THE PROCEDURAL POSITION OF THE EXPERT HIRED BY THE DEFENSE IN THE CRIMINAL PROCEDURE

PROCESNÁ POZÍCIA ZNALCA POVOLANÉHO OBHAJOBOU V TRESTNOM KONANÍ

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ABSTRACT
In the XXI century in Hungary there are lot of cases in which we can see a significant need of the activity of justice experts during the criminal procedure. The aim of this study is to present some of the anomalys of the expert activity in connection with the regulations of the current Hungarian Criminal Procedure Code. Furthermore the aim of this study is to draw some conclusions and to suggest some de lege ferenda suggestions about the topic. In our opinion this topic is a relevant part of the criminal procedure law which would need some new regulations in Hungary.

ABSTRAKT
V 21. storočí je v Maďarsku vedených mnoho súdnych procesov, v rámci ktorých možno badať potrebu súčinnosti súdnych znalcov v trestnom konaní. Cieľom predmetného príspevku je poukázať na niekoľko anomálií v činnosti znalca v súvislosti s platným maďarským trestným poriadkom. Okrem toho cieľom uvedeného príspevku je sformulovať návrhy de lege ferenda. Podľa názoru autorov je uvedená problematika relevantnou časťou trestného poriadku, ktorá si vyžaduje zavedenie nových pravidiel v Maďarsku.

I. INTRODUCTION

Due to the development of the economic and social relations, in the last few years we can detect the overgrowth of the crimes, in which during the investigation the expert judgement plays a key role as an evidence. We can declare, that in the current Hungarian Criminal Code there is no chapter where the expert evidence would not have significance. As a result of the work of the expert, the qualification of an offense can change into favorable[1] or unfavorable direction, not to mention the cases where the judgement of the criminality of the perpetrator depends on the expertise. The above mentioned fact causes that in the criminal procedures next to the public expert (ordered by the authorities) the number of the experts hired by the defense is growing. The experts hired by the defense are doing the same kind of work as their public colleges, but their procedural position is special, which fact - in our opinion - can cause evidentiary problems during the exploration of the facts.

On one hand the goal of this study is to present the anomalys, which anomalys we can see through the practice, in connection with the regulations of the current Hungarian Criminal

[1] Dr. Katalin CSERE: The legal measuring and use of the judgement of the private expert purchased by the charged person or its attorney without the preliminary permission of the court in the criminal procedure. In: Overall opinion. Expert evidence in the procedure of the court. Budapest, 2014. 231. p. http://www.lb.hu/sites/default/files/joggyak/osszefoglalo_velemeny_2.pdf (24 May 2016).

Procedure Code (CPC).[2] On the other hand the goal of this study is to draw up a de lege ferenda suggestion, to clarify the procedural judgment of the expert hired by the defense and to clarify the evidence nature of the expertise. The study so tries to reach the procedural problems from the aspect of the practitioner, according to the below mentioned partition:

- the procedural positions of the hired expert
- the usability of the purchased expertise as a legal document
- de lege ferenda suggestion

II. THE PROCEDURAL POSITIONS OF THE HIRED EXPERT

As it was mentioned above, there are two ways for the expert to get involved into a criminal procedure. The first, generally applied form for the expert is to be ordered by the authorities (public expert/ordered expert). The CPC refers to this in its 102. § (1).

The other form is rarer. In this case the expert is hired (hired expert/asked expert) by the charged person or its attorney.

The process of the expert in the first case is based on an unilateral action of the authorities, and in the second case is based on a bilateral transaction. This distinction is not only concluded from the provisions of the CPC but from the 1. § (1)[3] and the 13. § (3)[4] of the Act XLVII. 2005.,[5] which regulates the frames of the justice expert activity (Expert Act). The CPC regulates the case of the hired expert under the 112. §. After the research of the referred section of the CPC and its legislators interperetation, it is going to be clear, that differently from the ordered expert, the procedural position of the expert hired by the defense can be dual from the angle of demonstration. Practically the base of this is the decree in the subject of involvement made by the prosecutor or the court. If the mentioned authorities make positive decision in the question, the expert nature of the expert of the defense will be acknowleged, and the expertise made by the expert will be the same evidence as the expertise of the public expert.

The real procedural dilemma occurs, when the authorities make a negative decision. Namely when they refuse the involvement of the hired expert in the procedure. In this case this study deals with the cases when the individual experts get totally different conclusions in relevant questions (ex.: drug addiction, insanity, the committed value, extent of damage). The basic of the dilemma is, that the person or persons who can be seen as an expert according to the Expert Act – in case of their involvement was refused - take over the procedural status of the so called whitness with skills. What means, that in respect of relevant circumstance from the view point of criminal substantive or procedural law, a person, who submit a judgement which is a result of expert examination (expertise), can be listened in the procedure according to the rules for witnesses. This - according to our standpoint - causes significant problems on both practical and theoretical sides. This significant problems are summarized below:

According to the 79. § (1) of the CPC a person can be interrogated as a witness if the person can heve awareness about the fact which has to be proven. The witness during the interrogation informs the authorities, which information has relevance from the perspective of

[2] Act XIX. of 1998 on Criminal Procedure (Criminal Procedure Code).

[3] According to the 1. § (1) of the Expert Act: 'the task of the justice expert - based on the order of the court, notary, prosecution, the police and other authority specified in the law (in the following together: authority) - is to help to determinate the state of facts, to decide the professional question, with its expertise, based on the results of the science and the technical development.'

[4] The provision says: 'the justice expert, the company, the institution of the justice expert and the body of justice expert can also give expertise based on hiring, if this is not obstructing the service of its tasks originated from the ordering authorities, and it is not incompatible with it. The provisions of this law have to be used properly for the expert activity.'

[5] Act XLVII of 2005 on the activity of justice experts (Expert Act).

the detection of state of facts of the crime subjected to the suspicion. In contrast to this the expert delivers an opinion about a question which needs professional skills. It is very important to emphasize that, because the authorities – according to the consistent court practice – do not expect an opinion with respect to the case from the witness. It is a matter of fact, that the witness delivers an opinion as well in many cases, even in the investigation part or at the trial of the procedure. Nevertheless, only the presentation of the facts can be taken into consideration, therefore the task of the authorities is to terminate the perceived statement of the witness from its conclusions. At the same time, the expert is only able to make an awareness in connection with the course and circumstances of the examination, not about the special issue, which is the subject of the demonstration. Say the expert, hired by the defense, who is not involved in the procedure, could be interrogated as a witness about the methods and circumstances of the expert examination, about the behaviour of the examinated person during the examination, and about the criteries stated by the profession in connection with the examination. But the expert can not be interrogated about, what - as a result of the examination - can only be commented by the expert. Namely about the relevant circumstances of the demonstration. Obviously there is no possibility to establish facts on the opinion of the expert as a witness, which says, that the suspect is a drug addict. The interrogation of the expert as a witness mixes the content features of the witness statement (testimony) and the expert judgement as evidences.

In context with the above mentioned problem, there is also a special procedural instance, when the acting authority interrogates the expert hired by the defense as a witness in the presence of the public experts. The reason of this in the legal practice is the possibility of comparing the opinions against each other, what can help to the authority to decide about the need of further demonstration. At the same time the above mentioned procedural situation does not fit into the CPC's regulation system of any demonstrational process. Viz. in case of witnesses, if there is a contrast in relevant questions between the statements, there is a possibility to try to solve the contrast within a confrontation, according to the 124. § (1) of the CPC. From the provisions of the CPC follows, that confrontation can be made between witnesses, suspects, and witnesses and suspect. Between witness and expert can not be made. This is only possible to confront statements to each other. There is no way to confront a statement and an expert judgement, so there is no way – according to the current procedural regulations – to confront the expert asked by the defense but not involved in the procedure as a witness with public experts. If we take a look at the expert side, the way to confront the different standpoints is the parallel hearing, according to the 125. § of the CPC. In the mentioned procedural situation nevertheless this rule also can not be used, because according to the regulations of the CPC there are not experts facing each other, but witness and expert, between whom the continuation of the parallel hearing is conceptually impossible.

The third problem is, when before the submission of indictment, the prosecutor has already refused the involvement of the expert – so the prosecutor only proposes to hear the expert as a witness – at the same time, in the trial section the possibility of recognition comes up again, and the court - agreeing with the prosecutor's proposal - before the repeated decision in the question of involvement – quasi as a condition of its decision- requests to hear the expert or experts as witnesses. This kind of case is coming up more often in the legal practice. In this case, except the above mentioned first problem, further problem is, that after the hearing of the expert as a witness, on what kind of procedural basic is possible for the court to decide about the involvement of the expert. Namely according to the 103. § (1) c) of the CPC in a case can not act as an expert, who takes part, or took part in the procedure as a witness. According to this rule, if the court hears the hired expert as a witness first, after that the court could not acknowledge the expert as an expert in the procedure. At the same time, if we accept that the expert can not make an awarensess about a fact which has to be proven, then

literally the expert can not make a witness testimony, - so this exclusion rule would not be interpretable – of course in the latter case there would be no sense for the witness interrogation. Here we think about a case for example, when according to the opinion of experts asked by the defense the charged person can be considered as a drug addict, while according to the opinion of public experts can not, and the court, during the process, wants to hear the asked experts as witnesses about the question of addiction. This practical interpretation roughly goes against the 99. § (2) (a) of the CPC, according to which the question of drug addiction is a special issue, in case of which to make the decision, the assistance of expert is obligatory. If the law prescribes expert assistance, witness testimony is causeless for this fact. The contradiction between the practice and the regulation can only be resolved by a clear legislative framework. We are going to discuss this framework in the de lege ferenda suggestions part of this study.

In connection with the interrogation of the expert as a witness, we would like to draw the attention to another theoretical problem. Namely that the expert - due to the rules of the profession – has obligation of confidentiality, which is also defined in the Expert Act. According to the 12. § (2) of the Act the expert has obligation of confidentiality concerning the facts and datas learned during the activity of the expert. About these facts and datas the expert can only give information to the acting authority and to other body or person which or who is authorized to handle the data concerned.

Nevertheless the question is, how to interprete this provision of the law, when the court authorities do not acknowledge the expert nature of the asked expert during the criminal procedure. The law knows exception from the obligation of confidentiality regarding the acting authorities, but just in case of expert as a relevant procedural person from the perspective of demonstration. What if the expert takes part in the procedure not as an expert, but as a witness? According to our point of view, in this case the expert as a witness - due to the rules of the profession - has obligation of confidentiality, which reason is a relative testify obstacle, if the court wants to interrogate the expert as a witness during the procedure. The acting authority, during the interrogation, has to warn such witness about the relative testify obstacle according to the 82. § (1) c) of the CPC, regarding which, there can even be a real obstacle of the interrogation. This procedural situation could only be resolved in case of the authority would a priori treat the asked person as an expert in the criminal procedure. Here we only would like to highlight the contradictory situation, when the court wants to hear the asked expert as a witness before the decision in the question of involvement within the frameworks of the trial to make the decision, and the above mentioned relative obstacle of the hearing comes up, the court in this procedural situation is not able to continue that procedural act on which the result of its decision depends. This results the real and causeless extention of the criminal procedure, not to mention the additional criminlal cost. In our opinion the protection against this is a real need in the XXI. century.

III. THE USABILITY OF THE PURCHASED EXPERTISE AS A LEGAL DOCUMENT

In this chapter we would like to deal with the evidence nature of the expert judgement and some of its problems.[6]

The situation is clear if the prosecutor or the court involves the asked person as an expert into the procedure. With this authority act, the opinion of the expert, demonstrated by the attorney or the charged person, gets an expert judgement (expertise) status during the

[6] Deals with the topic: Gábor Kovács in his work: Gábor KOVÁCS: The criminal procedural position of justice experts. In: Ilona Benisné Győrffy (ed.) 27th Jurist Rover-Assembly: Pécs, Hungary. 9-11 October 2008. 258. p. Studies of Hungarian Jurist Club. p. 92-101.

procedure. In case of the decision of the authority is negative, the provided opinion can be used as a legal document according to the 112. § (3) of the Expert Act.

The definition of the legal document as an evidence can be found in the 116. § (1) of the CPC, where the legislature formulates, that the legal document serves to prove the reality of a data or a fact, or the occurrence of a happening, or the taking of a statement. This provision is contradictory, which contradiction can be found with the help of the interpretation of the procedural rules regarding to the formal criteries of expertise. According to the 108. § (2) c) of the CPC, a relevant part of the expertise is the so called professional fact-finding, which is the basic of the judgement part. According to the prescriptions, the legal document also serves to prove the reality of a fact, so the fact-finding part of the judgement of the expert - who is not involved - has to be accepted as real. According to this we can state, that if the fact-findings are real, then the conclusions driven from theam are also real, say we should accept the judgement part as real. And if it is true, then it is hard to defend that legislative distinction, which distinguishes the judgement of the expert hired by the defense from the judgement of the public expert.

IV. DE LEGE FERENDA SUGGESTION, CLOSING REMARKS

According to our viewpoint, it would be necessary to create a procedural norm, which would help to decide the credibility of the private expert judgement according to professional basis. Not arguing with the importance of that the acting authority has the procedural possibility to make the decision in the question of involvement, in our opinion it would be well-founded, if the decision-making competence of the authority would cover questions, judgment of which is expected from it professionally. Such as the study of procedural formalities of the expertise, say, if the given expert's name is in the list of the experts, if the expert is entitled to give an expertise or if the judgement has the formal criteries according to the 108. § (2) of the CPC. If the answer to these questions is yes, the acting authority should not have the possibility of deliberation regarding to the decision about the subject of involvement, because it can cause the restriction of the right to defense in the criminal procedure. Videlicet in case of the expert hired by the defense states a standpoint, which is different from the expertise, which is the basic of the prsecution, and the acting prosecutor or the judge refuses the involvement, then an important principle of the pocedural law, the principle of burden of proof breaches.

Furthermore we emphasize, that the possibility of the authority to hear the private expert as a witness should be terminated.[7] This kind of amendment is not only justified by the procedural dilemmas mentioned in this study, but also by the above suggested amendmental direction. Because if the authorities involve the expert hired by the defense as an expert into the procedure, then the problem of hearing the expert as a witness could not come up. The above mentioned professional credibility would only be examined within the frames of 'expert' procedure, which - according to the current regulations - could be the parallel hearing of the experts as well as the legal institution of ordering of the other expert. At the same time the practice shows, that there are several cases when within the frames of only one trial it is necessary to hear an expert who lives far from the location of the trial. Knowing the workload

[7] Gábor Kovács emphasizes the importance of this in his work: Gábor Kovács: The revaluing rule of justice experts in the criminal procedure (In: Mihály Bihari, András Patyi (ed.) In Honor of Dr. Gyula Szalay, to his 65th birthday 606. p., Győr, Hungary. Universitas Győr Kht. 2010. p. 310-319. (ISBN:978-963-7175-55-8).

of the courts and the experts, granting of the circumstances of parallel hearing can significantly spin out the criminal procedure, not to mention the criminal costs.

Taking into consideration the economic viewpoints of the trial, possibility should be given to the prosecutor or to the court deciding in the question of involvement to measure which act of proof to choose to resolv the contrary between the purchased expertises. And if in the opinion of the prosecutor or the court is more justifiable, there should be a possibility -with ignoring the parallel hearing - to automatically order a third expert to clarify what is in the 111. § (6) of the CPC.

According to our standpoint, with the implementation of the above mentioned rule changings, the acting authority could be in a situation, where it is possible to measure – within the frames of its real discretional activity – the judgement of the private expert, which is contrary to the judgement of the ordered expert in relevant substantive or procedural question. Such regulation would strengthen more effectively the principles in the criminal procedure, with respect of the right to defense.

KĽÚČOVÉ SLOVÁ

maďarský trestný poriadok, znalec, znalec obhajoby, súdny znalec ako svedok, dôkaz, názor znalca.

KEYWORDS

Hungarian Criminal procedure, expert, expert hired by the defense, justice expert as a witness, evidence, Opinion of the expert.

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