Forensic and procedural aspects of the use as evidence of information obtained by law enforcement authorities before the date of the decision to charge the suspect

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Abstract

The purpose of this article is to attempt to assess the possibility of using as evidence in a criminal trial information obtained by law enforcement authorities prior to the date of issuing a decision to charge a suspect, usually taking the form of a hearing or interview. The author's field of interest, therefore, includes activities having the character of pre-trial actions, for which the law does not provide for a number of guarantees for the accused, such as the right to remain silent, the absence of any obligation to provide evidence to his or her detriment (nemo se ipsum accusare tenetur) or the participation of the defence counsel in the interrogation of the suspect, whose presence is aimed, within the limits of the applicable law, at adopting the appropriate tactics that are the best from the point of view of the interests of the suspect and not of the law enforcement authorities. The author, in analysing the views of the doctrine and case law, strongly advocates the prohibition of the use of such information as evidence in criminal proceedings.

Keywords: forensic tactics, evidence, criminal proceedings, questioning, interrogation of suspect, participation of defence counsel in questioning

Introduction

The journal Problemy Kryminalistyki (299 (1)) published an interesting article by M. Witewska (Witewska, 2018) on cognitive interrogation (interview), in which the author addresses issues related to this procedural and forensic activity concerning essentially the witness, indicating only in passing that it may concern the suspect (accused). In a broader sense, the issue of the use as evidence of information obtained by the investigating authorities prior to the date of the decision to charge the suspect and the subsequent questioning as a witness of the person who participated in this extra-procedural hearing appears to be important from the point of view of both the forensic tactics adopted by the investigating authorities and the rights of the suspect: the right to remain silent and the absence of an obligation on his or her part to provide evidence to his or her detriment (nemo se ipsum accusare tenetur). This informal hearing, known in practice as ‚questioning', and its procedural recording can be very important for the future fate of the entire criminal proceedings, and in particular when the suspect does not admit guilt and refuses to give an explanation, or gives an explanation whose content contradicts the findings of the investigating authorities. The information thus obtained can then provide evidence of guilt and perpetration. It is therefore worth taking a closer look at this informal hearing, not least because it is the practice of the pre-trial authorities, especially the police, to make increasing use of methods aimed at obtaining from the future suspect all the information about the circumstances of the incident, and the formal transition from the in rem to the ad personam phase is the moment when the suspect acquires a number of rights, including in particular the right to refuse to provide explanations and the right to be assisted by a defence counsel and to the counsel's presence during the interrogation. The possibility of obtaining relevant information prior to the date of interrogation as a suspect therefore provides an attractive impetus to get such information, especially when valuable information for

the further conduct of the case can be provided by the future suspect in particular. The analysis of the indicated issues should be based on the statements of representatives of the doctrine and the position of the judicature.

The forensic and procedural aspects of obtaining procedural statements from a suspect

At the outset, as it were, it is worth noting the importance of questioning a suspect as both a procedural and a forensic act. In accordance with the wording of Article 175 (1) of the Code of Criminal Procedure, a suspect has the right to provide explanations, but may, without giving reasons, refuse to answer individual questions and refuse to provide explanations, and he or she must be advised about this right. The primary purpose of interrogating a suspect is to obtain as complete and truthful information as possible about the course of a particular event, the role the suspect played in it, as well as the circumstances of the event and its aftermath and other facts, phenomena and persons relevant to the case. The interrogation of a suspect should more or less serve the purpose of getting answers to the ‚seven golden questions' (Hanausek, 2005). According to H. Gross, the interrogation of a suspect is the most difficult investigative activity and is the touchstone of the investigating judge's work. On the other hand, directly requiring the suspect to confess and describe his or her despicable act in a few words is somewhat cruel and, from a psychological point of view, incorrect. Those interrogated, even after confessing, avoid certain words that describe their act. They change words such as 'stole' or ‚killed' to other words - with a milder meaning and in a sense justifying their action. If it is so difficult for these people to pronounce such a word, it is even more difficult to tell the whole story. For these reasons, it is necessary to ‚prepare the way' for them, to facilitate their confession (Gros,1908). The way this ‚preparation of the way' should be done, as indicated in forensic science, is both by permissible persuasion and by paying special attention to the person of the suspect, by careful preparation of the interrogation and by asking questions appropriately chosen according to the suspect's intellectual level and degree of mental development (Gutekunst, 1974, Widacki, 2018, Jagiełło, 2019). Persuasion by law enforcement officers before the formal commencement of the interrogation can also be a means of achieving the desired result, the ‚fruit' of which is the submission of previously prepared explanations by the suspect, and a outcome of which is the official note confirming the fact of the interview with the suspect, indicating the circumstances of the interview and the content of the statements of those involved in the questioning.

Interrogation of a suspect in accordance with Article 143 (1) (2) of the Code of Criminal Procedure requires a report to be made, and the explanations and statements of certain circumstances by the authority conducting the proceedings are included in the report as accurately as possible, as required by Article 148 (2) of the Code of Criminal Procedure. While the report is not a stenographic record of everything that was said during the activity, it should be a faithful reflection of the content of these statements. By definition, it should use the terms used by the person making a statement and not legal language (Grzegorczyk, Tylman, 2011). Each report should therefore reflect the actual course of the reported activity, as the provision of Article 148 (2) of the Code of Criminal Procedure stipulates the requirement that, among other things, the explanations or testimonies of the persons being interrogated should be included in the report as accurately as possible, and as far as possible with the linguistic form used by the person providing the explanations (testimony, statements). This is important in order to control the fairness of the interrogation. Meanwhile, the activity of extra-procedural hearing or questioning of a suspect before his or her formal interrogation in the light of Article 143 § w in fine of the Code of Criminal Procedure goes beyond these limits, since it does not require drafting a report and may only be recorded in an official note made exclusively by a law enforcement officer. Such a document does not have important features of a report that prove its credibility - it deprives the persons taking part in this activity of the right to include in the report, with full accuracy, everything concerning their rights and interests, and the right to request the reading of excerpts of their statements included in the report - pursuant to Article 148 (2 and 4) of the Code of Criminal Procedure. Thus, a significant circumvention of the guarantee norm expressed in Article 175 (1) of the Code of Criminal Procedure is an attempt to collect from the suspect, before charging him or her and instructing him or her on his or her procedural rights, as much relevant information as possible on the circumstances of the event and to 'encase' his or her future explanations with statements of the persons who conduct this informal hearing, recording their content in an official note, and possibly with subsequent testimonies.

In undertaking such activities, investigative authority officers perform tasks in the area of forensic tactics in the segment responsible for investigating crimes. It is a type of activity, which includes the issue of the ways and principles of planned and purposeful conduct during the investigation of crimes. It can, in this view, be seen as a system of norms of conduct aimed at detecting a crime and discovering and apprehending the perpetrator. It also constitutes the scope of the theory of forensic science, which creates a system of rules for the most effective conduct of individual procedural and operational-investigative activities and the rules for the use of scientific and technical means in their course (Gutekunst, 1974).

This segment of forensic activities is furthermore the realisation of the principle of combat organisation, dealing with the planning of forensic activities in the course of combating crime, which takes place under conditions of negative cooperation between the criminal and law enforcement authorities. Those carrying out activities in the sphere of forensic tactics are obliged to organise their activities in such a way that they bring the best possible results, and most importantly in the detection of the crimes committed and the detection and apprehension of the perpetrators of these acts (Hanausek, 1994, Pikulski, 1997). Thus, the best effect of a questioning is precisely obtaining from a suspect as much information about

the crime as possible, which he or she might not have given if he or she had been correctly instructed about his or her right to refuse to provide explanations, to refuse to answer questions and, of course, the right to be assisted by an appointed defence counsel. The task of a questioning is also for the suspect to indicate the place where the crime was committed, the tools used in the course of the crime, material evidence associated with the act, and a number of other important circumstances that are intended to later confirm the validity of the charge and the subsequent indictment.

In their efforts to achieve the fundamental objective of the process, which is to decide on its subject matter, the procedural authorities - including at the pre-trial stage - must seek to discover the truth. This is because all decisions that are made in a criminal process must be based on true findings of facts (Cieślak, 1984). There is no dispute that the activity of the investigating authorities attempting to obtain information by means of questioning is aimed at arriving at the truth and obtaining information that can then provide evidence of the suspect's guilt and perpetration. This interesting field of consideration, however, should include the procedural aspect of forensic tactics, as aptly emphasised by W. Daszkiewicz, who points to the strong connection between forensic tactics and criminal procedural law, whether understood narrowly - as one of the equivalent branches of forensic science - or broadly - as an overarching concept expressing a scope that also includes forensic technology. Due to forensic tactics, the relationship between forensic science and criminal procedural law is not limited to the set of norms conventionally called the 'law of evidence'; it is much broader and also includes norms concerning the conduct of proceedings. It is in this aspect that there is a close and inseparable relationship between tactics (and of course forensic technology), there is a coupling of these elements and together they have an impact on the sphere of evidence but also on procedural guarantees and civil rights (Daszkiewicz, 1985). Thus, procedural criminal law is not only a set of norms for the implementation of substantive criminal law, but also has a guarantee character, as it creates a system of subjective rights for the participants (Daszkiewicz, 1985; Cieślak, 1984). This leads to the conclusion that the question of obtaining and then using as possible evidence of guilt information obtained by law enforcement authorities prior to the date on which the decision to charge a suspect is issued is, firstly, an element of the application of appropriate tactics in the segment responsible for the prosecution of crimes. Secondly, however, it must be assessed from the perspective of a number of procedural rights to which the suspect and later the accused are entitled, without which it is difficult to say at all that the criminal process in a given case had the character of a fair trial, i.e. one that takes into account the existence of the principle of procedural loyalty - a fair trial (Skrętowicz, 2009). In other words, discovering the truth cannot be done at any cost, without respecting the powers granted to the suspect.

This particular right, which is part of the guarantee of fair criminal trial, is the accused's right to remain silent, considered according to the rule nemo se ipsum accusare tenetur and materialised in the content of the provision of Article 74 (1) of the Code of Criminal Procedure. It stipulates that the accused (suspect) is not obliged to prove his or her innocence or to provide evidence to his or her detriment. Correlated with this provision is the norm expressed in Article 174 of the Code of Criminal Procedure, according to which evidence from the explanations provided by the accused or the testimony of a witness may not be substituted by the content of letters, records or official notes. The significance of these two norms lies in the fact that the testimony of a law enforcement officer, provided in relation to the statements of the person questioned, cannot replace the evidence of the accused's explanations (Hofmański, Sadzik, Zgryzek, 2011). This position stems from respect for the accused's right not to actively assist the authorities conducting the process in any way in proving circumstances unfavourable to him or her from the point of view of criminal liability. It also extends to the in rem stage of criminal proceedings against a person who subsequently becomes a suspect and, of course, to the jurisdictional procedure stage. Accepting the opposite view would give the investigating authorities the ability to circumvent this principle by, for example, questioning the prospective suspect as to the course of an incident, making notes or records of this questioning and then introducing this evidence into the proceedings by questioning an officer of the authority about making them, and making factual findings as to guilt on the basis of this testimony. In addition, the passivity of the accused and the right to remain silent provided for in Article 74 (1) of the Code of Criminal Procedure in the situation in question would not be preserved, but would in fact force the accused to actively cooperate with the law enforcement authorities(facere) against himself or herself and would require him or her to explain the course of events subsequently covered in the decision to present charges, the indictment or finally the conviction.

The tactic of investigating crimes by taking steps to obtain information from a suspect as part of questioning is also intended to counteract the tactics adopted by the suspect, who may remain silent and also the tactics of the defence counsel in connection with the interrogation of the suspect, as the norm expressed in Article 301 of the Code of Criminal Procedure, which is important from the point of view of the interests of the suspect, stipulates that at the request of the suspect, the suspect should be questioned with the participation of the appointed defence counsel. An important task of a defence counsel in connection with an interrogation is to ensure that the suspect, in his or her explanations, does not provide the trial authority with incriminating evidence beyond the limits covered by the willingness to cooperate with criminal law enforcement authorities (Zagrodnik, 2020). The tactics of the defence counsel's actions in connection with the interrogation of a suspect also boil down, in particular, to watching over the proper course of the activity - keeping an eye on whether the interrogator uses prohibited methods, preparing the suspect, i.e. consulting on the content of his or her explanations and the manner in which they are to be given, and choosing the right tactics - remaining silent or providing explanations (Girdwoyń, 2004).

One of the fundamental procedural guarantees of a suspect is also the obligation to ensure his or her freedom of

expression. The term implies a state in which the person being interrogated is not subjected to various pressures that do not allow him or her to speak freely (Koper 2022). The consequent use of impermissible forms of influence on the act of will during questioning, in particular in the form of deception taking the almost sacramental form of the statement 'if you confess, we will let you go' creates an obviously false perception of the reality of the prospective suspect. Communicating a factual or legal situation in a manner that is not true bears the hallmark of misrepresentation. The use of deception undoubtedly at least restricts the freedom of decision and therefore the information thus acquired must always be treated in the context of the norm expressed in Article 171 (7) of the Code of Criminal Procedure - i.e., such a statement cannot constitute evidence of guilt (Waltoś, 1975; Jeż - Ludwichowska, 2004). Consequently, the Supreme Court was wrong in expressing the view in which it did not include among the conditions excluding freedom of expression certain behaviour which, although it may affect a person's motivational process, e.g. contribute to the confession of an offence, does not deprive the person of the possibility of choosing the content of the future explanations to be provided. This includes misleading such a person or using prohibited promises.

Views of the judicature

The possibility of using as evidence information obtained by law enforcement authorities prior to the date of issuing a decision to charge a suspect is an issue of great importance in the jurisprudence practice of common courts and the Supreme Court. It would seem that the already well-established jurisprudential practice does not give rise to any major interpretative doubts, and yet one gets the impression that law enforcement officers, unmindful of the clearly formulated evidentiary prohibitions, extremely often take advantage of the possibility to obtain information by questioning, as evidenced by quite a large number of court rulings evaluating such tactics for the investigation of crimes. In addition, one also gets the impression that there has been a certain erosion of views in case law towards giving some possibility to use information obtained in the discussed manner as evidence in a criminal trial. Hence, it is worthwhile to at least synthesise the views of the jurisprudence.

In the case law of the Supreme Court, the view has been expressed that if a participant in an incident has given an 'interview' to a police officer about the circumstances of the incident at a time when no procedural action has yet been taken against him or her, it is inadmissible to take an action of an evidentiary nature in the form of the preparation of the officer's testimony specifying the contents of the ‚interview', and information obtained from a later accused during the ‚interview' cannot constitute evidence against him or her. A similar position emerges from the judgements of Courts of Appeal. The argumentation cited in the earlier part of this publication allows us to assume that this view of the judicature is accurate and correctly assesses the guarantee norm described in the content of Article 74 (1) of the Code of Criminal Procedure.

However, it may be noted that the Supreme Court in one of its decisions departed from the previously established line of case law. Indeed, it stated that the conduct of the so-called questioning may be recorded in the form of an official note (Article 143 (2) of the Code of Criminal Procedure). It is used not only in investigations or prosecutions as one of the steps taken in pre-trial proceedings (Article 297 (1) of the Code of Criminal Procedure), but also prior to its initiation as part of checking activities (Article 307 of the Code of Criminal Procedure). The act of questioning a person who may become a suspect in the future does not violate Article 74 (1) of the Code of Criminal Procedure, as such a person is not under a legal obligation to provide information on any circumstances of the offence at the request of law enforcement authorities. The act of questioning also does not violate Article 175(1) of the Code of Criminal Procedure, as the right to remain silent applies to the person charged with an offence. It follows from the nature of the act of questioning that a person who could potentially become a suspect is under no obligation to provide information, or even, as in the case of a person who subsequently acquires the status of a witness, he or she may make a false statement with impunity. Such a position should be considered wrong, as it clearly leads to the circumvention of the provisions of both Article 74 (1) of the Code of Criminal Procedure. and Article 175 (1) of the Code of Criminal Procedure and allows for a situation in which the content of a suspect ‚s explanations and the strength of his or her rights under these provisions of procedural law, in particular the right to remain silent, would be of no significance, since it is always possible to confront these explanations with the account of officers of investigating authorities, considering that only the moment of issuing the decision on presenting a charge allows the suspect to exercise the right to remain silent. The point is also that, if this decision is correct, the law enforcement authorities may question the prospective suspect for hours or repeatedly, applying unlawful pressure, until he or she makes a statement in line with their expectations and only then issue a decision to charge that person, while the evidentiary value of the subsequent explanations will in any case be considerably weakened if they can be confronted with the statements of the officers involved in the questioning, who draw up an official note. It is also clear that a suspect is not in a position to verify the content of the statement contained in the official note, with the result that the onus will be on the suspect to prove that it contains information that is inconsistent with the statement made by him or her and referred to in the document.

On the other hand, in the field of consideration that interests the author, the legal view expressed by the Court of Appeal in Katowice in its judgement of 21 September 2018 deserves special attention. This is because this court recognised that:

1. In the light of Article 174 of the Code of Criminal Procedure, the official note prepared from the questioning activity cannot replace the evidence of the accused's explanations. Indeed, findings of fact contrary to the accused's explanations cannot be made solely on the basis of the note made. On the other hand, nothing prevents the police

officer who carried out the questioning and made an official note from it from being questioned as a witness. Such evidence is admissible and is assessed in the context of the totality of the evidence gathered. A police officer may be questioned about the course of the conversation he or she had with the accused.

2. It is not prohibited to interview the accused about an incident before questioning him or her, as long as this does not involve the use of physical or mental coercion to compel the accused to confess, nor is it prohibited to give the accused evidence and circumstances that indicate that he or she is the perpetrator.

3. Conducting an questioning activity using interrogation techniques, whereby the suspect is asked multiple questions in different chronological order, in different configurations, in an intense manner, causing that person to become perplexed and nervous, is not tantamount to creating conditions excluding freedom of expression. The same arguments also apply to the assessment of the free expression of the suspect and witnesses. In pre-trial proceedings, particularly at the stage of profiling potential suspects, the nature and character of the activities carried out at that time already implies that they often have to be carried out in an intensive and often unconventional manner. Therefore, if there are no additional elements that would indicate the use of physical or psychological violence against suspects or witnesses, their effects should not be automatically depreciated. It is natural that the person being questioned or interrogated experiences stress, the degree of which depends not only on the behaviour of law enforcement officers. However, stress, even if it is accompanied by nervousness and embarrassment of the person being questioned or interrogated, cannot discredit the importance of the information obtained. Therefore, an assessment of the testimony of police officers in connection with the content of the notes from the questioning of the accused, as well as an assessment of the explanations of the accused provided in pre-trial proceedings, should take into account all the elements accompanying these actions and at the same time refer to the other evidence gathered in the case.

In the case at hand, the accused, who was charged with the offence of murder under Article 148 (1) of the Criminal Code in conjunction with Article 31 (2) of the Criminal Code, was acquitted by the court of first instance. This was based on the recognition that the first explanations of the accused, questioned as a suspect, admitting guilt, were preceded by a conversation with an investigating officer, who allegedly applied the methods and techniques of interrogation learnt on a specialist course, until the suspect provided explanations accepted as true by that officer. In addition, immediately after the suspect was detained, he was questioned twice by police officers, and during this questioning he allegedly confessed to the crime of murder on two occasions, and the officers who prepared the notes from the questioning were subsequently questioned as witnesses and confirmed the suspect's confession. The Court of Appeal, as a result of the public prosecutor's appeal, overruled the judgement under appeal and referred the case back to the court of first instance for re-examination, with the reasoning set out in the written reasons in the thesis.

Without, of course, determining the final outcome of the criminal proceedings against the accused, the ruling raises a very significant controversy. The reasoning cited is manifestly unsound and it is already prima facie apparent that it represents a significant departure from the previous line of case law. The flawed reasoning of the Court of Appeal is based on the following premises: The thesis described in par. I is self-contradictory, because the provision of Article 174 of the Code of Criminal Procedure exists in the legal space because its fundamental aim is to prevent the situation in which the right of the accused to provide explanations may be circumvented by using other evidence, carried out precisely in order to replace it with statements of investigating officers, to the exclusion of procedural guarantees. The Court of Appeal also recognises that facts contrary to the accused's explanations cannot be determined solely on the basis of an official note, but can be made on the basis of the testimony of the witnesses who are the authors of the note. In other words, if this view were correct, the trial authorities would always ‚encase' the content of the accused's explanations with the testimony of the witnesses who questioned him or her before the interrogation and in such a way that he or she confessed and his or her later explanations would no longer be relevant. The second and third theses justify the use of various manipulative techniques of a deceptive nature against a suspect, the use of which, as previously shown, is prohibited because they exclude freedom of expression. It is not disputable that a person being questioned as a suspect is stressed, also as a result of pressure from law enforcement officers, but what is important is that they cannot, using manipulative techniques, e.g. the previously mentioned promise ‚confess then you will leave' - an important thing in a case involving an act under Article 148 (1) of the Criminal Code, but also the ‚nine-step method' developed by American psychologists F.E. Inbau, J.E. Reid and J.P. Buckley, which is designed to unconditionally break down a suspect's resistance and provide an explanation in line with the interrogators' demand (Jagiełło, 2017). A possible official note also does not reflect the actual course of the questioning, since the provision of Article 148 (2) of the Code of Criminal Procedure does not apply and the reliability of the statement recorded therein cannot be reliably examined. The Court of Appeal clearly confuses a legally admissible conversation between an interrogator and a person being interrogated as to the circumstances to be the subject of the interrogation, which may form part of the first, informal stage of the interrogation, referred to as preliminary interrogation, which is indicative and exploratory in nature (Koper 2022), with the replacement of an interrogation by a conversation about the incident, from which the interrogator makes an official note, which is then attached to the case file and which is introduced into the criminal proceedings as evidence as a result of questioning such a person as a witness.

It should also be emphasised that the Court of Appeal completely fails to recognise the fact that the accused had a significantly impaired capacity to understand the meaning of the act and to direct his conduct, which in the light

of Article 79 (1) (3) of the Code of Criminal Procedure gives rise to the existence of a so-called ‚mandatory defence'. In such circumstances, carrying out the described actions with the suspect flagrantly violates his right of defence and constitutes a very serious breach of the guarantees of a fair criminal trial. It is difficult to consider that such a criminal trial realised procedural justice, which is the purpose of a trial, when the accused had such serious mental disorders that made it difficult, if not impossible, for him to defend himself effectively, additionally without the presence of a defence counsel, which is important in a case in which he was charged with such a serious crime - the crime of murder. The Court of Appeal also fails to point out that both the content of the testimony of the persons questioning witnesses and the explanations provided under their influence must be assessed from the point of view of the principle of free evaluation of evidence referred to in Article 7 of the Code of Criminal Procedure and, consequently, the adjudicating court has the right to examine the correctness and legality of the actions of law enforcement officers.

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Endnotes

1. Judgement of the Court of Appeal in Lublin of 22 October 2003, II AKa 115/03, LEX no. 122332
2. For the purposes of this paper, it is necessary to distinguish conceptually between two, strictly non-separated scopes of forensic science: tactics and technology. Forensic (criminal) tactics deal with: a) the ways in which criminals commit acts, b) the principles of the investigative authorities used to detect a crime and to discover and apprehend the perpetrator. Forensic technology, on the other hand, deals with the issue of physical and chemical means: a) used in the perpetration of criminal acts, b) used to detect a crime and to identify and apprehend the perpetrator (Horoszowski, 1958, Kasprzak, Młodziejowski, Kasprzak, 2015, Hołyst, 2018)
3. Judgement of a panel of 7 Supreme Court judges of 15 July 1979, V KRN 123/79, OSPiKA 1981, no. 7-8, item 141.
4. Judgements of the Supreme Court: of 28 June 2001, II KKN 412/98, LEX no. 51377; of 15 October 2015, III KK 206/15, Lex no. 1948886; decision of the Supreme Court of 12 March 2021, LEX no. 3232241.
5. Judgement of the Court of Appeal in Wrocław of 29 December 2009, II AKa 405/09, OSAW 2010, 3; judgement of the Court of Appeal in Katowice of 18 May 2018, LEX no. 2612792; judgement of the Court of Appeal in Warsaw of 22 February 2021, LEX no. 3165909.
6. Judgement of the Supreme Court of 4 May 2016 r., III KK 334/15, LEX no 2044481.
7. Judgement of the Court of Appeal in Katowice of 21 September 2018, II AKa 271/18, thesis Lex no. 2751434. For the purpose of this paper, the author reviewed the written reasons for the ruling.