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The Unconventional Approach to Evidence in Criminal Trials

Mihaela Agheniței[1]

Abstract: There is an indissoluble connection between the evidence and the means of proof, since the evidence can only be used if it is obtained through the means of proof provided by the law, a connection that can cause one to be confused with the other. The legal means of evidence by which the evidence in the criminal process is obtained presuppose certain concrete practical ways that the judicial bodies must resort to for their legal administration. These methods are called evidentiary procedures. The possibility given by the legislator to the judicial bodies in the sense of the administration of evidence in the criminal process by means of evidence other than those provided by way of example demonstrates a flexible, modern legal thinking, adapted to social realities, in the service of finding the truth in the criminal process, distinguished from the one addressed in the old Criminal Procedure Code. The freedom of evidence conditioned by the legality of obtaining it, in the context of continuous and implicit technological changes in the means of committing crimes, represents an evolution from a legal point of view, a useful and flexible tool available to judicial bodies to find out the truth.

Keywords: criminal process; freedom; evidence; expertise; judicial bodies

[1] Lecturer, PhD, "Dunarea de Jos "University of Galati, Romania, Address: Domneasca Street 47, Galati, Romania;Legal Research Institute –Romanian Academy, ESIL member, ELI member, Romania, Address: Building B, Calea 13 Septembrie 13, Bucharest 040731, Romania, ORCID ID: 0000-0001-9594-4343, Corresponding author: mihaela.aghenitei@ugal.ro.

Introduction

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Body of Paper

The principle of freedom of evidence, established by judicial doctrine and practice, covers the following aspects:

a) Any element of fact can constitute evidence.

b) The evidence does not have a value established in advance by law, but the judicial bodies assess their value (Neagu, 1992; Mateu, 2019, p. 492; Udroiu, 2019, p. 411). It has rightly been shown that the value of the evidence is „a value associated with the evidence that reflects the contribution of the respective evidence to the clarification of the case and which is expressed through attributes that designate either its probative force, some evidence being more or less relevant, or its contributing potential to finding out the truth, some having the potential to contribute to the clarification of the case in its entirety, and others only to the clarification of an aspect of it" (Dragomirescu, 2003), the judicial bodies having the right to freely appreciate, „both the value of each legally administered evidence (in relation to with others) regardless of the procedural phase in which they were administered, as well

as their credibility (...) following the analysis of all the evidentiary material legally and loyally administered in the case" (Udroiu, 2019, p. 355; Mateu, 2019, p. 47).

c) Evidence can be obtained by any means of evidence (Volonciu & Uzlău, 2017, p. 80). It has rightly been shown that the principle of freedom of evidence „means, in essence, that the existence of a crime can be established by means of evidence permitted by law, without some being excluded or, on the contrary, privileged and without distinguishing as the evidence results from the interrogations of magistrates and members of the judicial police or advanced by the parties" (Udroiu, 2017, p. 134).

Regarding the expert report, mentioned by art. 97 para. 1 lit. e) Criminal Procedure Code, it was also rightly pointed out that „the probative value of expertise is not predetermined by the Criminal Procedure Code either. Like all evidence in Romanian law, this evidence will be analyzed in context, by corroboration with the other evidence in the case file (Roșu, 2018)," criminal investigation bodies or courts not being obliged to appropriate the results, the conclusions of the expert report, but , if the conclusion is unclear, equivocal, contradictory, the report is incomplete or the ways of carrying out the expertise have deficiencies revealed by the parties, they can be completely removed from the analysis of the evidence, establishing the factual situation on the other existing evidence in the case file or the organs judicial „order a new expertise, proceed to the hearing of the expert and order the performance of an expert supplement (Lazar, 2009).

Therefore, from the legal texts and the doctrine it follows that the expert report is one of the means of proof, along with the others, not having a privileged position. As for the evidence obtained through the means of evidence of the expert report, they also do not have a privileged position in the evidentiary ensemble (Mateuț, 2004).

In this sense, regarding the evidence obtained through the judicial expert report, it was appreciated that this is a simple element of conviction of the magistrate, the court not being bound by the conclusions of the judicial expert report (Micu, Slăvoiu & Zarafiu, 2022). In the same sense, regarding the evidence obtained through the judicial expert report, it was assessed that they do not have a special probative force compared to those obtained through other means of evidence (Balaci, 2022, pp. 60-65).

There are situations in which the evidence obtained through the forensic expert report has a superior value, even decisive, based on the non-contestation by the parties of the expert report and the declarations of recognition of the facts (Manea,

Iugan, Bălan, Magdalena & Anghel, 2022, pp. 346-357). In the same sense, it was appreciated that the superior probative value is based on the scientific nature of the judicial expert report, which can only be contested by evidence of the same nature, not by documents or statements of the parties or witnesses (Chis, 2022, pp. 46-49). We note the fact that judges balance the elements of scientific evidence, for example appreciating that the forensic (technical) expert report hasa higher probative value than the statements of a witness who has specialized (technical) knowledge (Lupașcu, 2022, pp. 46-49).

There are also situations in which the evidence obtained through the forensic expert report is not considered, because it has a very low probative value (Udroiu, 2022, pp. 134-145), sometimes even non-existent (Udroiu, 2022, pp. 45-47; Ciobanu, 2022, pp. 34-38).

Regarding the probative value of the judicial expert report compared to the probative value of the extrajudicial expert report, it has been assessed that the probative value of a judicial expert is like that of an extrajudicial expert conducted in another case (Crișu, 2022, pp. 123-134).

The majority opinion, however, is in the sense that the probative force of judicial expertise is superior to that of extrajudicial expertise, the explicit argument in this regard being the contradictory nature of the judicial expertise report (Paraschiv, 2022, pp. 243-256). The same argument is found in the jurisprudence and implicitly, without being expressed (Bouloc & Matsopoulou, 2018). In the same sense, there are isolated opinions, based on a slip of reasoning, in the sense that the extrajudicial expertise ordered by the criminal investigation body has a greater probative force because the body e criminal prosecution is a judicial body, just like the court,which orders the performance of judicial expertise (Soyer, 2012).

According to art. 102 CPP ":

(1) The evidence obtained through torture, as well as the evidence derived from it, cannot be used in the criminal process.

(2) Illegally obtained evidence cannot be used in the criminal process.

(3) The nullity of the act by which the administration of evidence was ordered or authorized or by which it was administered determines the exclusion of the evidence.

(4) Derived evidence is excluded if it was obtained directly from illegally obtained evidence and could not be obtained in any other way".

The evidence obtained by resorting to torture, as well as the evidence derived from it (regardless of whether the derived evidence was legally administered), cannot be used in any situation in the criminal process, they will be automatically excluded, regardless of the finding any injury. The use of such means will be analyzed under the aspect of violating the right guaranteed by art. 3 ("prohibition of torture") of the European Convention.

The penalty for illegally obtaining evidence is sanctioned with the impossibility of using it in the criminal process. This is not an absolute impossibility, so that the evidence considered to have been obtained illegally is not automatically removed, following that it will be analyzed by the judge of the preliminary chamber, depending on the sanction involved, namely relative or absolute nullity. The sanction of the exclusion of the evidence is therefore after the finding of nullity of the act by which the administration of the evidence was ordered or authorized or by which it was administered (Lazar, 2009).

In Decision no. 383 of May 27, 2015, the Constitutional Court found that evidence cannot be obtained illegally unless the means of evidence and/or the evidentiary procedure by which it is obtained is illegal, this presupposing the illegality of the disposal, authorization or administration of the evidence. However, their illegality is sanctioned by the provisions of art. 102 para. (3) of the Criminal Procedure Code, by applying the regime of absolute or relative nullity. This is because nullities, as they are regulated in art. 280 – 282 of the Code of Criminal Procedure, concern only the procedural and procedural documents, i.e. the means of evidence and evidentiary procedures, and by no means the evidence itself, which are only elements of fact. Therefore, it is natural to apply the nullity regime, according to art. 102 para. (3) of the Code of Criminal Procedure, only the acts by which the evidence was ordered or authorized or the acts by which it was administered. Only these acts can be struck by absolute or relative nullity, the latter presupposing a violation of the rights of a participant in the criminal process, which cannot be removed otherwise than by excluding the evidence thus obtained from the criminal process. Therefore, the Court assessed that art. 102 para. (2) of the Code of Criminal Procedure must be combined with para. (3) of this legal text, which means that the evidence obtained through the acts provided for in art. 102 para. (3) of the Code of Criminal Procedure cannot be used in criminal process under the conditions in which these acts are struck by absolute or relative nullity. The two paragraphs do not regulate different institutions, but always presuppose the application of the nullity regime in the matter of probation, as it is regulated in art. 280 – 282 of the Code of Criminal Procedure, and

the result of the nullity of the documents, respectively of the evidence and the evidentiary procedures, (Udroiu, 2022, pp. 134-145).

The evidence derived from the evidence obtained illegally will not be automatically excluded from the administered evidence, the preliminary chamber judge will analyze their connection with the evidence from which they come and the possibility of obtaining them in another way. Thus, if it is established that there is a direct and necessary connection between the evidence obtained or administered illegally, regarding which the exclusion was ordered (as a result of the finding of nullity of the act by which the administration of the evidence was ordered or authorized or by which it were administered) and the derived evidence, the judge of the preliminary chamber will also find the nullity of the subsequent acts by which the administration of the evidence was ordered or authorized or by which they were administered and will order the exclusion of this evidence (Udroiu, 2022, pp. 45-47).

As stated in the doctrine, (Lupașcu, 2022, pp. 46-49) derivative evidence is not excluded if:

(i) the connection between the illegally administered evidence and the later lawfully administered evidence is marginal, that is, the causal link has become so attenuated as to dissipate the illegality.

(ii) Whether the subsequent evidence could be obtained by other legal means, different from the initially illegally administered evidence (from an independent source).

(iii) if the subsequently administered evidence, even if related to the initially unlawfully administered evidence, would inevitably have been subsequently covered by legal means.

Given the purpose of the preliminary chamber (Udroiu, 2022, pp. 134-145), the evidence that was not excluded or the criminal investigation documents maintained during the verification in the preliminary chamber can no longer be excluded at the trial stage.

It is rightly argued that the standard of proof beyond a reasonable doubt does not require the existence of absolute certainty in determining the defendant's guilt regarding the crime charged, but it must be close to this certainty, to effectively guarantee the presumption of innocence.

After the administration of all the evidence and its evaluation, any doubt of the judicial bodies in the formation of the conviction regarding the criminal

responsibility of the accused for the crime committed, is interpreted in his favor. The „in dubio pro reo" principle, enshrined in art. 4 para. 2 CPP, represents a complement to the presumption of innocence, closely related to the powers of judicial bodies related to finding out the truth in the criminal process. Compliance with this principle is mandatory, being necessary to avoid judicial errors. If, following the evaluation of all the evidence administered in a legal and fair manner, there are objectively doubts, reasonable doubts regarding the guilt of the accused, the judicial bodies are obliged toorder the closing of the case or the acquittal of the defendant. The evaluation of the evidence by the criminal investigation body does not prejudice the criminal process but determines the way to complete the criminal investigation (Udroiu, 2022, pp. 45-47).

The analysis of the standard of proof beyond any doubt was also carried out by the Constitutional Court in Decision no. 47 of February 16, 2016, published in the Official Gazette no. 323 of April 27, 2016, regarding the rejection of the exception of unconstitutionality of the provisions of art. 396 para. (2) of the Criminal Procedure Code. In this decision, the Court analyzed the compliance with the provisions of the Constitution (in the aspects related to the rule of law, the principle of the supremacy of the law and the right to a fair trial) of the standard of proof beyond any reasonable doubt, in the court's assessment of the existence of the fact, of the fulfillment of the constitutive elements of the crime and its commission by the defendant.

Thus, the Constitutional Court found that precisely the contested legal provisions relating to ordering the conviction only when the accusation was proven beyond any reasonable doubt give the procedure a fair character, because, in addition to the fact that, according to art. 4 para. (2) from the Code of Criminal Procedure, any doubt in forming the conviction of the judicial bodies is interpreted in favor of the suspect/defendant, the principle of free assessment of the evidence is not absolute, being limited by the existence of compensatory means that ensure the existence of a sufficient balance between the accusation and defense.

The Court also notes that the standard of proof beyond any reasonable doubt originates in the way the evidentiary system is regulated, regarding which the doctrine identifies two major orientations: that of the ability of the evidence to convince, respectively to lead to the formation of the intimate conviction of the judge in the situation of solving a criminal case, orientation specific to the continental law system, and that of the ability of the evidence to prove guilt, beyond any reasonable doubt, specific to the Anglo-Saxon law system and the jurisprudence of the European Court of Human Rights. The adoption in the continental system of the standard of

proof beyond any reasonable doubt, specific to adversarial systems, is the result of the tendency to objectify the standard of the intimate conviction of the judge which, in its essence, assumes an appreciable degree of subjectivity. This standard can only be fully understood by reference to the *in dubio pro reo* standard, which, in turn, constitutes a guarantee of the presumption of innocence and reflects the way in which the principle of finding the truth, enshrined in art. 5 of the Criminal Procedure Code, is applied in the matter of probation. He refers to the fact that, to the extent that the evidence administered to support the guilt of the accused contains doubtful information precisely regarding the guilt of the perpetrator, in relation to the imputed deed, the courts cannot form a conviction that constitutes a certainty and therefore they must conclude in favor of the accused's innocence and acquit him.

That being the case, the standard of evidence beyond any reasonable doubt from the provisions of art. 396 para. (2) of the Code of Criminal Procedure constitutes a procedural guarantee of finding out the truth and, implicitly, of the right to a fair trial. Also, this standard ensures compliance with the presumption of innocence until the judge assumes the conviction of the defendant's guilt, beyond it is any reasonable doubt, an assumption made concrete by the pronouncement of the judicial decision of conviction.

The decision to condemn, to waive the application of the punishment or to postpone the application of the punishment cannot be based to a decisive extent on the statements of the investigator, the collaborators, or the protected witnesses.

This express provision in the chapter relating to the general rules regarding evidence, means of proof and evidentiary procedures, which did not exist in the old regulation, has the role of ensuring and guaranteeing the right to a fair trial for persons accused of committing criminal acts, considering the imbalance that could be created in this situation between prosecution and defense, by violating the principle of equality of arms. The use of these statements is not prohibited in the process of assessing the evidence, but their value is conditioned, on the one hand, by their corroboration with other direct or indirect evidence of guilt that is sufficiently strong, and on the other hand, by the obligation of the judicial bodies to provide the possibility of the accused to combat this evidence effectively, for example by the possibility of asking questions to this person, regarding the statement made.

In relation to the notions of “undercover investigator” and “collaborator”, they must be understood by referring to the provisions of art. 148 para. 4 and 10 of the RCPC (Romanian Criminal Procedure Code) (Bouloc & Matsopoulou, 2018). According to art. 148 para. 8 RCPC, the undercover investigator and his collaborator may be heard

as witnesses in the criminal trial, under the same conditions as threatened witnesses. Since the mentioned provisions do not distinguish between covered investigators and those with real identity, we appreciate that the probative value of their statements in the criminal process is identical, being therefore conditioned by their exclusive or determining character. According to art. 150 of 6 RCPC, the investigator with real identity, who carried out the authorized activities, can be heard as a witness in the criminal process, in compliance with the provisions on the hearing of threatened witnesses, if the judicial body considers that the hearing is necessary. It follows from these provisions that the questioning of investigators and collaborators is not mandatory in the criminal process, but if it is considered that their questioning is necessary, it will be possible to do so while ensuring their protection, by questioning them as threatened witnesses (Bouloc & Matsopoulou, 2018). We believe that the documents drawn up by undercover or real-identity investigators, respectively minutes, represent conditional evidence, and can be considered in the process of evaluating the evidence, like the statements given by them (Debove, Falletti & Dupic, 2018).

Regarding the notion of „protected witnesses", since the legislator did not give them a definition, we appreciate that the rich jurisprudence of the European Court of Human Rights in this field should be considered, which includes in this category injured persons who are heard with the assurance protection. The European court refers to anonymous witnesses, considering in this case the people who were heard with the protection of their identity or by including them in special protection programs (Stancu, 2014).

With regard to the expression "to a decisive extent", it must be understood in the context of a standard imposed on the courts in the process of evaluating the evidence, in the sense that they cannot be decisively based on the statements of the investigator, collaborators or protected witnesses, which, although they are not providing evidence obtained illegally or dishonestly, still create a real imbalance between the prosecution and the defense, given the specifics of this evidence. In the context of the existence of these means of evidence in the criminal process, the courts must consider the evidence provided by them when establishing the defendant's guilt but must pay more attention to them and provide the defense with effective procedural means to combat them, for example, by administering them under adversarial conditions. In the context where these statements have a significant evidentiary contribution, the courts must give the defense procedural means of counterbalancing, which will remove any doubts regarding the factual elements that they tend to prove.

Also, the courts must consider when analyzing these statements, the criminal procedure, including the prosecution phase.

Although the situation of protected witnesses is not like that of absent witnesses, the European Court of Human Rights shows that it is not different in principle, given that they represent the same disadvantages for the defense. Therefore, the jurisprudence developed in relation to the assessment of evidence resulting from the statements of absent witnesses must also be considered in the situation of anonymous witnesses, undercover investigators, and collaborators (Stancu, 2013).

In practice rec entity of the European Court of Human Rights, in the case of Al-Khawaja and Tahery against the United Kingdom, a three-step analysis of the compatibility of the procedure in which evidence of absent witnesses is administered, with the provisions of art. 6 para. (1) and (3) letter d) from the European Convention (Soyer, 2012). These three steps are interdependent and only evaluated together, in no order, lead to a conclusion as to the fairness of the procedure.

This decision, applied and later developed in the case of Schatschaschwili v. Germany, represents a landmark for the judicial bodies both regarding the assessment of the evidence that comes from the statements of the investigator, collaborators or witnesses, in the autonomous sense used by the Court, as well as regarding to the procedure to be followed in case these evidences are administered and evaluated, to ensure the right to a fair trial, in all its components, according to art. 6 para. (1) and (3) letter d) from the European Convention.

Conclusions

The administration of evidence in the criminal process will respect a fundamental principle, entitled the principle of loyalty to the administration of evidence. The content of this principle is reflected through art. 101 of the Romanian Criminal Procedure Code, and according to it, it is prohibited to use threats, violence, or other means of coercion, promises or exhortations to obtain evidence. In the following we will also develop the sanctions applicable to the evidence obtained in this way. According to paragraph (2) within the same article, it is prohibited to use listening methods or techniques that would have the effect of affecting the ability of the person listened to, in the sense of his impossibility to testify voluntarily and consciously, those facts constituting the object of the evidence. In the situation where even, the person listened to would consent to his listening by using such means, the law keeps

the ban as a valid one, beyond the consent of the person who would be listened to. Another prohibition that the criminal procedural law provides is valid for criminal judicial bodies (applicable also to persons acting for criminal judicial bodies), in the sense of their impossibility to provoke a person to commit or continue to commit a criminal act, for to obtain evidence in criminal proceedings. Such prohibition provided for in para. (3) is beneficial and clearly aimed at the protection of persons in the criminal procedural sphere.

Regarding the evidence in the criminal process, as I stated previously in the article, the sanction applicable to the evidence obtained illegally is represented by the exclusion of the evidence and the impossibility of using it in the criminal process. The provisions of art. 102 of the Criminal Procedure Code are relevant in this regard. It is specified that evidence obtained through torture or evidence derived from evidence obtained through torture cannot be used in criminal proceedings. Also, the law excludes the use of illegally obtained evidence in the criminal process. With regard to the documents by which the administration of the evidence was ordered or authorized, or by which the evidence was administered, determines the exclusion of the evidence from the criminal process. In matters of constitutionality regarding art. 102, para. (3) of the Code of Criminal Procedure, regarding the nullity of the act by which the administration of the evidence was ordered or authorized, or by which the evidence was administered, is relevant Decision no. 22/2018 of the Constitutional Court of Romania. Regarding this decision, the Constitutional Court of Romania found that the provisions are constitutional only to the extent that the phrase „exclusion of evidence" will also mean „elimination of evidence from the case file".

The assessment of evidence in criminal procedural matters will comply with the rules of art. 103 of the Criminal Procedure Code. In the specified sense, the evidence will not have a value that was previously established by the law, but they will be subject to the free assessment of the judicial bodies (criminal investigation bodies, prosecutor, judge of rights and liberties, judge of the preliminary chamber, court of judgment). An important provision is reflected through para. (2) of the same article, in the sense that when the court must decide regarding the existence of a crime and the existence of the guilt of the defendant in question, it must refer to all the existing and evaluated evidence. The court will be able to order the conviction of a person only when he is convinced, according to art. 103, para. (2) of the Code of Criminal Procedure, that the charge has been proved (beyond reasonable doubt).

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