The Importance Of Expertise As An Evidence And Its Triangulation With Other Evidences

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Abstract

The right to initiate court action and conduct legal proceedings aims to resolve a dispute and put the parties on equal terms in regards to proving their claims. If we refer to the phrase "due legal process", provided by Article 6 of the ECHR, it is the prosecuting body that has the responsibility to prove different facts or versions in support of the injured party or the suspected perpetrator of a criminal offense, and the prosecuting body shall also prove, in each case, the sustainability of the versions raised during the investigation or not.

One of the evidences obtained during the investigation or trial is the expertise, which holds a special role and importance in the process. It is an indicator of the full investment of the judiciary body to conduct a fair and impartial adjudication in the context when the trial panel or the prosecuting body can not take a stand based only on their professional background or internal conviction, and therefore, they summon subjects with special knowledge in a certain field, to clarify such circumstances of special nature.

1. Introduction

The summoning of the expert in the process, both during the investigation and the trial, aims to provide an opinion, or, otherwise, it can be referred to as "p*rediction*", on the matter under investigation or object to the trial. It is referred as a prediction because it constitutes an important evidence, almost crucial, in the trial process.

Its importance comes from the authenticity that this evidence holds, considering its special technical, scientific or cultural nature, as well as the legal liability of the expert in case of false expertise. Thus, established within this framework of a special nature and characterized by legal liability, the expertise constitutes an important piece of evidence in the investigation or trial.

The specific types of expertise make us understand the variety of situations that the judiciary may face and the legal nature that each situation of everyday life bears in itself. Each expertise is different from the other because the nature of the expertise dictates the procedure to be followed and the general norms upon which it should be developed.

Adherence to the proper procedure in its performance and the observance of legal provisions and other norms, avoids the possibilities for invalidity or incapacity of the expertise as evidence.

Compliance with the provisions is also important for the expert who performs the examination, because, in order to have a usable and valid evidence in the trial process, the expert should not be in conditions of non-compliance or exclusion. Such cases are foreseen in Criminal Procedure Code of the Republic of Albania for the position of the j*udge*, as well. This means that an expertise performed by an expert in the conditions of non-compliance, makes this expertise invalid because there are doubts on its impartiality in giving the opinion, and its incapacity to be used, because during the establishment of this evidence, an important procedural provision has not been observed concerning the subject who has performed the expertise.

"44. Admittedly, the fact that Mr Bandion was a member of the staff of the Agricultural Institute which had set in motion the prosecution may have given rise to apprehensions on the part of Mr Brandstetter. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified … Such an objective justification is lacking here: in the Court's opinion, the fact that an expert is employed by the same institute or laboratory as the expert on whose opinion the indictment is based, does not in itself justify fears that he will be unable to act with proper neutrality. To hold otherwise would in many cases place unacceptable limits on the possibility for courts to obtain expert advice. The Court notes, moreover, that it does not appear from the file that the defence raised any objection, either at the first hearing of 4 October 1983 when the District Court appointed Mr Bandion, or at the second hearing of 22 November 1983 when Mr Bandion made an oral statement and was asked to draw up a report; it was not until 14 February 1984, after Mr Bandion had filed his report, which was unfavourable to Mr Brandstetter, that the latter's lawyer criticised the expert for his close links with the Agricultural Institute …"[1]

[1] Case Brandstetter v. Austria, 11170/84, 12876/87 and 13468/ 87, 28 August 1991

The evidences collected during an investigation or trial may be unrelated, completely independent of other evidence, or closely related to each other. The expertise is one of those evidences that in most of its types, is closely related to other evidences, and this is stipulated in provision 183 of the Criminal Procedure Code and Article 227, points 4 and 6 of the Civil Procedure Code, where the expert is given the possibility and the right to get acquainted with the acts and circumstances and also, to ask the subjects involved in the process on more details compared to what is provided in the available acts, and that is not all. In special cases, when:

- The object of the expertise is an item which can be destroyed or lost, this does not stop the expertise from being performed. Expertise is given priority over the conservation of the item.
- In order to carry out the expert examination, an inspection must be made. Third parties are *ordered* to allow the expert to perform the assigned task.
- When, according to the court decision for performing the expertise, it is necessary for the expert to be acquainted with items, evidence, accounts and other documents, the parties may be present and may submit to the expert, in writing, the opinions and remarks of their specialists, who may be interrogated in the capacity of witnesses, or requests related to the execution of the task. Therefore, in a sense, the expert gets the necessary assistance or readiness to perform the expertise.

2. The importance of expertise in investigation or trial

As the Albanian legislation stipulates, expertise as evidence is required at key moments in the process, when the investigation and trial encounter a situation which cannot be clarified or dealt with by the trial panel or the parties in the trial process cannot express an opinion on this situation, nor can it be left uninvestigated by the prosecuting body during the investigation, as this would be an incomplete investigation, where circumstances are left ambiguous. This is why the expert is summoned and through an expertise, he reaches a conclusion and it is exactly this conclusion, in its findings and all its content that constitutes evidence. Therefore, when we use the term "Expertise" as evidence, we refer to the "Act of Expertise".

Regarding the criminal process, there have existed and exist various criminal procedural systems at different times and in different places, in harmony with the society where they have been applied (mainly, the inquisitorial, accusatory and the mixed systems are more well-known), in which the ideology of "proving" and "the truth" is not the same. [2]

[2] Tonini, P. "Manuale di Procedura Penale" Milan 2018, Edition 19, p. 4

In medieval times the procedural system which gave the judge the power to initiate *ex officio* the criminal prosecution for criminal offenses committed, as well as the power to collect evidence, was called "inquisitorial" system. Whilst, the procedural system in which the initiation, conduct of the trial process and collection of evidence was in the hands of the accusing party, while the accused party enjoyed the respective rights in compliance with the principle of adversarial proceedings, was called "the accusatory" system. Thus, the judge had the right to decide only based on what had been brought by the parties as evidence.

Today, in substance, the same concepts exist, even though, in different justice systems, mixed types are applied and each country, according to its legislation, can "chose" the best features or characteristics of each of the systems, without having to strictly follow only one type or another. The latter constitutes the mixed procedural system or type. Just as procedural rules changed, so did "*proving*".

In the inquisitorial system all procedural functions were grouped in one single subject, i.e. the inquisitorial judge, be it a single judge or a collegial trial panel[3], who enjoyed entirely the right / duty to find and obtain evidence, not to mention their evaluation[4], thus, the lack of procedural activity of other subjects was noticed from the initiation of the process. The inquisitorial judge can start the proceedings even without a charge filed from someone, unlike in the accusatory system, where the accusing party conducts preliminary investigations, establishes a base of evidences relating to the filed charge and afterwards, the case is referred to the court. Thus, the power of the inquisitorial judge included the investigation phase and establishment of evidence in trial[5].

In this system, there is no preliminary investigation phase, so the characteristics of this procedural method apply only during the trial phase and the criminal proceeding consists of one phase. Having such power, it is hard to believe that procedural guarantees existed, or that the rights of the defendant have been exercised in the proceedings and, consequently, neither has benen the right to a due process.

There was a risk in conducting the expertise in the inquisitorial system: The expert did not have to justify the outcome reached by him. This is because of the "science" behind the expertise. Hence, we can state that the term "scientific evidence" was misused.

There was no limit to the admissibility of the evidence[6]. This means that in this process, neither party can doubt or question the regularity of obtaining the evidence, its validity or usability. What the inquisitorial judge intends through the trial is to reach a decision, but the method that is applied does not matter. This

[3] Tonini, P. "Manuale di Procedura Penale" Milan 2018, Edition 19, p. 6
[4] Donato,F. "CRIMINALISTICA FORENSE" Milan 2013, p. 12
[5] Ibidem
[6] Tonini, P. "Manuale di ProceduraPenale" Milan 2018, Edition 19, p. 7

includes the expert examination, in cases when the judge decides to admit it as evidence.

Only the court had the right to order an expertise and the parties did not enjoy the right to raise questions. Not to forget that the expertise is one of those evidences for which the oath of truth is made, and under the guise of the oath of truth, the expertise in the inquisitorial system was performed "secretly".

There is no doubt that the result will be in line with the predetermination of the decision to be taken and that it constitutes the so-called "voice of reason"[7] (here, we recall the political will behind the inquisitorial judge stand, as it was mainly applied as a procedural paradigm in totalitarian political systems) and also, the way of performing the expertise does not adhere to the norms of a due process, neither does it respect human rights. What proves this is the fact that the court could not take the expertise into account without providing any reasoning, and thus, it overturned an evidence which might have been in the interest of the parties in trial.

Hence, if we consider the "Expert examination" as evidence during this inquisitorial system, we realize that it did not enjoy this special and authentic nature that it should have enjoyed, but it was an evidence equal to other evidence, that could easily be tried and overturned.

In the accusatory system, the expertise shall respect a set of rules for the execution and presentation of the conclusion reached, in order to constitute valid and admissible evidence in the trial. In this system, the power to search, collect and evaluate evidence is not concentrated on a single subject, but the parties have the right to request it in certain procedural moments and under certain conditions.

It is not uncommon in this procedural system that the expertise constitutes an evidence and its conclusions have a huge weight on the process of decision-making and evaluation by the judiciary bodies. It constitutes the missing element of evidence in determining the guilt, in determining the pertinence of right, or in clarifying other key circumstances that serve to one or the other party intrial.

This also happens in the civil process. When special circumstances are explained by the expert and the Court is served a scientific, technical or cultural opinion relevant to the occurrence, the Court, after assessing its veracity, adds it to the other evidence under consideration and continues the trial on the basis of clear circumstances.

"*By using the expertise as evidence, the truth is revealed and based on it, a fair decision is given, which observes and applies the rights of the parties. Therefore, we can say that, seen in a broad sense, the expertise contributes to the detection of perpetrators of criminal offenses by punishing them or even by preventing other criminal offenses in criminal matters, by protecting life, health*[8] and any another

[7] Ibidem

[8] "Tribunë Juridike" Magazine, No.49 (4) Year 2004, V.,Luan, "Ekspertimi kriminalistik në mbrojtje të lirive dhe të drejtave të njeriut", p.57

right or freedom at the conter of the criminal proceeding, or the termination of conflicts and disputes in a civil process, if we adhere to the principle of "Truth is the same for all".

Nevertheless, it is also important to conduct an effective and timely investigation, which is part of the right "For a due legal process ". According to the Jurisprudence of the European Court of Human Rights, regarding the right to life, provided by Article 2 of the ECHR, "*The court noted that the defendant State had violated its obligation to protect the lives of children under its care and had failed to conduct an effective investigation. Therefore, the Court held that there had been a violation of Article 2 of the Convention*"[9].

In this case, the expertise affects *the effective investigation* that should be carried out by the prosecuting body, in the sense that the investigation shall not be formal, but the aim of the prosecuting body shall be focused on discovering the truth through any possible evidence. By *Effective investigation* it is understood the fact that, if the procedure is observed, the material law in substance is always achieved. Therefore, the proceeding body should not be sufficient only with the fact that it has taken the decision to execute the expert examination, but should appoint the expert, assign him clear and concrete tasks, be aware of its development within the deadlines and evaluate it.

3. Triangulation of the expertise with other evidence. Practical aspects

The Criminal Code of the Republic of Albania, in Article 309, provides for the criminal offense of false expertise, which explicitly states "*Intentionally presenting false findings in a written or oral examination report, before the criminal prosecution bodies or the court, is punishable by a fine or imprisonment of up to three years. When the false expertise is done for profit or any other interest granted or promised, it is punishable by a fine or up to five years of imprisonment*".

Furthermore, Civil Procedure Code stipulates that: *The opinion of the expert is not binding on the court and, in cases when it has a dissenting opinion with the expert, it must justify this opinion in detail in the final decision or in a decision rendered during the trial*[10].

The expertise has a greater credibility in itself as evidence compared to other evidences, as its credibility is guaranteed by several known scientific, technical or cultural basis, if not by the masses, it is known by the specialists of the field. Even so, these provisions shed light on the fact that the expertise is evaluable, in terms of the *veracity* and *validity* of the finding.

[9] B., Ledi, K., Odeta, "Jurispudenca e Gjykatës së Strasburgut", IV Edition, Tirana 2017, p. 127

[10] Article 224/b of Civil Procedure Code

This means that the Court, to some extent, is above the expert in terms of ascertainments, although this area continues to have a certain specificity.

By evaluation of the veracity of the act of expertise, it is implied the evaluation of the existence and legality that describes the expertise process, from the evidence taken in consideration, to the tactics and methods used for the expertise, reasoning and logical relevance of the findings, to the conclusions drawn. When these evidence or processes are non-existent or illegal, we can state that we are dealing with false expertise. Based on the interpretation of the provision, it is clear that the subject who commits this criminal offense is the expert himself.

While the Civil Procedure Code provides for the fact that the Expertise may not be considered as evidence by the Court, however, this must be justified in the final decision or in another decision during the trial.

This seems to contradict what was said above on the importance of the expertise, but, in fact, it is exactly the special evaluation made to the expertise compared to the other evidence, as it is one of the evidence, whose rejection must be reasoned by the Court, since the provision determines the "peculiarity" i.e. the details with which the Court shall express their stand, in the decision.

What is actually implied by the Albanian legislation on these provisions is the fact that the Expertise as evidence, even though executed by a special subject who has special knowledge, must be evaluated. But, how can this be done when the Court has summoned the expert or experts in the process precisely because of their lack of such knowledge? A practical aspect of how expert evaluation can be done, is through *triangulation* of evidence.

The triangulation of evidence refers to the evaluation of evidence against each other in a triangular paradigm, by creating a closed cycle, where the truth and conclusion are evaluated in each of the evidence, including the performed expertise, and when this consistency is not achieved, then we can state that we are dealing with deviation or the creation of a new circumstance which leads to disconnection in this process. Thus, this disconnection means that the evidences are not well connected with each other and they are not adhering to the contexts.

More specifically, if we refer to the auto-technical act of expertise, the expert, in the drafted act, describes the evidence on upon which he was based to perform this expertise, which usually include: minutes of the crime scene inspection, witness statements, photographic materials, other physical evidence found at the crime scene.

This way, the expert has revealed the story based on these evidences. However, it is necessary that he furnishes additional technical details. In a broader context, the mechanism in which the occurrence took place is generally known, but the expert provides a more precise description of the circumstances that occurred, seeing elements that the average mind and eye would not see. The auto-technical

expert estimates the speed by accurate calculations, relying on the traces of brakes, which is something that not everyone can do. An average mind and an average estimation would only state whether it was fast or not, but only the expert can estimate how fast it actually was.

Therefore, it is understood in general terms what has happened, but certain details, which affect the establishment of responsibility or the determining cause, can only be affirmed by the expert and the act of expertise in criminal proceedings where there is damage and this act of expertise is always taken into consideration because it concerns the objective aspect of the commission of the criminal offense and the responsibility of the perpetrator, and the cause-and-effect relationship between the actions of the driver of the vehicle and the caused consequence.

Hence, we can say that the expertise is about converting simple evidence into concrete and hard evidence, and it is based on these types of evidences that the expertise is built upon, and it is on the basis of the same evidence, as well, that the expertise can be overturned and often, the defense lawyers of the parties in trial work this way, in order to protect the interests of their party.

What should be noted is that "When the expertise presents affirmations which do not have a logical flow or when the combination of evidence established by the expert does not match the evidence taken as a basis, we can say that the expertise is not clear, accurate or true."

This discrepancy leads to three possible scenarios: a new re-examination; the Court does not take the expertise into account; or, in addition to holding the above stand, a criminal report for "False expertise" may be filed against the expert.

The evaluation of the evidence in trial by the parties and by the Court shows that all parties involved in the Process interact in order to follow a due legal process and to avoid impartiality and the creation of circumstances that could potentially favor of one party or the other. Thus, there is no ground for abuse of rights.

"66. Having analysed all the material submitted to it, the Court considers that neither at the pre-trial stage nor during the trial was the applicant given the opportunity to question the experts, whose opinions contained certain discrepancies, in order to subject their credibility to scrutiny or cast any doubt on their conclusions. Relying on its case-law on the subject, the Court concludes that in the instant case the refusal to entertain the applicant's request to have the experts examined in open court failed to meet the requirements of Article 6 §1 of the Convention"[11]

Thus, the evaluation that the parties themselves make to the act of expertise, according to the system of evidence triangulation, constitutes in itself an element of the right for a due legal process and the non-observance of this procedural right constitutes a violation of the right provided by Article 6 of the ECHR.

[11] Case Balsyte-Lideikiene v. Lithuania, 72596/01, 4 November 2008

Conclusions

The expertise constitutes an important evidence in investigation or trial, as it is developed based on knowledge of a special nature and legal liabilities which guarantee the veracity of its finding.

In different procedural systems, the expertise has not had the same value and specificity. In the inquisitorial system, it was almost equal to the other evidence, except for the oath of the expert, which distinguished it from the rest.

The expertise, even though it is different from other evidence, remains a valuable evidence by the court.

The court and the defense lawyer in trial, evaluate the expertise by comparing the findings from each of the evidence, or otherwise, by performing the "triangulation of evidence".

The whole process of conducting the expertise, from the decision to appoint the expert until the issuance of the finding and its evaluation by the Court and the parties, shall be in accordance with the standards of Article 6 of the ECHR.

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