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Protocol and misusing its name

Summary

This article addresses the criteria that are decisive in determining whether a given document can be referred to as Protocol within the meaning of the provisions of Chapter 16 of the Penal Code. From this point of view, the two-staged medico-legal postmortem inspection, consisting of an external inspection and autopsy (opening of the corpse) can be de lege lata documented by drawing up a medico-legal report, which is not considered a Protocol. The autopsy, artificially separated from an inspection (cf. Art. 209, par. 4 of the Penal code), is carried out "in the presence" of a prosecutor, not under his supervision or with participation, by a forensic pathologist who is not authorized to draw up a Protocol. In the light of the above, Art. 209, par. 4 of the Penal Code should be amended for the sake of truth and justice.

Keywords protocol, forensic pathologist, prosecutor, postmortem inspection, autopsy, truth

Introduction to discussion

The idea and necessity to write this article came from an adequate judgment of the Court of Appeal in Krakow, stating that "The person participating in the activity is one who, through his or her conduct, can exert influence on the activity, and not simply be a passive onlooker. Only such participants in the proceedings shall be entitled to sign the protocol thereof, not the onlookers or service providers (Art. 150, par. 1 of the Penal Code)"[1]. The vital issues concerning the protocol require in-depth discussion.

To make this topic more comprehensible, a brief background description of the decision of the Court of Appeal is needed. A defense attorney filing an appeal on behalf of K.M. convicted of the offense under Art. 18, par. 2 of the Penal Code, in connection with Art. 148, par. 2, item 3 of the Penal Code, accused the judgment of the Court of Appeal of a violation of Art.150, par. 1 of the Penal Code in that the Protocol of the first hearing that took place on 28 November 2012 at the County Police Headquarters in S. "was not signed by all the participants in the said hearing". In the Court of First Instance, K.M. testified that he was interrogated by five police officers, while the protocol was signed by only one of them. Thus, the correctly justified judgment of the District Court stated that the suspect was in fact interrogated by only one police officer, whereas the remaining were present in the room in order to provide security in this high-profile case. Both the interrogator and the suspect signed the protocol after reading.

Experience shows unambiguously that in some serious cases, the prosecutor collecting the statements without police assistance can be exposed to different forms of aggression, including physical.

The reasoning of the Court of Appeal inspires the search for additional rules governing the practice for protocol preparation. Here, certain important aspects of procedural recording of medico-legal postmortem inspection will belong, which is based on the definition of the protocol as the document describing the manner of conducting this procedure, signed by the examiner as well as at least one of the participants[2]. Failure to

1 Published in „Prokuratura i Prawo. Orzecznictwo" 2015, vol. 10, item. 36.

2 M. Cieślak: Podstawowe zagadnienia w procesie cywilnym i karnym, „Państwo i Prawo" 1955, vol. 10, p. 585–613; Polska procedura karna, PWN, Warszawa 1971, p. 350, 351; judgment of the Supreme Court of 3 May 1985, file no. V KRN 222/85, OSNPG 1986, no. 1, item 8; judgment of the Supreme Court of 3 December 1985, file no. IV KRN 305/85, OSNPG 1987, no. 2, item 24; S. Waltoś: Criminal Proceedings. Zarys systemu, Wydawnictwo Prawnicze LexisNexis, Warszawa 2003, p. 67 et al.; Z. Gostyński, J. Bratoszewski: Penal Code. Comment, Volume I, ABC Publishing House, Warszawa 2003, p. 701–709; V Kwiatkowska-Darul: Przesłuchanie małoletniego w polskim procesie karnym, Dom Organizatora, Toruń 2007, p. 230–234; W. Grzeszczyk: Penal Code. Comment, Wydawnictwo Prawnicze LexisNexis, Warszawa 2012, p. 180.

sign the protocol by even one of the participants in the proceeding makes it merely a project which cannot be disclosed during the trial[3].

The protocol's accuracy and honesty should be ensured by the following mandatory rules: a) aside from the person directly involved in a given activity, the protocol may be signed by another person appointed as a court recorder, whereby the judicial authority in charge of the case takes affirmations from such a person that he/she will diligently record any statements of the interrogated individuals, dictations of the examiners, persons in charge of the experiment, search of premises etc. (Art. 144, par. 2–3 of the Penal Code); b) a court recorder is subject to exclusion on the same conditions as a judge (Art. 146 of the Penal Code); his (court recorder's) position in the criminal proceedings is reflected by judicial decisions, including the argument of the Supreme Court that the appointment by the prosecutor of a person who has previously led the investigation on the same case is contrary to Art. 132, par. 1 (now Art. 145, par. 1) of the Penal Code[4]; such a person does not guarantee objectivity in fulfilling his/her function, c) only a lead investigator has a duty and power to, among others, "ascertain specific circumstances" within the meaning of Art. 148, par. 2 of the Penal Code, d) only "persons participating in the activity" or involved therein can sign the protocol after reading it and have the right to request certain amendments to its content (Art. 148, par. 2, Art. 150, par. 1–2 of the Penal Code); these regulations reflect the fact that a given person perceives other persons, events, items, traces and phenomena in his/her own way, i.e. through the vocabulary. Although both active vocabulary and expressions recorded in the protocol convey the suspect's view of the world to the interrogator, they may in fact distort the reality when selected too hastily[5].

It should be constantly born in mind that the standards in question relate undoubtedly to all protocols. There is NO PROVISION of law that would relax the principles set out expressis verbis in Chapter 16 entitled "Protocols". Referring to various aspects of the argument of the Court of Appeal, it is worth mentioning that over 60 provisions of the Penal Code contain synonymous terms: with participation, participating, participant and participation[6]. On the other hand, the Penal Code relatively rarely contains such terms as: present, in the presence[7], which have a slightly different meaning compared to the previous group.

Within the meaning of the Penal Code, "to participate" means to be involved in an activity, initiate it, settle down to it, overcome the obstacle, win, etc. The participation in an inspection means that the lead investigator takes an assertive approach, directly and unambiguously communicates his views and needs, thus demanding that they be respected by other persons, albeit not at the expense of undermining someone's (e.g. forensic expert's) competences, autonomy, personal rights[8]. At the pre-trial stage, a prudent interactivity of the prosecutor must be combined with his awareness of a shared ethical and legal responsibility between himself and forensic experts for an appropriate course and documentation of postmortem inspection, referred to, among other activities, in Art. 143, par. 1 of the Penal Code[9].

From a linguistic point of view, a fundamentally different meaning has been assigned to Art. 209, par. 4 of the Penal Code, by using the term "presence of the prosecutor". Ironically, this term could be compared to the presence at a boring conference or at the birth of a son, sitting on our own hands with eyes and ears shut[10]. Therefore, an inactive and thoughtless prosecutor cannot merely complete formalities

3 See: aforementioned judgments of the Supreme Court of May and December 1985; E. Skrętowicz: Criminal Proceedings. General part, Kantor Wydawniczy Zakamycze, Kraków 2006, p. 296.

4 Judgment of the Supreme Court of 8 November 1979, file no. II KR 247/99, OSNKW 1980, no. 4, item. 38; similar content is carried by par. 74 of the Rules of internal procedure of common organisational units of the Prosecutor's Office of 11 September 2014 (OJ, item 1218).

5 M. Lipczyńska, W. Wolter: Elementy logiki, PWN, Warszawa 1980, p. 16–18; A. Kępiński: Rytm życia, Wydawnictwo Literackie, Krakow-Wroclaw 1983, p. 82, 85; C. Tavris, C. Wade: Psychologia. Podejścia oraz koncepcje, Wydawnictwo Zysk i S-ka, Poznan 1999, p. 28–33; L. Kołakowski: in Gazeta Wyborcza of 28–29 June 2008.

6 Cf. Art. 3, 148, par.4, 80, 117a, par. 1, 150 par. 1–2, 205 par. 1, 301, 318 of the Penal Code.

7 Cf. Art. 171, par.3, 185c par. 3, 209 par. 4–5, 224 par. 2 of the Penal Code.

8 M. Arcta: Słownik wyrazów obcych, Wydawnictwo S. Arcta, Warszawa 1947, p. 246; S. Skorupka, H. Auderska, Z. Łempicka (ed.): Mały słownik języka polskiego, PWN, Warszawa 1968, p. 55; A. Markowski (ed.): Nowy słownik poprawnej polszczyzny PWN, Wydawnictwo Naukowe PWN, Warszawa 2002, p. 31, 69, 70.

9 For more information, see A. Głazek: Biegły sądowy i jego status, Iure et facto. Anniversary book presenteed to Dr. Józef Gurgul (ed. J. Wójcikiewicz), Wydawnictwo Instytutu Ekspertyz Sądowych, Kraków 2006, p. 94, 95; J. Gurgul: Protokół znaczy precyzja, Gazeta Prawnicza 1980, vol. 19–20; Prokurator – jakim jest i jakim być powinien, Prokuratura i Prawo 2005, vol. 5, p. 24, 42; O „Zbiorze zasad etyki zawodowej prokuratorów", Prokuratura i Prawo 2014, vol. 7–8, p. 111–139.

10 S. Skorupka (ed.): Słownik wyrazów bliskoznacznych, Wiedza Powszechna, Warszawa 1989, p. 112; A. Markowski (ed.): Nowy słownik poprawnej..., idem, p. 530.

that would relieve him from responsibility for infringements of external and internal postmortem inspection procedure.

Interestingly, this procedure has been entirely conferred on coroners, whose education, experience and skill levels show, as commonly known, individual variability. Another paradox consists in separating two s t a g e s of the same activity in Articles 143 and 209 of the Penal Code, respectively. For educational purposes, medico-legal autopsy can be divided into five stages I) establishing identity of the corpse, in practice often trivialized, which may lead to astonishing mistakes, 2) clothing inspection, 3) external postmortem inspection, 4) internal postmortem inspection, i.e. opening the corpse, 5) drawing up a protocol containing the names of, as pointed out by some experts, "persons participating in the autopsy"[11]. By looking realistically at present and possible future scenarios, these experts draw conclusions similar to the argument of the Court of Appeal.

In order to determine the scope of the discussion and in anticipation of the resulting conclusions, I will refresh the memory of the interpretation of the provisions of interest of the Penal Code of 1928. E. Chróścielewski, who was a student of Sergiusz Schilling-Siengalewicz taught the students at the Faculty of Law of the University of Warsaw that forensic pathologist submits a report of the examination and its results in the form of a protocol only in case when it was carried out with the involvement of an active lead investigator. Otherwise, forensic pathologist submits only "medico-legal report" to the court (sic!). Prof. Chróścielewski equally firmly lectured his law students that "drawing up a protocol from external and internal postmortem inspection, based on forensic pathologist's dictation, is a competence of the investigators"[12], and therefore of the judicial authority. Such conclusions are in line with the content of Art. 219, par. 1 a and d, Art. 219 par. 3, Art. 221 B, Art. 223, and Art. 225 par. 2-3 of the Penal Code of 192.

11 J. Walczyński: Przewodnik do ćwiczeń z medycyny sądowej, PZWL, Warszawa 1964, p. 59, 60; E. Chróścielewski, S. Raszeja: Sądowo-lekarska sekcja zwłok, Medycyna sądowa (ed. B. Popielski, J. Kobiela, PZWL, Warszawa 1972, p. 116–132; Z. Marek, M. Kłys: Opiniowanie sądowo-lekarskie i toksykologiczne, Kantor Wydawniczy Zakamycze, Kraków 2001, p. 34, 35 et al; M. Barzdo, J. Berent: Rodzaje sekcji zwłok, Iure et facto. Anniversary book..., idem (ed. J. Wójcikiewicz), p. 258–269.

12 E. Chróścielewski: Przewodnik do nauki medycyny sądowej, Uniwersytet Warszawski, Warszawa 1958, p. 59, 60; cf. S. Kalinowski: Biegły i jego opinia, CLK KGP Publishing house Warszawa 1994, p. 90–96 and passim; M. Całkiewicz: Modus operandi sprawców zabójstw, Wydawnictwo Poltext, Warszawa 2010, p. 240, 241.

Departing from status quo ante and skimming (critically) through status praesens

We arrived at history which cannot be escaped. Historically, the above procedures have been present on Polish soil, where they germinated within the three Partitions of Poland. During the interwar period, they were fully regulated in the Penal Code and, most of all, in the Regulation of the Minister of Justice and Minister of Internal Affairs of 15 July 1929 on performing medico-legal inspection, adopted pursuant to Article 651 of the then applicable criminal procedure[13].

Since the beginning of the 19th century, the general rule in the Russian Partition was to give the autopsy an appearance of legality and dignity by the presence of a police officer, who endorsed postmortem investigation carried out by a forensic pathologist and "was responsible for its orderly, decent, peaceful and and safe conduct". Forensic pathologist dictated the relevant content to the police officer, who drew up a protocol. After reading aloud the protocol, it was signed by both forensic pathologist and police officer.

Prof. L. Wacholz, a great Pole (by his way of thinking) of Austrian descent in the foreword to a short book "Sekcya sądowo-lekarska..." (eng. Medico-legal autopsy) announced "a job offer in a mother (Polish) tongue", indicating that the results will not be "sufficiently precise". Specifically, the offer consisted in writing a clear comment to the Regulation of the Austrian Ministry of Internal Affair and Ministry of Justice of 28 January 1855 (OJ 1855 L 26). Nowadays, in relation to the criticized provisions of the Penal Code of 1997, it would be worthwhile to take an interest in the standards of a 19th century legal act, in particular par. 5 "Legal inspection should always be performed in the presence of two physicians", par. 10 "Inspection should be performed with conscience of forensic pathologists (...). Inspection is led by an investigative judge or his deputy (...), whereby in some cases, opening the corpse should be preceded by (attention! – JG) "scrupulous inspection of the place (crime scene) and its surroundings (...)".

It is utterly symptomatic that the spirit of Austrian administration has penetrated the Regulation (never repealed) of 15 July 1929. Below, those provisions of the Regulation will be selected and quoted that have been recently referred to (sometimes) in extenso by the experts in recognized textbooks and monographs as "most practical" for forensic pathologists performing autopsies[14]. The following

13 Official Journal of the Ministry of Justice of 15.VII.1929, no. 4.

14 K. Kamińska: Opinie biegłych lekarzy w kodeksach postępowania karnego z drugiej połowy XIX w: rosyjskim, austriackim, niemieckim, Doctrina multiplex veritas una. Anniversary book presented to Professor Mariusz Kulicki, a creator of the Department of Forensic Sciences at

paragraphs are worth recommending, not only the prosecutors:

- par. 3 "A judge leads a medico-legal inspection, which should be carried out and recorded in the form of a protocol (...)", par. 6 "A judge provides court-appointed experts with relevant explanations (...). External and internal (mentioned in the same breath – JG) inspection is personally carried out by a forensic pathologist and the results thereof are dictated in the protocol (...)", par. 14 "Medico-legal postmortem inspection consists of two stages: A) external inspection, B) internal inspection (autopsy, opening the corpse)", par. 15 "External inspection is intended to establish (...) characteristics and properties of the corpse, e.g. gender, age, height, distinguishing marks, birth defects, lesions (including postmortem lesions), teeth condition, injuries of different organs, etc.[15], par. 27 If the divergence arises between forensic pathologists while drawing up a protocol (...) a judge applies the provisions of Art. 137 of the Penal Code, empowering him to interview forensic pathologists without delay in order to clarify ambiguities and inconsistencies.

As can be seen, the above Regulation and criminal procedures of 1928 and 1969 gave the investigator and then the prosecutor real possibilities to exert impact on the course and results of both stages of postmortem inspection, which in organizational sense make up the same system. Experience has confirmed the relevancy of the prosecutor's assertiveness in his relations with forensic pathologist and, to the contrary, a detrimental effect of his passivity. It is therefore difficult to understand the permission to do nothing, supported by the provision of Art. 209, par. 4 of the Penal Code, with a side effect of undermining the will to develop one's professional skills by acquiring bridging knowledge.

To summarize this fragment of my considerations, I will highlight several issues that are cumbersome de lege lata and could be changed de lege ferenda in order to give a stimulus to learning the truth, especially about the events which pose a threat to human life. Firstly, the aforementioned provisions of the Penal Code are mutually exclusive and do not comply with homogeneous expert opinions about the structural aspects of the autopsy and occasionally, with common sense. Despite an integral unity of inspection and autopsy, the latter has been separated, which broke a common context, not without adverse effects. The legislator does not draw any conclusions from the difference between postmortem inspection carried out at the site where the corpse was discovered, usually limited in terms of scope and methodology, and a comprehensive inspection of a corpse placed on the autopsy table[16]. It only takes a hint of imagination to understand the significance of these differences.

Secondly, as it follows from Art. 144, par. 2–3, Art. 150 par. 1–2 of the Penal Code as well as, a contrario, from the thesis of the ruling of the Court of Appeal in Krakow, the prosecutor who is merely "present" at the site of external and internal postmortem inspection is divested of his formal rights and incentives to co-participate in drawing up and signing a protocol, which is mandatory under Article 143 of the Penal Code. S. Waltoś was undoubtedly right, when after confronting applicable legislation with his own investigatory practice, he arrived at the right conclusion that "a proper decision-making process related to the further course of action during or immediately after the autopsy, requires that the leading role be conferred on the prosecutor and court"[17], as stipulated in par. 3 of the Regulation of 15 July 1929 and of Art. 188, par. 2 of the Penal Code of 1969.

Thirdly, the provisions repeatedly and not without reason referred to in this article[18] have led to a dead

the Faculty of Law and Administration of the Nicolaus Copernicus University, on the occasion of the 35th anniversary of the establishment of the Department (ed. A. Bulsiewicz, A. Marek, V. Kwiatkowska-Darul), Faculty of Law and Administration of the Nicolaus Copernicus University), Toruń 2004, p. 487–493; S. Gromoff: Medycyna sądowa, Warszawa 1837 (Russian edition: Petersburg 1932), p. 48, 51, 116 and passim; L. Wachholz: Sekcya sądowo-lekarska, protokół, orzeczenie, Kraków 1895, p. 3, 271–273; J. Walczyński: Przewodnik do ćwiczeń..., idem p. 34, 39; E. Chróścielewski, S. Raszeja: Sekcja zwłok. Technika z uwzględnieniem metodyki sądowo-lekarskiej i wskazówek diagnostycznych, PZWL, Warszawa 1970, p. 8,9, 174-180; fourth edition of this monography, referring to the Regulation of 15 July 1929, was published in 1990.

15 It should be emphasized that the above are the universal and actual tasks, which can be accomplished even by a sharp-witted layman.

16 Cf . J.S. Olbrycht: Medycyna sądowa w procesie karnym, PZWL, Warszawa 1964, p. 196; Z. Marek, M. Kłys: Opiniowanie sądowe i toksykologiczne..., p. 32, 33; A. Jakliński, Z. Marek: Medycyna sądowa dla prawników, Kantor Wydawniczy Zakamycze, Kraków 1996, p. 151, 152; V. Kwiatkowska-Wójcikiewicz (ed.): Kryminalistyka dla prawa. Prawo dla kryminalistyki, „Dom Organizatora", Toruń 2010, p. 203–209; J. Widacki (ed.): Kryminalistyka, C.H. Beck Publishing House, Warszawa 2008, p. 53, 54.

17 S. Waltoś: Proces karny..., p. 386, 387.

18 See K.J. Pawelec: Biegli, tłumacze, specjaliści (Chapter 22 of the Penal Code) after the amendment Zagadnienia wybrane, Problemy Kryminalistyki 2015, vol. 290, p. 18, wherein the confusion surrounding this issue is reflected by the reasoning that "the absence of a prosecutor or a court does not entail the annulment of forensic pathologist's activities". Perhaps so, but the next sentence surprises with its style and meaning: "Evidence in the form of an autopsy protocol (even though the protocol should only be drawn up by judicial authority),

end situation, i.e. a classical stalemate. The Penal Code does not authorize a forensic pathologist to automatically become an autopsy recorder. All doubts in this respect should be allayed by the content of Art. 144, par. 2–3 of the Penal Code. Similarly, the prosecutor also does not have the any powers related to the recording, drawing up a protocol or even signing it, conferred on him by the provisions. The prosecutor's function as the host of pre-trial procedure in external and internal postmortem inspection has been reduced to, I will repeat myself once again, the mere presence! As he himself does not "carry out" this activity, he cannot appoint an autopsy recorder (conclusions of Art 144, par. 2–3, 148 par. *2,* 150 par. 1 of the Penal Code). Considering that: clara sunt non interpretanda, there is no reason to continue to ponder over the above provisions[19].

Fourth, when considered jointly, the provisions of Chapter 16 "Protocols" make it clear that opening the corpse in merely the presence of a prosecutor can be documented by drawing up a medico-legal report from postmortem inspection, and that's the end of that, period. Conclusions of forensic pathologist included in his personal report are devoid of aforementioned objectivity, precision, reliability, moderation etc. Significantly, these shortcomings face a human tragedy of death, which usually evokes huge emotional reactions. Sometimes, the prosecutor is blamed for even the most minor misconducts, real or imaginary, including those related to corpse inspection.

Based on his long-time expert experience, Z. Marek recommended: "it is imperative that (especially during the autopsy – JG) aside from supervising forensic pathologists, the prosecutor be actively involved in the decisions on the selection and type of evidence collected for the purpose of laboratory and forensic analyses"[20]. Through this practice, the prosecutor gradually overcomes his fears of standing at the autopsy table next to forensic pathologist, in order to decide together ad hoc what to do and how to do it[21]. This way, the prosecutor's picture as an inactive hedger, not responsible for the course and recording of the postmortem investigation, may be departed from.

I shall complete my reflections with a remark that with certainty, at least since the beginning of the 1960's, the two-part "Autopsy protocol" form has been in use in the District Prosecutor's Office in G. The first part made up a real protocol, wherein the prosecutor hand-wrote (at that time) the conclusions dictated by forensic pathologist. Sometimes, these conclusions were further developed or precised by adding the prosecutor's remarks. After the final word has been written down, the prosecutor read the content aloud and, where needed, the document was amended ad hoc and signed. The second part, entitled "Medico-legal opinion" was filled out by forensic pathologist in accordance with the facts and own conscience. Sometimes the opinion was preliminary but still valuable for the focusing of investigative proceedings.

As we established, the leading role in the corpse opening procedure should be given to the prosecutor and court

This should translate into an adequate, meaning unequal, division of responsibilities for the activities referred to in Art. 209 of the Penal Code between the prosecutor and forensic pathologist. The key to understanding of such a solution may lay in the awareness of their interweaving and diverse experiences, ideas, intuitions and professional skills. The awareness of one's own knowledge deficiency, in the case of a lawyer, insufficient proficiency in bridging disciplines, is one of the factors facilitating professional development and factual cooperation in the "extraction" of as much information from the corpse as possible[22]. Both parties should be aware that many embarrassing shortcomings may be dealt with on an ad hoc basis, such as a terrible practice of failing to deliver forensic pathologist the court notice of appointment as an expert, prior to commencing a postmortem inspection. Often, he must rely on information passed by telephone by the secretariat of the Prosecutor's Office. The analysis carried out at the Department of Forensic Medicine in Katowice revealed the absence of the prosecutors in as much as two thirds of the total number of performed postmortem inspections[23]. In such situations, forensic pathologists

including the opinion contained therein, can be used in criminal proceedings as admissible documents".

19 J. Gurgul: Proces kosztowny, przewlekły, poznawczo niewydolny, Prokuratura i Prawo 2016, vol. 1, p. 5-32.

20 Z. Marek, M. Kłys: Opiniowanie sądowo-lekarskie..., p. 103.

21 The last sentence is a paraphrase of the motto written by Goethe to the lyric cycle known as the West-Ostlicher Divan: "Who wishes to understand the poetmust go to the poet's land". Ergo, who wants to understand the work of a forensic pathologist must gain "first-hand knowledge", so as to be able to direct this work in a reticent manner.

22 H. Kraschutzki: Die Gerechtigkeitsmaschine. Erfahrungen und Strafvolzug, Verlag CR Muller, Karlsruhe 1970, p. 59, 60 and passim; F.C. Schroeder: Das neue Sexualstrafrecht. Einstellung-Analyse-Kritik, C.F. Muller, Juristischer Verlag, Karlsruhe 1975, p. 40, 41 and passim; T. Kotarbiński: Medytacje o życiu godziwym, PWN, Warszawa 1976, p. 56; J. Gurgul: O swobodnej ocenie opinii biegłego, Prokuratura i Prawo 2013, vol. 10, p. 34–56.

23 Z. Gąszczyk-Ożarowski: Summary of a presentation attended at the Convention of the Departments of Forensic Sciences in Szczytno, 9–11 September 2013, entitled: "Getting acquainted by a forensic pathologist with the

are lacking basic information on what to pay attention to while inspecting the clothing of the deceased, how to modify the autopsy procedure (based on a general scheme), which activities should be undertaken on the basis of the instructions received etc.

Assuming that experience surpasses theory, we should listen to what case studies from different years and organizational units of the Prosecutor's Office can tell us. For example, to pay attention to the fact that the motives, modus operandi, perpetrator's personality or other elements of a crime against life seem like a puzzle until the right key is found, such as microtraces, conjunction, conjecture etc.[24]. Then everything suddenly becomes clear, as illustrated below.

1. Marek Z. has been finally convicted of abusing his spouse D over the course of many years. Additionally, he was suspected of murdering his spouse in L. by stabbing her in the chest. Two knives have been secured in the apartment belonging to the contending spouses, among which one had the parameters suggesting that it might have been used in the murder of Danuta Z. The prosecutor did not show up in the morgue. In a "substitute of a protocol", forensic pathologist wrote: "Within the integuments of the chest, in the extension of the outwardly visible wound, presence of a grooved cavity penetrating through the sixth rib within its costal cartilage segment". He failed to secure evidence i.e. the knife with characteristics matching rib damage for mechanoscopic comparative analysis. Regardless of the level of identification accuracy (group, narrow group, individual), if performed, it could have initiated "wearing away the stone", with the result that the investigation would perhaps not have been discontinued due to the lack of sufficient evidence of the alleged offense.

Second example. Again in a „substitute of a protocol" (drawn up in the prosecutor's absence) from the autopsy of Kazimierz J., forensic pathologist wrote: "No traumatic injuries present, nostrils unobstructed, lower limbs symmetrical, death resulting from freezing". The deceased's family complained about the decision of the District Prosecutor's Office in Z. on discontinuing the investigation due to the absence of the offense (Art. 11 of the Penal Code of 1969). When the case-file was reopen as a result of the complaint filed by the victims, it was concluded that: a)there had been no symptoms of hypothermia whatsoever, b)the witnesses had unanimously testified that the nostrils of the deceased were filled with blood clots, brownish stains were present on the jacket's collar and the skin cut on the head. Additionally, these and other sources unanimously confirmed that Kazimierz J. was a disabled person with left leg shorter and severely deformed.

The investigation was reopened. Among new evidence available, I will mention only the most significant facts. In the hospital autopsy record book, the same forensic pathologist diagnosed Kazimierz J. with "subarachnoid hemorrhage, (...) dislocation of shoulder joint" etc. When interviewed by the prosecutor, he explained the discrepancies by stating that: "...a mistake has occurred (...), Kazimierz J. died of head injuries (...), thus, the autopsy protocol is invalid (sic!) (...), considering the quantity of alcohol consumed by Kazimierz J. and his illness (sic!), an accidental fall was possible".

It was established that the death of J. was a result of being hit by a car.

Third example. As part of the operation being precursory to contemporary X-Files, the case-file of the Prosecutor's Office in B. was reopened concerning the death of Bolesław O., which had been discontinued due to the lack of statutory features of a prohibited act (Art. 11 of the Penal Code of 1969). In a highly valued expert opinion regarding the case, forensic pathologist expressly stated that the death resulted from "acute pancreatitis"[25]. However, the contents of the autopsy protocol as well as other evidence ruled out suspicion of acute pancreatitis. The confidence in forensic pathologist's diagnosis accuracy has been already undermined by comparison between the nomenclatures of tissue specimens taken during the autopsy and those received by the laboratory. Among specimens received, laboratory technicians have not identified any slices of pancreas, adrenal glands, kidneys or organs of the pelvis minor, which suggested that forensic pathologist had collected specimens randomly, only to simulate observing the autopsy procedures.

After reinitiating the pre-trial proceedings, the body of Boleslaw O. was exhumed, regardless of other activities undertaken. It was proven that the man had been stunned by head hits and thrown in a water reservoir where he had drowned. The three accused persons were finally convicted of manslaughter.

The fourth example appears clear-cut. Namely, Adolf F. was rightly acquitted by the Court on charges of murder and robbery of 80-year-old Katarzyna F., due to the failure to rebut the defendant's alibi. This decision was based on the fact that (quoting judgment)

circumstances of death before the commencement of the autopsy – study results" (Convention minutes in print).

24 Cf. A. Jakliński et al.: Medycyna sądowa. PZWL, Warszawa 1983, p. 121–128; J. Widacki (ed.): Kryminalistyka..., idem p. 309–313; D. Wilk (ed.): Kryminalistyka, „Dom Organizatora", Toruń 2013, p. 244–248; E. Fromm: Anatomia ludzkiej destrukcyjności, RebisPublishing House, Poznań 2014, p. XVI, 96, 206, 267 and other.

25 See e.g. B. Popielski, J. Kobiela (ed.): Medycyna sądowa, idem p. 70,429; K. Konopnicka, Z. Plucińska (ed.): Mała encyklopedia zdrowia, PWN, Warszawa 1969, p. 535.

"the autopsy protocol (...) does not contain even the approximate time of death of Katarzyna K., thereby making it impossible to confront the defendant's and witnesses' testimonies, and assess whether Adolf F. could have been present at the crime scene within the critical time frame.

Anyone who wrongfully claims that „forensic medicine is not for lawyers" (A. Pare) should give this incident some thought. As if for such people the issue of early postmortem appearance were a taboo subject. Or the issue of the evidential value of establishing the time of the offense. Criticism of incompetence should be alleviated and combined with an optimistic overtone of the paraphrase that it is enough for the prosecutor (lawyer) "to set his heart on it" to get acquainted with bridging disciplines.

Fifth example. The autopsy protocol for Irena P., a 70-year-old foreign language teacher, did not contain a single word referring to the time of her murder. According to the prosecutor "present" in the morgue, forensic pathologist remarked during the autopsy that "the victim had an active sex life". However, the protocol did not contain entries suggesting that forensic pathologist had made any attempts at verifying this hypothesis, which was of major importance from the point of view of determining the motive and criminal profiling of the perpetrator. This grave mistake resulted in discontinuation of further search for the relevant traces/microtraces on the bedding, clothing, body integuments and within the reproductive tract of the deceased[26].

Because of her good looks and intellect, P. had been perceived as an attractive person and she had caught the attention of a backpacker, Janusz Z. Unfortunately, in the absence of any biological evidence secured during external and internal postmortem inspection, the hypothesis that he had been connected with the teacher's death could not have been verified.

Sixth example. The protocol from external and internal postmortem inspection of a 18-year old man in the county of S. prepared by a court-appointed psychiatry expert, stated that the body was "recovered from the bush where it was hanging in a loop". "On the forehead" – wrote a psychiatrist – "scabs" were present, although a few lines below he already saw scabs on the man's face and concluded that they might have resulted from "agonal seizures". After giving consideration to all the facts, he concluded that the man had committed suicide.

The investigation was discontinued despite the fact that forensic pathologist have not answered a whole range of fundamental questions. Even though the relevant questions have not been asked by the prosecutor, his professional ethics oblige him to consider – before a decisive opinion is issued – all the uncertainties related to the cause of suicide, number, location, shape, color and swelling of lesions, presence of the signs of a struggle on the body, determine the time of presentation of symptoms etc. In the light of the above facts, the confidence of forensic pathologist could have been replaced with the will to search for any arguments clarifying the doubts as to what had happened[27].

To list only the bungled cases, would contradict the objective of this article. Therefore, below I will provide three examples showing that if the prosecutor is willing to take the lead or to participate in medico-legal postmortem inspection as stipulated by the provisions of an earlier codification, then he is able to do so. In such a case, the prosecutor makes a real contribution to determining the facts of the case and, contrary to the nonsensical provision of Art. 209, par. 4 of the Penal Code, yet in conformity with LAW, the sensu stricto protocol from postmortem inspection is drawn up.

Seventh example. Forensic pathologist has initially concluded that the female body recovered from the river was that of S.K. who had been missing for more than a year. Thus, the closure of the investigation seemed a mere formality. However, the prosecutor, who truly participated in the autopsy, directed pathologist's attention to a lump of earth extracted from the abdominal cavity and thrown into a garbage bin. After recovering the material and cutting it open, it was found that it contained an internal organ that the deceased had removed a long time ago. Hence, the identification proved incorrect and the investigation had to be re-started from scratch.

Eight example. During the autopsy of Zofia G., forensic pathologist dictated in the protocol that there were a few injuries on the deceased's face, caused by an oval, flexing tool and one caused by a flat tool with rectangular tip. According to pathologist, all injuries observed resulted from active action. Experience suggests that G. had been killed by two persons, which puts an investigation in a slightly different perspective than in the case of a single perpetrator. However, forensic pathologist was open to imagination-driven suggestions of the prosecutor, who proposed that prior to issuing the final opinion, the site where the body was discovered be searched in order to clarify the issue of a second tool.

The prosecutor's doubts proved true. The search of a scene ended with finding a piece of a narrow-gauge track protruding from the heap of earth, whose terminal fragment matched the shape of the injury. It

26 J. Zięba-Palus: Seeing the invisible – criminalistic microtraces, Problems of Forensic Sciences, 2014, vol. 100, p. 307-312.

27 For more information on the assessment of similar incidents, see: J. Stojer-Polańska, A. Biederman-Zięba (ed.): Samobójstwo. Stare problemy, nowe rozwiązania, Chair of Forensic Science and Public Safety of the Jagiellonian University, Kraków 2013, p. 9-47 and passim,

was beyond doubt that the injury was sustained as G. fell on the track after being hit with a spring. Such was the verdict of the court of first and second instance.

Ninth example, by far not the last of equally spectacular cases known to the author. After his arrest, Jan F. admitted to slapping his mother in the face with an open hand, claiming that she fell afterwards, showing no signs of life. Forensic pathologist only noticed mild epidermal abrasions around the deceased's face. Thus, the autopsy did not reveal the cause of death. The prosecutor, a man with an extensive experience and imagination, advised forensic pathologist to perform preparation of longitudinal muscle layers. With the eyes of his soul, he saw the killer clamping his hand over his mother's mouth (hence spotted epidermal abrasions), while the other hand clutched her throat (external clutch marks may not appear on the throat). The prosecutor's predictions came true. Jan F. confessed to and was convicted of murdering his mother by strangulation.

One may hope that the above case study, by no means isolated, should stop giving the lawyers an inferiority complex, by telling them that they are incapable of understanding forensic science, and hence (quoting Heiroth) "rule as dictated by pathologists"[28]. Moreover, the case studies described above should prompt lawmakers to amend Art. 209, par. 4 of the Penal Code in such a manner that an alleged protocol from medico-legal postmortem inspection, which de iure is a report from this activity, becomes a real protocol meeting the statutory criteria. The above is particularly desirable in cases where: a) Existing stereotypes that overpower creative activity of the judicial authorities are well established, and thus, need to be tackled boldly, b) the competences of a judicial authority and a forensic pathologist overlap, with no demarcation line delineating the sole competence of a pathologist to make a diagnosis that "the nostrils of Kazimierz F. are free of obstructions and his lower limbs are symmetrical" (compare with second example, p. 7). The dramatic failure should once and for all make all stakeholders aware of adjacent areas (Germ. Grenzgebiete), which entails certain consequences for the fields concerned. c) every forensic pathologist is different. Some of them should be almost literally led by the hand. It so happened once (exceptionally, yet still it happened) that at the request of a prosecutor to break rigor mortis in an upper limb of the deceased, forensic pathologist replied that "he has no knowledge of a method of doing that" (sic!). The prosecutor showed pathologist how this can be done in practice. The breaking of rigor mortis appeared instrumental in determining a non-criminal nature of the incident; d) the levels of forensic science displayed by experts and lawyers are unequal; some of them just push forward, acquire unique experiences, study literature on their own initiative, while others retrogress mentally or remain stuck at the level of their academic knowledge.

Every prosecutor who practices in a particular discipline can achieve mastery (cf. saying: "Practice makes perfect"). A prosecutor's mastery in the field of bridging disciplines should be tailored to his possibilities and professional needs. This is plastically illustrated (with the relevant additions) by the phenomenon of the Lwów School of Mathematics established by internationally renowned scholars: Banach, Łomnicki, Steinhaus, Ulam... Not all graduates of the Faculty of Mathematics of the Jagiellonian University became Banach. Likewise, the illegitimate son of an illiterate servant-maid did not become "This" Professor Kazimierz Banach in one day. He himself used to tell a fascinating story of his way to the heights of Exact Science. Namely, he began his education with history, ancient Greek and Latin. According to a mathematician Banach, translating from Latin to Polish (which should be also practiced by lawyers) is an excellent exercise of logical reasoning (this is exactly the case! – JG). There is "nothing better in solving riddles than accusativus cum infmitiwo and ablativus absolutus"[29].

The similar wisdom flows from the adage of J. Tischner: "REASONING comes first". Regardless of the reasoner's profession, reasoning constitutes the first, irremovable step to scientific cognition. For example, the understanding of the mysterious death of a 2-year-old Adam W. and his mother inside the house that was set on fire in Beskid Niski in 1960 or a recent rail accident near Szczekociny, e) a whole lot depends on the awareness of the countless interdependent factors in the case and on establishing proper relations between the prosecutor and forensic pathologist, demonstrated as the ability to work in a team, the willingness to carry out even secondary tasks with a view of achieving mutual success, mutual respect and the commitment to the truth.

Another issue that needs to be voiced despite the lack of general consensus is the fact of achieving personal benefits from cooperation, i.e. lawyers LEARN from forensic pathologists, physicians, engineers, linguists, fingerprint experts and vice versa. In general, learning consists in acquiring decision-making skills from each other, such as: what, when and why should be assessed, what else could be experienced or changed ? Kazimierz Jaegermann frankly admitted that the art of issuing forensic opinions can only be

28 J. Gurgul: O swobodnej ocenie opinii biegłego, Prokuratura i Prawo 2013, vol. 10, p. 34–56, Przyczynek do zagadnień identyfikacji zwłok, Problemy Kryminalistyki 1991, vol. 193–194, p. 8–11; Intuicja i wyobraźnia w śledztwie, Problemy Kryminalistyki 1994, vol. 204, p. 14–18 and the references therein.

29 M. Urbanek: Genialni. Lwowska Szkoła Matematyczna, Wydawnictwo Iskry, Warszawa 2014, p. 22–30, 160 i passim,

learned by practicing and "through direct contacts with experienced lawyers"[30].

This context should be applied to the stance of J. Kobiela, who made the commencement of a medico-legal postmortem inspection of Zofia G., a resident of the village of G., conditional on the participation of a particular prosecutor. Prof. Kobiela assessed that a second pair of eyes and experience will be useful in the analysis of a specific modus operandi, motivation and identity of the perpetrators who committed similar murders. It is common knowledge that much depends on the skill of opening the corpse, however, other factors of importance include trace selection and description, a sense of proper trace-related metaphor, context, nuance and order of words and sentences in the protocol from legal proceedings, which, after the fulfillment of the conditions described above, will become a protocol within the meaning of Chapter 16 of the Penal Code.

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30 K. Jaegermann: Refleksje związane z rekonstrukcją wypadku drogowego, Problemy Praworządności 1984, vol. 4. p. 56–60.