Expertise as Evidence in Criminal Procedure

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Abstract: Expert evidence is one of the evidences through which with the use of expert knowledge, various facts, that are important for decision, are established. It involves the preparation of expert finding and opinion based on application of scientific methods, technical advances, expert knowledge and experience in the areas defined in all cases determined by law, or request of an interested party-orderer. With the adoption of the new Law on Criminal procedure, procedural parties have changed roles and authorizations and that determines the essential reform of the system of evidences, including expertise. Changes of this evidence are in direction of implementation of the standards established by Article 6 of the European Convention on Human Rights and Freedoms in Strasbourg, especially equality of arms of procedural parties. For this purpose, there was introduced a new institute- technical experts, which the public prosecutor and the accused and his counsel are hiring them when they need professional help in particular area. Both parties can appoint technical experts, which means that they aren’t reserved only for the defense, but for the prosecution as well, which choses in what form will provide expert opinion.

Keywords: evidences, order, expert opinion, alternative expert opinion, equality, violation.

1. Introduction

As evidence, expertise was defined as an expert activity of the expert witness, that is performed according the rules of appropriate specialties according the regulations of the Law on criminal procedure, on whose foundations the expert witness gives an expert finding and opinion on important facts and circumstances whose clarification and determination are entrusted to him by the court or other competent authority. Previously, expertise as a procedural action was undertaken with a written order by the court, as a body which conducts the procedure, that independently and at its own discretion was bringing a decision whether there was a need for expertise, and in the order were not specified the facts for which the expert testimony was made. As a process activity, the expert testimony was determined at all the stages of the procedure, from the investigation as a previous procedure to the procedure of legal remedies. The results of the performed expertise were presented by the expert witness through preparing a report which consisted two parts, finding and opinion.

With the enactment of the new Law on criminal procedure, amendments are made regarding this means of evidence, so that in the Law it is specified that it is determined with a written order by the public prosecutor during the previous procedure, and at the main hearing by the court, in which order it is stated for which facts the expert testimony is performed and to whom it is entrusted. In aim the Law to enable the participants in the criminal procedure relative equality in the proceeding, it is planned a new institute to be introduced – technical experts, who are professional people from the register of expert witnesses that the public prosecutor and the accused and his defense counsel are hiring them when during the procedure they need an expert help at a certain field.

2. General characteristics of the expertise as evidence

Expertise is one of the evidences through which with application of an expert knowledge different facts which are important for making a decision are determined. Traces that are taken on the spot (locus delicti) can be subject of an expertise, facts related with the moment of perpetration of the criminal offense (tempore criminis), as well as facts that can appear during the criminal procedure (perprocedendi), and which are very often related with the psychological i.e. the state of mental health in which the accused can fall. Also subject of an expertise can be objects, substances, as well as writings, but the expertise can also relate to a certain psychosomatic conditions of the accused, as well as to the injuries i.e. the consequences that because of the criminal act has suffered the damaged i.e. the victim.

The expertise consists two parts: finding and opinion. Finding is direct sensually perception of the facts by the expert witness, i.e. everything that he has ascertained in the review of the subject of the expertise. Opinion is a conclusion that arises from
what is found, concluded to the subject of the expertise, brought at the base of the rules of a certain scientific discipline, skill, profession e.t.c.

Actually the expertise is performed by expert witnesses enrolled at the register of expert witnesses. The expert witness was, and still is defined as an impartial person who has a certain expert knowledge, and because of that the court appoints him to help it during determination of important facts at the criminal procedure, which determination is required beyond legal expert knowledge. The duty of the expert witness covers two obligations and they are: to prepare finding and opinion in the period determined in the order and to answer the summons for the main hearing.

As we have mentioned, the expert testimony is determined with a written order, which order during the previous procedure is brought by the public prosecutor, and at the main hearing by the court, and it is stated in it for which facts the expert examination is performed and to whom it is entrusted. An exception of this is the possibility of the court at the main hearing to determine super expert testimony. According the Law on criminal procedure super expert testimony is determined at a proposal by the parties or ex officio, but only for elimination of the inconsistencies in the findings and opinions by expert or professional people. Super expertise is determined by the court through electronic way with a random selection from the register of expert witnesses, in the presence of the prosecutor and the counsel.

2.1. A procedure of an expertise

The expertise is managed by the body that ordered the expertise, i.e. the public prosecutor that enacts an order during the previous procedure, or the court that enact an order at the main hearing. Before the main hearing starts, the expert witness will be called to review the subject of the expertise carefully, precisely to specify everything that he will notice and find, and to give his opinion impartially and in accordance with the rules of the science or the skill. He will be especially warned that giving a false statement is a criminal offense. The expertise starts in a way that the body that conducts the procedure shows the expert witness the items that should be reviewed, asks him questions that he has to answer and if required, asks for an explanation regarding the given finding and the given opinion. The expert witness can be given explanations, and he can be allowed to review the acts. The expert witness also can propose proofs to be collected, items and data that are of an importance for giving finding and opinion.

According the Law on criminal procedure, the expert witness is obliged to give a report to the body that has ordered the expert testimony, which consists:

Proofs that he has reviewed, conducted tests, finding and opinion which he has found, all the other relevant data that the expert witness thinks are needed for fair and objective analysis and an explanation of the given opinion.

For the expertise, minutes shall be made or a written finding and opinion, in which are put data about that who has performed the expert testimony, the license number of the expert witness and the area for which the license is issued to him, that arises from the changes of Law on expertise. After the expertise finishes, the body that has ordered it, will inform the parties and the defense counsel if they have been present, that the expertise is performed and that they can review the written finding and opinion i.e minutes. At an order by the body that conducts the procedure, the expertise can be given back to the same expert witnesses for removing of the identified deficiencies, if the finding and the opinion are unclear, incomplete or they are in contradiction with themselves.

3. Term of a technical expert and his role in the expertise

The new Law on criminal procedure provides an introduction of a new institute – technical experts, which are professional people from the register of the expert witnesses that are engaged by the public prosecutor and his defense counsel when during the procedure they need a professional help from a certain field. Their role is at a request by the parties to attend the expertise and to give the expert witnesses proposals, or to make remarks regarding the expertise that are entered into the report.

The number of the expert witnesses that are appointed by the public prosecutor and the defendant and his defense counsel, in order to help them in collecting data for professional issues or contestation of the expertise, can not be more than two people. A person who can not be an expert witness, can not be appointed for technical expert.

The Law on criminal procedure provides that the defendant and his defense counsel have a possibility to use help by a technical expert even in the cases when they do not have sufficient funds that would enable them to hire a technical expert. Using of this institution is necessarily linked with material expenses, and for that is provided a possibility hiring of the technical expert to be at the expense of the Budget of The Republic of Macedonia, mostly connecting it with fulfilling the conditions provided for realization of the requirement for defense of the poor.

The both parties can appoint a technical expert, the public prosecutor and the defendant and his defense counsel. Moreover, it is the prosecution makes a decision in which form will provide a professional finding and opinion, through an order
for an expertise, or through appointing of a technical expert. So it appears that the technical expert of one party will be for denying or reducing of the probative force of the finding and opinion that has been given by the technical expert of the opposite side, which means that the understanding that the expertise is reserved only for the prosecution and technical experts only for the defense is completely wrong. It occurs as a problem the hiring of the technical expert by the defense, not only from a financial aspect. In the judicial practice a problem appears connected with the hiring of a technical expert that has to testify contrary from what there is an expertise by an expert witness. Namely, the practical application of this order is brought into question in the cases when the defense can not hire a technical expert who would dispute the expertise to his colleague (of collegiality or similar) and with that a criminal responsibility could be given to the expert witness, in the cases when the expertise is performed contrary to the rules of expertise.

4. Expertise and the equality of arms

The principle of equality of arms is an excellent starting point to determine whether the trial has been really fair. It is closely connected with the right of contradictory procedure. The principle of equality of arms is extremely important because it implies adherence to the rights of the defense and to the need for contradictory hearing. The European court for human rights reminds that proofs must be performed in public through contradictory hearing. The practice of the European court for human rights in Strasburg is rich in regard to the violation of the equality of arms, when this concerns the expert witnesses and the expert testimonies, their determination, permitting and examination, i.e. their participation in the procedure. The most common reason for violation of the principle of equality of arms is contained in the following right: everybody who is a party of a criminal procedure will have an equal possibility to present his arguments under conditions that do not place him in disadvantage vis-à-vis opposite party. Also, violation of an equality of arms is considered to have in those procedures in which there is an unequal access to proofs, documents and similar.

Also, inequality is determined in regard to the right to submit proofs and hiring expert witnesses. According the Court, the equality of arms is not respected in the cases when the request of the defendant is refused for presenting an alternative professional opinion. Considering that the defendant was not given possibility to deny the opinion of the expert witness that has been presented as a proof by the public prosecutor, the Court has estimated that the defendant has been deprived of the possibility to present arguments in his own defense under the same conditions as the prosecution. This is especially important for our criminal procedure, especially because with the changes in our law, technical experts are introduced, which opens many questions for the equal approach.

The right for fair trial is implemented in our criminal procedure and it is one of the basic values to the system of criminal justice. This right is absolute and can not be limited on any legal basis. It’s essence consists fair and public trial in front of an independent and impartial court by guaranteeing of all minimal rights of the defendant. One of those minimal rights is the right of equality of arms between the parties, the public prosecutor and the defense. In our Law of criminal procedure is provided that the defense has the same rights and duties as the prosecution, except those rights that belong to the public prosecutor as a state body.

Macedonian judicial practice develops and upgrades with judgments that today are an important part of the judicial practice and are used as a reference judgments in many procedures and against other countries that have ratified the European Convention for human rights. It is already noticeable that Macedonian subjects from year to year become an important part of the evolutionary nature of the Convention as alive instrument. From Macedonian judicial practice the most notably is the judgment Stojmenov versus Republic of Macedonia, which judgment actually was a call for waking up, both for the legislator and for the academic public, in which the court ruled that Macedonian court, has used an expertise in a way that is contrary to the basic requirements of article 6 of the European convention for human rights and freedoms, while not fulfilling the requirements of the standard of equality of the parties.

5. Conclusion

The expertise as evidence for a long time was one of the most constant institutions in our criminal law. With the enactment of the new Law on criminal procedure, especially with the introduction of the institution technical experts, efforts were made to allow at least some equality of arms of the process parties at the proceedings. Judicial practice of the European court for human rights with its practice shows many variations of violation of the right of equality of arms. During the expertise in the criminal procedure are not respected the standards that are established with the article 6 of the European convention for human rights and freedoms and the appropriate judicial practice of the Court for human rights in Strasburg, and especially for equality of arms of the process parties. The court has found a violation of article 6 of the European convention for human rights and freedoms in regard to the expertise, in the sense that the sentence was brought
at the base of expert witness opinion enclosed by the prosecution, and the defense was not given possibility to hire a technical expert, the defense was not given possibility to make an insight at the writings of the subject and at that base to make qualitative expert testimony and similar.

To make it possible for the parties at relatively equal way to be able to prove their assertions a new Law on criminal procedure was brought with which Law, the procedure got partisan physiognomy, and efforts were made complete integration to be achieved of the principle of contradiction and procedural fairness. In a contradictory procedure it must be made possible for the defense to present an alternative argument in a kind of technical or professional proof, regardless whether with that action will deny the facts or will offer another version of the events. The defense can submit an alternative professional opinion in a form of expertise prepared by an expert witness who is hired by the defense as a technical expert. The court must not neither announce such proof as unlawful nor to prevent its performing as a proof, guided by the fact that for its preparing there was not previous written order by the body that conducts the procedure.

6. References


