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Illegal Evidence and the Polish Criminal Procedure

Nielegalny dowód w świetle polskiej procedury karnej

Нелегальное доказательство в свете польской уголовной процедуры

ROOTS OF POLISH LAW

In the development of Polish law, including criminal law and procedure, two basic periods can be discerned:

1. From the foundation of the Polish state in 966, when the Polish ruler subjected the whole country to Christianity, to 1795 when Poland lost her independence due to the partition of her territory between three neighbouring powers, i.e. Russia, Austria and Prussia.

2. From the rebirth of the Polish state in 1918 to the present time.

In the first period common law prevailed, however with the passage of time it was more and more often revamped and changed by king's edicts and next, from the XVI century, by parliamentary Acts, until finally the natural development of Polish law was interrupted by the partition. In its consequence three parts of the country's territory were subjected to three different foreign legal systems: Russian, Austrian and German.

After the First World War the Law Commission was formed and burdened with the task of the unification of law for the whole country. Instead of copying the law of the former invaders, the Commission created an orginal and modern system of Polish law. The Criminal Procedure Code (referred to subsequently as CPC) of 1928 and the Criminal Code of 1932 remained in force until they were replaced on the 1st of January 1970 by new codes passed by the Parliament a few months earlier. The basic rules of the new codes are nearly the same as those of the former ones, in spite of the fact that the political system in Poland has changed re-

markably. The influence of communist ideas can be more easily traced in that part of the Criminal Code which describes particular offences and sets penalties for them, than in the general principles of criminal liability. As far as criminal procedure is concerned, the imprints of the political structure are mostly insignificant, however the same cannot be said about the court practice. Among others, the Supreme Court has been empowered to pass "Directions of Justice and Court Practice" which have a binding force in relation to all court decisions. Although formally the "Directions" are not regarded as law, their violation creates good grounds for appeal. Through its "Directions", passed on the initiative of the Minister of Justice, President of the Supreme Court, or Procurator General, the Supreme Court moulds an official policy in civil and criminal cases.

SAFEGUARDS FOR THE ACCUSED

Before I move on to discussing the rules relating to illegal evidence in criminal cases, it seems desirable to outline the main legal privileges of the accused.

The presumption of innocence is one of the fundamental principles of criminal procedure. It was well established in the Supreme Court decisions as well as in legal writings under the rule of the Criminal Procedure Code of 1928. Since 1970 that presumption has been clearly expressed in section 3 of the new code which reads as follows: "The accused shall not be regarded as guilty until his guilt has been proved in accordance with the procedure provided in this code". The Supreme Court decisions concur in requiring for the conviction that guilt be proved beyond reasonable doubt and sec. 4 § 1 of the Criminal Procedure Code sets an additional condition: the judges or lay assessors must be inwardly convinced that the person before them is guilty.

In consequence of the presumption of innocence the burden of proof lies on the prosecution. In order to secure a conviction the prosecution must produce evidence which proves *actus reus* and *mens rea*. However, as soon as this has been done, it is practically up to the defence, should the occasion arise, to show that the accused committed his act in circumstances which either exclude or extenuate his criminal guilt, such as self-defence, necessity, duress, mistake of fact or insanity. Anyway, the defence is expected at least to prove the probability of the existence of those circumstances.

The Polish criminal procedure does not provide for the accused's sworn statements on trial. In other words a defendant cannot be a wit-

ness in his own case. Instead of this, in both stages of criminal proceedings, i.e. during preliminary investigations and on trial, he may give unsworn "explanations" to a charge. It should be his own free choice whether to make a statement in response to a charge or remain silent. At trial the presiding judge has, in a sense, to warn the accused of his right to stand mute by asking him if he would like to say something in response to the accusation. Unfortunately, it is not the case in preliminary investigations. Neither the Police (who carry out most of the investigations) nor the public prosecutor called "procurator" (who carries out such investigations personally when very serious crimes are involved and supervises the rest of them) are under a legal obligation to inform a suspect of his privilege to refuse explanations to a charge. Perhaps this is one of the reasons why only on rare occasions the accused claims his right to silence. However, if he chooses to give explanations, they should be carefully considered by the court and weighed against contrary evidence. The explanations, although unsworn, are legally regarded as a form of evidence and this is why they must not be ignored. Of course, the court may finally come to conclusion that the accused's explanations are untrue but then reasons must be given for their discredit.

As a rule the defendant does not bear any legal responsibility for false statements contained in his explanations. In any case they never amount to an offence just because they are untruthful and have been made before the court. It should be, however, stressed that the clear rule becomes arguable especially when the accused in his explanations deceitfully casts accusations of a crime on an innocent person or slanders him in another way. The Supreme Court decisions on this subject have been split for three decades and so have the opinions of scholarly experts.[1] It seems that the prevailing arguments can be gathered in support of the view that a defendant may be held criminally responsible for one of the above mentioned acts, committed on the occasion of giving explanations to the Police, procurator or court, only when his statements have no connection with the scope of the defence. Even such a narrow range of possible liability for making false statements is enough to contend that the accused has not been granted "the right to lie", although the risk of bearing responsibility for the lies contained in explanations is very small and arises exclusively when false statements are harmful to another person. Nevertheless, from the fact that the accused cannot claim the right to lie it should not be inferred that he is legally bound to tell the truth. His position is different than that of a witness

[1] For a discussion, see Z. Sobolewski: *Samooskarżenie w świetle prawa karnego [Self-Incrimination in the Light of Criminal Law]*, Warszawa 1982, pp. 79—98.

or an expert. The two latter have to solemnly promise [2] to tell the truth before they make their spontaneous statements on the matters in issue or answer questions put to them, while the accused is never expected to give such a promise.

The accused has a right to give explanations in reply to a charge brought against him (sec. 63 CPC). This means that he may demand to be listened to and to have his statement recorded, in particular when he is being charged in preliminary investigations or arrested as well as on trial, right after an idictment has been read to him. Also on other occasions he may require criminal justice authorities to give him an opportunity to supplement or change his former statement.

The accused can voluntarily construct the contents and the form of his explanations. This is guaranteed by sec. 157 §1 CPC which reads as follows: "An examined [interrogated] person should first be allowed to express himself freely on the matter in issue and then he may be asked questions aimed at supplementing, clearing up or controlling of his statement." On trial the court's protection and the presence of other participants as well as of the public are regarded as a sufficient practical safeguard of the voluntariness of the accused's explanations. However, like in other countries, it is mainly a statement made by the accused and recorded in the stage of preliminary investigations which is quite often called in question before the court. I shall later discuss the circumstances of interrogation which render the confession or admission illegal and how this influences their admissibility into evidence. Before that it seems desirable to point out the circumstances which, according to Polish law and jurisprudence, do not by themselves impair the legality and credibility of the accused's statement made during an interrogation.

INTERROGATION OF ARRESTED SUSPECTS

As it is commonly known, the United States Supreme Court held in *Miranda* v. *Arizona* (1966) that "in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" and because of that he must be adequately and effectively appraised of his right to remain silent and to have counsel present at the interrogation. [3] Contrary to this view, neither the Polish criminal procedure nor the Supreme Court de-

[2] In 1949 an oath taken by witnesses and experts in court proceedings was replaced by a lay promise.

[3] See S. Gillers: *Getting Justice, The Rights of People*, New-York — London 1971, pp. 148—149.

cisions form a basis for considering a confession or admission to be inadmissible just because it was made during an interrogation following an arrest or detention. The Criminal Procedure Code only requires that the accused should be interrogated before his arrest by the procurator personally, instead of by the Police, and regards this as a sufficient safeguard of the voluntariness and reliability of the confession. The accused does not have to be warned of his privilege to remain silent and he formally has not been granted the right to demand that his lawyer be present at the interrogation. Even so, he is in a position which practically might enable him to secure his lawyer's presense, that is by claiming as an alternative his right to silence. An interrogator is usually anxious to know what the accused is going to say in response to a charge. What's more, he knows, that when an accused person decides to confess and give a full report of what has happened and why, this significantly facilitates and speeds up preliminary investigations. But even when the accused denies his guilt it is still worth knowing beforehand with what arguments he is going to challenge incriminating evidence on trial. For this reason one can assume that an interrogator would be inclined to allow the lawyer to be present if the accused made the telling of his own story dependent on that condition. In practice however, it is not so. The accused does not insist on his attorney's presence at the interrogation because he is unaware of the possibility of having his demand enforced.

In the Polish legal system and juristic culture it is hard to expect that one day the Supreme Court may, by its ruling, confer on the accused the privilege to have his lawyer present at the interrogation, since the Criminal Procedure Code makes a lawyer's participation nearly in any act of preliminary investigations dependent on the decision of the procurator who can always say that this would be prejudical to the criminal proceedings. So, the only way open to granting the accused that privilege is by changing the law. In my opinion this should be done for the benefit of the accused and criminal justice as well. If on trial the accused chooses to plead "not guilty", in spite of his confession made during preliminary investigations, and in consequence changes his explanations, he is asked to give reasons for that. Then, no matter whether his confession has been extorted or not, the accused just cannot think of a better excuse than claiming it has been extorted. The interrogator, of course, denies that and no wonder as otherwise he would expose himself to criminal liability. This leaves the court with a doubt which is hard to dispel. The embarassing problem would not arise at all or at least not so often if the accused had a clear right to require that his lawyer be present at the interrogation. Confessions and admission made in this lawyer's presence would amount to reliable evidence and could not be easily withdrawn.

EMPLOYMENT OF TRICKERY

Although in theory it is an arguable question accompanied by a complete lack of the Supreme Court decisions on this matter, it should be assumed that, as the law stands, trickery employed in the search for incriminating evidence does not form a basis for the suppression of that evidence. It may be otherwise only when trickery is combined with something else which is illegal like, for instance, threats or when the given type of trickery is plainly forbidden by law, e.g. the interception of telephone conversations without the procurator's or court's warrant. Apart from these exceptional situations, there is no ground to question the legality of such manifestions of trickery as a trap set for a blackmailer or eavesdropping and recording of a conversation carried out in a place which is normally accessible to the public like a street, waiting room or café. As to the latter, it should be born in mind that neither the Polish Constitution nor another statute grants citizens the right to privacy if they express themselves in public places. Furthermore, even S. Waltos's view that at least no statements in criminal proceedings should be induced by trickery because this method excludes voluntariness and thus must be regarded as prohibited by sec. 157 § 2 CPC[4], seems too restrictive. It is true that certain kinds of trickery can amount to strong pressure put on the accused in order to make him confess. This may be the case if trickery is combined with implied threats or irresistible promises. Let us take as an example the so called "reverse line-up"or promise to free an arrested person in return for his confession. In the first situation the suspect is identified by fictitious witnesses who accuse him of more serious crimes than the one under investigation. It is expected that the suspect will become desperate and confess in order to gain an alibi and avoid responsibility for the offences which have been thought up. In this instance the confession should be found inadmissible but not as much because of trickery as because of implied threat. Nevertheless, not every trickery and likewise not every promise deprives the accused of the freedom of expression.

Efforts made in order to convince an interrogated person that his denial of guilt is senseless in the light of incriminating evidence have enough room in the normal tactical measures of interrogation to which bluff also belongs. The accused, while deluded into the belief that his associates or witnesses have inculpated him, may decide to confess, however by this fact he is not coerced into confessing, in particular if no promise or threat is used at the same time. Even if there are reasons to

[4] See S. Waltoś: *Swoboda wypowiedzi osoby przesłuchiwanej w procesie karnym [Free Expression of a Person Examined in Criminal Proceedings]*, „Państwo i Prawo" 1975, No. 10, p. 71.

believe that the accused broke down and lost his will to resist when he envisaged his hopeless situation which had been deceitfully suggested to him, his confession may be regarded as unreliable but not as illegal. This means that such a confessions is admissible, although it does not necessarily form a basis for conviction.[5] The truthfulness of that confession should be evaluated mainly by checking its consistency with the remaining evidence.

As far as the reliability of a suspect's utterance is concerned, it is worth bearing in mind that when such an utterance is obtained by means of trickery, like eavesdropping, it may be more reliable than when it results from a formal interrogation. K. Krasny[6] does not question this assumption, however he thinks that the use of trickery in preliminary investigations and especially during an interrogation is forbidden because that method is unethical and collides with the idea of the rule of law, while M. Lipczynska[7] points out to the incompatibility of trickery wiht the state authorities' required loyalty towards other participants of criminal proceedings. Yet, these arguments do not seem convincing, as from the moral point of view trickery becomes blameworthy only when it is employed for a mean purpose but not when it supports the fight against offences. It is rather a lie which is unethical, while its disclosure with the help of trickery should not be considered as such. Loyalty and fair play are, undoubtedty, important values, however it would be unwise to stick to them firmly if the other party plainly refuses to comply with them. Then, if a given form of trickery violates common decency but does not undermine the reliability of the evidence which has been obtained owing to that trickery, a policeman or the public prosecutor who has applied the wrong method should be discouraged to do so by a disciplinary action while the evidence remains admissible, as otherwise the Justice would be punished.[8]

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[5] According to the Polish procedure all criminal cases brought to the court must be committed for trial, no matter whether the accused pleads guilty or not, unless the court decides to dismiss a charge or orders further investigations.

[6] K. Krasny: *Swoboda wypowiedzi podejrzanego w śledztwie na tle spraw aferowych [The Freedom of Expression of the Accused in Preliminary Investigations of Organized Embezzlement]*, „Problemy Praworządności" 1978, No. 6, p. 41.

[7] M. Lipczyńska: *Granice stosowania zdobyczy postępu technicznego w procesie karnym [The Limitations of the Applicability of Technical Inventions in Criminal Process]*, „Studia Kryminologiczne, Kryminalistyczne i Penitencjarne" 1975, No. 2, p. 246. R. Cross (*Evidence*, 4th edn, London 1975, p. 280) contends that English courts have discretionary power to suppress evidence obtained through trickery if that trickery seems to be unfair.

[8] In the Federal Republic of Germany the employment of trickery by the Police is not prohibited in general. Only such forms of trickery violate § 136a of the German Criminal Procedure which exert a pressure on the accused's will and

THE CONDITIONS OF INTERROGATION WHICH EXCLUDE THE FREEDOM OF EXPRESSION

The Criminal Procedure Code in sec. 157 § 2 declares that the accused's explanations, statements by witnesses and experts and other statements must not be used as evidence if they have been made in circumstances which "exlude the possibility of free expression". However, the Code does not enumerate the means by which such circumstances can be created. This task has been left to scholarly considerations and Supreme Court decisions.

In my opinion the wording "circumstances which exclude the possibility of free expression" should be interpreted as relating to the situation in which a specific person cannot express himself freely because of the means of pressure applied to him as well as his individual inability to resist. The prolonged and aggressive interrogation of a sick and timid suspect may crush his will to explain that, in spite of circumstantial evidence, he has not committed the crime. The same situation, however, may have no influence on the will and conscientiousness of a strong and self-confident suspect. So, if the accused persistently denied his guilt though a coercive method of interrogation was applied, the record of his denial is very reliable and there would be no sense in removing it from evidence as it is obvious that the defendant successfully resisted the undue pressure put on him.

It is also worth taking into account that the same extortive method of interrogation may be applied with varying intensity and depending on this the court has to decide whether to suppress the evidence. The Supreme Court seems to be quite right in stating that "not all inconvenient conditions amount to circumstances which exclude the possibility of free expression. Only those circumstances may be regarded as such in which the will of an interrogated person or a person making a statement is entirely or to large degree paralysed and in consequence that person is unable to say what he would like to."[9] Although this type of a somewhat relaxed intepretation of the sec. 157 § 2 CPC narrows the range of illegal evidence which should be found inadmissible, it is still worth

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force him to confess, like for example when it is deceitfully suggested to a minor that his mother is going to turn him adrift unless he admits his guilt. See J. Puppe: *List im Verhör des Beschuldigten*, „Goldammer's Archiv für Strafrecht" 1978, pp. 297—303. However, the more rigorous point of view is advocated by H. Walder (*Die Vernehmung des Beschuldigten*, Hamburg 1965, p. 160) and Löwe-Rosenberg (*Die Strafprozeßordnung und das Gerichtsverfassungsgesetz, Kommentar*, Berlin 1953, p. 354).

[9] See the Supreme Court's judgement of 8th February 1974 (Case No. V KR 42/74), OSNKW 1974, No. 6.

noting that any evidence may be finally rejected if its credibility has been questioned because of the circumstances in which it had been obtained. Furthermore, an exemplary enumeration of those methods and conditions of interrogation which usually render the evidence illegal is certainly fruitful as when such methods or conditions have been proved the evidence must be suppressed, unless there are reasons to believe that either the pressure was not strong enough to break the will or the resistance was exceptionally effective.

According to *opinio communis* the following means used for and conditions accompanying an interrogation should be considered as those which deprive an accused person (or a witness) of the possibility to express himself freely: *vis compulsiva,* i.e. infliction of physical pain, threat, hypnosis, suggestive promise, stupefacients, severe intoxication or tiredness and psychological torment. Instead, consensus has not been reached yet among scholars as to whether the use of a lie-detector is legal, however the Supreme Court cautiously accepts that method of testing the truthfulness of the accused's explanations but only if he agrees to it.[10]

The motion to suppress extorted evidence is usually made on trial as the Polish criminal procedure, unlike for instance American, does not provide a special pre-trial stage for doing so. It is expected that the defence will show some grounds for the motion, which is not an easy task. In order to make it feasible, the Supreme Court decided that it is enough to prove the probability of the existence of circumstances which might have excluded the accused's freedom of expression and that any doubt in this respect should be construed in his favour.[11]

As it is almost exclusively the evidence collected by the Police in the stage of preliminary investigations which is challenged because of its alleged illegality, it should be pointed out that the procurator — who supervises the investigations, brings a charge to the court and represents the prosecution on trial — should suppress illegal evidence himself before he files an indictment. It would be unfair if he founded his charge on the incriminating evidence which to his knowledge had been extorted from the accused.

The Criminal Procedure Code does not prescribe a particular form for the suppression of illegal evidence. On the other hand it is clear that such evidence should not be removed from the record in a physical sense

[10] See the Supreme Court's judgements of 25th September 1976 (Case No. II KR 171/76), 14th December 1977 (Case No. I KR 136/77) and 8th July 1980 (Case No. III KR 211/80) which have been published respectively in: "Państwo i Prawo" 1979, No. 5, „Nowe Prawo" 1979, No 7—8. „Problemy Praworządności" 1981, No. 3.

[11] See the Supreme Court's judgement of 9th August 1976 (Case No. V KR 34/76), „Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1979, No. 1, p. 18.

because the decision as to the suppression may be questioned in further stages of criminal proceedings, especially on appeal.[12] In the case of the lack of evidence in question it would be impossible to decide whether the suppression was justified.

From the formal point of view each piece of evidence which has been obtained or recorded in a way contrary to law provisions may be regarded as illegal. However, such a broad sense of illegality cannot serve as a criterion of inadmissibility because in the Polish criminal procedure the stress has been put on the pursuit of truth. It might be gravely imperilled by the acceptance of a simple rule: "all illegal evidence should be suppressed". Then, the court has to weight carefully the seriousness of the violation of law on evidence on the one hand and the danger created by the offence in question on the other. It is characteristic that Polish courts are reluctant to let a defendant benefit too much from a mistake or even a wilful but minor violation of procedural rules caused by the Police. A common feeling is that it would be unjust if the court was bound to pass an acquittal, in spite of convincing evidence of guilt, only because that evidence had to be suppressed. This approach will become particularly clear when we shall discuss the "fruit of the poisonous tree" doctrine. The only concession in favour of a strict inadmissibility is made when it should be assumed that a confession or admission has been extorted, as in this case illegality of evidence coincides with its unreliability. Other technical mistakes usually do not bar the admissibility of evidence, which although illegal in a sense may form a basis for conviction if only it seems to be convincing and reliable.

FRUIT OF THE POISONOUS TREE

An involuntary confession may help to find a witness for the prosecution or other incriminating evidence, like an exhibit or document. The question arises whether that kind of evidence becomes illegal and inadmissible because the information about it has been obtained through extortion or another forbidden act.

The Criminal Procedure Code does not give an answer to that question. However strange as it may seem, the Supreme Court also has not yet considered in detail the problem of indirectly tainted evidence. There is only one decision of that Court which allows one to infer that even if a source of information is illegal this does not influence the admissibility of evidence which has been obtained due to that information. The

[12] Both parties have equal right to appeal each judgement (acquittal or conviction and sentence) of a trial court on the matter of fact or law.

Court stated that an accused woman confessed to theft while under threat. Namely, before trial she was threatened with immediate arrest in case of her further denial of guilt. In result of this she broke down as she could not bear the thought of being separated from her one month old child. The Supreme Court expressed the opinion that the prosecution should have taken the trouble to ask the accused what had happened to the stolen goods which, if found, might have served as convincing evidence of her guilt. [13]

Perhaps it would be more consistent to reject all evidence ensuing from an illegal source, no matter how reliable it may be. This would discourage the Police from breaking the safeguards granted to accused and suspected persons. However, such an approach makes the administration of criminal justice too much dependent on technicalities which in consequence may turn into a mockery of justice.

In the United States the doctrine of the fruit of the poisonous tree has been enforced with rigour but unfortunalety not with the best results. The evidence becomes illegal and inadmissible not only when it has been obtained owing to the information contained in the accused's extorted confession but also when it has been found in result of a search which exceeded the authorization of a search warrant.[14] At the same time a very broad interpretation of "illegal evidence" is applied which may lead to decisions like in the following case.

A man shot and killed his wife and her parents at his home. Next he hid the gun and went to a pub where he confessed to his friend. On the way back home he was stopped by a policeman because of noticeable blood stains on his shirt. At the Police station he voluntarily made a full confession but did not agree to have that confession recorded. So, he was brought to the District Attorney's office where he confessed once again and this was recorded with his permission. On trial he was convicted of murder, however on appeal the Supreme Court of California quashed the conviction, granting a retrial. The Court held that the Police were not allowed to listen to the confession off the record and because of that this evidence was illegal. The confession made to the District Attorney was illegal too as it must have been influenced by the former one. The gun, the corpses and the statement given by the witness from the pub also became inadmissible into evidence because the information about them had come from an illegal confession. Then, the final outcome of the Supreme

[13] See the Supreme Court's judgement of 18th November 1978 (Case No. VI KRN 326/78), OSNGP 1979, No. 4.

[14] See S. Hirtle: *Inadmissible Confessions and Their Fruits*, „The Journal of Criminal Law, Criminology and Police Science" 1969, vol. 60, No. 1 and Gillers: *op. cit.*, pp. 58—9.

Court's decision could only be the dismissal of a charge against the actual murderer as the prosecution would not be able to find new evidence, entirely independent from the suppressed one.[15]

The Polish courts have not accepted the doctrine of the fruit of the poisonous tree. In general, their attitude can certainly be justified by the supreme command to pursuit the truth, which has been clearly declared by sec. 2 § 1 CPC. Furthermore, the courts reasonably strive to avoid situations in which, despite reliable evidence of guilt, the accused would have to be acquitted as this might damage the society's trust put in criminal justice and deepen the harm caused to the victim of a crime. Nevertheless, it can hardly be denied that such an approach goes too far in favour of the prosecution and cannot deter them from the violation of safeguards granted to the accused. Perhaps it would be better if the courts' standpoint were more flexible. The evidence indirectly tainted should be suppressed when it results from an outrageous violation of the accused's rights.

As regards an illegal search, the evidence seized in its effect is always admitted into evidence and, however incredible as it may seem, the defence never makes the slightest effort to have it suppressed. Two reasons are accountable for this situation:

1. The conditions of a search are usually broadly described in a search warrant which in preliminary investigations is issued by the procurator. Apart from this the Police may search and seize evidence without a warrant in case of emergency.

2. No one pays any attention to the fact whether the Police had reasonable grounds to believe that incriminating evidence could be found in a given place if it has been really found.

What we have already discussed related to illegal actions undertaken by prosecuting authorities in their search for evidence. However, illegal acts can also be committed by private persons, like the accused or an injured party, in order to get access to evidence favourable to them. They may, for instance, use threat or force to come into possession of an exhibit or document. Although the action is obviously illegal, the evidence acquired in that way should be regarded as admissible because the Criminal Procedure Code does not regulate this situation and the Supreme Court has never mentioned it in its decisions. Then, the general command of the pursuit of truth must be given priority and this in turn requires the use of all reliable evidence, no matter how it has been possessed by a participant to criminal proceedings.

[15] This case was reported in November 1979 by "The Philadelphia Inquirer".

STRESZCZENIE

W pracy tej, przeznaczonej głównie dla czytelnika zagranicznego, przedstawiono najpierw, jako niezbędne tło, podstawowe gwarancje procesowe służące oskarżonemu, a następnie kontrowersyjny problem dyskwalifikacji dowodu uzyskanego w sposób niezgodny z prawem.

Obowiązujący kodeks postępowania karnego z r. 1969 zapobiega pochopnemu stawianiu obywatela w stan oskarżenia między innymi przez ustanowienie domniemania niewinności (art. 3 § 2), a w konsekwencji tego złożenie ciężaru dowodu na barki oskarżyciela. Ponadto z art. 4 § 1 k.p.k. wynika, że wyrok skazujący może być wydany tylko wtedy, gdy sędziowie są wewnętrznie przekonani o winie oskarżonego. Aby obalić domniemanie niewinności, oskarżyciel powinien wykazać, że oskarżony popełnił czyn zabroniony i że uczynił to w sposób zawiniony. W przypadku natomiast, gdy zachodzą okoliczności wyłączające odpowiedzialność karną, w praktyce oczekuje się, że obrona je wskaże i udowodni lub przynajmniej uprawdopodobni, chyba że wynikają one wyraźnie z zebranego już materiału dowodowego.

Odmiennie niż w procedurze anglosaskiej, oskarżony w Polsce nie może zeznawać jako świadek we własnej sprawie. Może jedynie złożyć wyjaśnienia albo zachować milczenie, które jest jego prawem. Wyjaśnienia, chociaż nie zaprzysiężone, traktowane są jako dowód, którego wiarygodność podlega ocenie sądu. Oskarżonemu nie można odmówić prawa do złożenia wyjaśnień (art. 63 k.p.k.) i do swobodnego kształtowania ich treści (art. 157 § 1 k.p.k.). Wprawdzie nie przysługuje oskarżonemu przywilej kłamstwa, lecz złożenie fałszywych wyjaśnień w zasadzie nie podlega karze. Jedynie kłamliwe pomawianie innej osoby o przestępstwo, nie podyktowane potrzebą własnej obrony, może być karane.

Według polskiej procedury, sam fakt aresztowania oskarżonego nie uchodzi za okoliczność, która istotnie ogranicza swobodę wypowiedzi. Dla ważności przesłuchania nie wymaga się w takim przypadku obecności obrońcy. W praktyce jednak oskarżony często mógłby wymusić dopuszczenie obrońcy do przesłuchania, gdyby od tego uzależniał złożenie wyjaśnień. Zdaniem autora, powinno się przyznać oskarżonemu wyraźne prawo domagania się, aby obrońca był obecny przy przesłuchaniu. To byłoby korzystne również dla wymiaru sprawiedliwości. Stanowiłoby bowiem gwarancję dobrowolności przyznania się, jeżeli oskarżony zdecyduje się na to.

W teorii sporna jest kwestia, czy organy ścigania mogą posługiwać się podstępem w celu uzyskania dowodów obciążających. W polskim prawie nie ma jednak wyraźnego zakazu czynienia tego. Dowód uzyskany w wyniku podstępu powinien więc zostać odrzucony jedynie wtedy, gdy podstęp łączył się z akcją zakazaną przez prawo, na przykład ze stosowaniem groźby albo też podsłuchu telefonicznego, bez zezwolenia sądu lub prokuratora.

Według art. 157 § 2 k.p.k., nie mogą stanowić dowodu wyjaśnienia zeznania lub oświadczenia złożone w warunkach wyłączających możliwość swobodnej wypowiedzi. Przez takie warunki rozumie się zadawanie bólu fizycznego podczas przesłuchania, stosowanie groźby, hipnozy, środków odurzających, kuszących obietnic lub udręczenia psychicznego albo też wykorzystywanie zmęczenia osoby przesłuchiwanej. Brak natomiast jednomyślności co do tego, czy dopuszczalne jest stosowanie wariografu.

Nie każde naruszenie prawa przy uzyskiwaniu dowodu prowadzi do jego dyskwalifikacji. Polskie sądy nie są skłonne do uniewinniania oskarżonych z braku

dowodów winy, gdy te dowody naprawdę istnieją, lecz przy ich przeprowadzaniu dopuszczono się mało istotnego uchybienia przepisom proceduralnym. Z tych samych powodów nie stosuje się doktryny „owocu zatrutego drzewa".

РЕЗЮМЕ

В настоящей работе, предназначенной в основном для зарубежного читателя, мы представили сначала, как необходимый фон, основные процессуальные гарантии служащие обвиняемому, а затем спорную проблему дисквалификации доказательства полученного незаконным способом.

Обязательный кодекс уголовного производства с 1969 года предупреждает опрометчивое введение гражданина в состояние обвинения, между прочим путем установления принципа презумпции невиновности (ст. 3 § 2), а в результате этого возложения тяжести доказательства на плечи обвинителя. Кроме того, из ст. 4 § 1 у. п. к. следует, что обвинительный приговор может быть вынесен только тогда, когда судьи внутренне убеждены в виновности подсудимого. Чтобы опровергнуть презумпцию невиновности, обвинитель должен доказать, что подсудимый совершил запрещенное действие и что сделал это виновным способом. Зато в случае когда возникают обстоятельства исключающие уголовную ответственность, на практике ожидается, что защита укажет на них и докажет, или по крайней мере подтвердит с достоверностью, разве что вытекают они ясно с уже собранных доказательств.

По-другому, чем в англосаксонской процедуре, подсудимый в Польше не может давать показания как свидетель в собственном деле. Он может только дать объяснения или сохранить молчание, на что у него есть право. Выяснения, хотя и без присяги, считаются доказательством, достоверность которого подлежит оценке суда. Подсудимому нельзя отказать в праве дать объяснения (ст. 63 у. п. к.) и свободно формировать их содержание (ст. 157 § 1 у. п. к.). Хотя и обвиняемому не полагается привилегия лгать, то внесение фальшивых объяснений в принципе не подвергается наказанию. Только ложное обвинение другого лица в преступлении, которое не вытекает из необходимости собственной защиты, может подвергаться наказанию.

Согласно польской процедуре, сам факт ареста подсудимого не считается обстоятельством, которое существенно ограничивает свободу высказывания. Для важности допроса не требуется в таком случае присутствия защитника. Однако на практике подсудимый часто мог бы принудить допущение защитника к допросу, если бы внесение объяснений он ставил в зависимость от этого. По мнению автора подсудимому необходимо дать право на то, чтобы при допросе присуствовал защитник. Это было бы полезно также для осуществления правосудия. Являлось бы гарантией добровольного признания, если подсудимый решается на это.

В теории спорным является вопрос, могут ли органы преследования пользоваться обманом с целью получения отягчающих доказательств. В польском законодательстве нет явного запрета делать это. От полученного в результате обмана доказательства необходимо отказаться только тогда, когда обман был связан с действием, запрещенным законом, например, с применением угрозы или телефонного подслушивания без разрешения суда или прокурора.

Согласно ст. 157 § 2 у. п. к., не могут являться доказательством объяснения, показания или заявления, данные в условиях исключающих возможность свободного высказывания. Под такими условиями понимается причинение физической боли во время допроса, применение угрозы, гипноза, наркотических средств или же использование усталости допрашиваемого лица. Зато нет единогласия относительно того, возможно ли применение вариографа.

Не каждое нарушение законодательства при получении доказательства ведет к его дисквалификации. Польские суды не проявляют склонности к оправдыванию подсудимых из-за отсутствия доказательств виновности, если эти доказательства на самом деле существуют, но при их представлении было допущено небольшое нарушение процессуальных норм. По таким же причинам не применяется доктрина „запретного плода" (*fruit of the poisonous tree*).