully studied and researched by modern scientific and technical processes, reveal the informative elements of extreme importance, for which exhibits have been called "dumb witness"[11].

Finding out the truth in the case of the research of several hypotheses, when the most important means of evidence (the body) is not found

The question is whether one can speak the truth as long, if a criminal investigation of murder, the prosecution failed, despite all efforts to discover the body, the most important means of sample material.

For instance in Henri Désiré Landru Brief[12] which has shattered France during the interwar period, the position of the main suspect abetted an number of eleven offences of murder, without discovering a body in either cases[13], has remained, until the end process the same: the sample returns prosecution and prosecution is not based only on assumptions, a missing person is not necessarily a murdered person. "Where are bodies?" has been the question - deeds on which several times, the respondent has made a claim. In his brilliant advocacy, Vincent of Moro-Giafferi, one of the most famous lawyers of its era, world - renowned in criminal matters, has shown that the prosecution could not prove with direct evidence none of the eleven murders attributed, charges likely remain permanently in the infinite area, without it can enter into that of certainty, and, therefore, suspect could not have been convicted on a simple calculation of likelihood; furthermore, there is no dead bodies shall carry with them an obligation to a thorough check of the facts; because the missing bodies were depicted a series of assumptions based on material evidence and expert opinion, the great danger that threatens the judges being dogmatic folly, as he called Montaigne, spring (unfortunately too abundant) of the worst miscarriages of justice[14].

The value and importance of direct and indirect evidence[15]

Value of different samples isn't stated *a priori* in Romanian Criminal Procedure Code, but is determined judiciary, the result of specific assessment by the judicial bodies of the evidence in criminal proceedings[16].

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[11] *Ibidem*, p. 235.

[12] See J. Belin, *L'affaire Landru,* in „Revue internaționale de criminologie et de police tehnique" no. 2 and 3/1953 (J. Belin was the police officer who arrested Landru).

[13] Police was virtually impossible, having no body to know what happened to the missing victims.

[14] See, Y. Eminescu, *Procese celebre*, Lumina Lex Publishing House, Bucharest, 1995, pp. 90-91.

[15] After their relationship with the object of probation, the samples are divided into direct evidence and circumstantial evidence. Direct evidence means evidence directly proving the guilt or innocence of the defendant (e.g. content recognition of the defendant, taking the moment a crime eyewitness appearances, establishing that the offense was committed when the accused or defendant was in another place). The circumstantial evidence means evidence not directly prove the existence or non-existence of the crime or the guilt or innocence of the defendant, but by their corroborating the conclusion that the act was committed or that the accused or defendant is guilty or vice versa (e.g. presence of the accused or defendant at the crime scene may be indirect evidence of his guilt, threats against the victim of the offense charged or indicted or finding the place in fraction of an object belonging to the defendant or the defendant may constitute circumstantial evidence). In other words, circumstantial evidence are facts related to other facts with which the sample can be committing a criminal offense or evidence of guilt of the accused or defendant.

[16] See art. 63 Criminal Procedure Code.

For establishing the existence or lack of offense or guilt or innocence, a single sample may be sufficient, with the exception of accused statements or defendant, injured parts, civil party and civil responsible party[17]. One indirect sample can never be enough, but we need more evidence indirect, from whose conjunction can be established existence or non-offense, or guilt or innocence.

Examination of dialectic is indirect evidence in connection with direct, not some more valuable than others. Direct and indirect evidence must be viewed as a reflection of truth resulting from facing their harmonization. Check samples taken individually, are evaluated as a whole, of their logical chain is necessary to result one conclusion, any other possibility being excluded.

Direct evidence are, certainly, which is particularly important for the resolution of the causes thorough criminal prosecution, judicial reality, however, has shown that most of the time samples are only indirect evidence in the case where derive their current importance[18].

The object of probation

Significant practical problem is probably system *factum probandum* in relation to the use of means of probation must serve to establish: the existence of all elements that constitute the offenses; all the circumstances that reveal the guilt or innocence of the accused or defendant; circumstances that aggravate or mitigate the guilt accused or defendant; the consequences of the crime; their knowledge is sometimes necessary to qualify the crime, data on parts, especially of interest for knowing the person accused - mobility his act, his attitude after the act, its degree of culture, family, reputation, factors which led, facilitated or encouraged the commission of the offense, which is likely to contribute to the administration of justice through educational role that directs the action of taking measures to combat crime[19].

The burden of proof

The burden of proof for an offense of murder and guilt constitutes an obligation for judiciary[20], the defendant was not bound to prove his innocence[21], but without eliminating the burden of presenting evidence that would hold evidence.

In this context, components of criminal prosecution shall be under an obligation to collect samples necessary to find out the truth and to clarify to cause under all aspects, for fair settlement of its purpose[22] can perform searches, on-site investigations can pick up objects, carry out reconstruction can call and hear witnesses can order a technical-scientific expertise[23], examine the material evidence. All for the purpose of identifying missing persons checks must be made to hospitals, mortuary, as well as in the records of police on unknown bodies with the ID and the persons with the id unknown. In addition, checks are to be made in the records Internal Affairs Ministry or the Ministry of Justice to determine if the missing person is researched in remand or serving a sentence of imprisonment or left the country.

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[17] Under the provisions of art. 69 and 75 Criminal Procedure Code, statements can not prove themselves, but only in conjunction with other evidence in the file.

[18] See V. Dongoroz, S. Kahane, G. Antony, C. Bulai, N. Iliescu, R. Stănoiu, *op. cit.*, p 172.

[19] *Ibidem*, p. 173.

[20] Rule *probatio incumbit actors* must be understood in the criminal in that the obligation to prove the offense and the guilt lies with the exercise procedure subject to prosecution.

[21] See art. 66 Criminal Procedure Code.

[22] *Ibidem*, art. 202.

[23] They are in fact evidence that processes operating within required as evidence, but as technical-scientific report and forensic expertise as report-documentary chronicling the existence of evidence, they acquire the character of evidence that any scored, so it is customary to enumerate through processes themselves evidence that led to the reports, substitutions of this type are used in legal terminology.

After identifying the victim or when there is evidence and probable cause that a crime was committed murder, even if the body was discovered, the research is carried out according to the rules established in the literature[24].

4. Conclusions

Significance of sample materials has increased with progress made in physics, chemistry, medicine, biology, which have been made to increase the possibilities of efficient use of materials of the sample in the work of the discovery and tracking of criminal offenses, the use the material evidence extending thanks to advances made in the art of discovery, securing and lifting them. In the evolution of evidence in the criminal system, the idea of a scientific phase led to an exacerbation of the importance of material evidence. We consider that it would be more appropriate conciliation between solution retelling of the significance of test samples materials and the denial or reduction of importance. In principle, in a possible criminal proceedings, find out truth can also be done using other means of sample.

Discovering and researching material evidence is not required, even if it's certain that there are no objects still unearthed containing, or bears traces of offense committed or which may serve to find out truth (within the meaning of Article 94 Criminal Procedure Code), such as a body, because the conduct and settlement trial may not be stopped by the lack of sample materials[25], in accordance with the conditions of the existence of other sufficient means evidence to find out the truth[26].

The truth has an objective character, given the concordance between facts dating back to reality and the facts as retained by final judgment. Knowing the facts and circumstances of the case is obtained by the evidence during trial, if all evidence were needed, and they are of good quality, that truth get in the criminal - judicial truth - corresponds to objective truth, but if not been given all the necessary evidence or evidence is false, the truth underlying judicial judgment doesn't correspond to objective truth. This lack of overlap of judicial truth with objective truth produced and could produce miscarriages of justice[27].

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[24] See V. Berchesan, I. N. Dumitrascu, *op. cit.,* section III and section IV, point 1.

[25] In the language of jurisprudence, the term means less sample material used commonly called material evidence being used both on material evidence and the evidence obtained by these means.

[26] See V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu, *op. cit.*, p. 236.

[27] See Gr. Theodoru, *op. cit.*, pp. 83-84.