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The scope of the prohibition on evidence referred to in art. 199 of the Code of Criminal Proceedings

Summary

The question of prohibitions of evidence, efforts to circumvent them, and the issue of indirectly illicit evidence evoke fierce arguments. In recent years, the practice of increasingly frequent releasing by the courts certain professional groups from the obligations of keeping confidentiality has been observed. In cases when such release could not be granted – there have been attempts to substitute the evidence in question with another, usually indirect one. The hereby work is an elaboration on these issues. It discusses the absolute prohibition on evidence specified in art. 199 of the Code of Criminal Proceedings stating one may not be be examined as an expert or physician in relation to circumstances he/she gained the knowledge of from the accused while providing opinions or medical assistance. The Author discusses the procedural possibilities of circumventing this prohibition by interviewing persons cooperating with an expert or doctor, as well as other persons participating in the rescue operation, including bystanders who may have knowledge about the accused's statements. He also reflects on the option of obtaining testimony from police officers who have interviewed the participants of an incident at the scene, including informal conversations. The Author strongly advocates the prohibition on obtaining this kind of evidence and treats it as illegal. However, he points out that other views have also been expressed on the subject. Hence the issue should be considered as controversial. The article can be treated as a discussion, which does not eliminate the thesis that the legislator should definitely determine this problem, therefore it is worth considering the postulate *de lege ferenda* contained in the hereby work.

Key words: prohibitions on evidence, professional secret, indirectly illegal evidence, prohibition on obtaining expert witness's testimony, prohibition on obtaining medical doctor's testimony, assessment of legitimacy of obtaining evidence, procedural admissibility if substituting illegal evidence, free evaluation of evidence

Introductory notes

Article 199 of Code of Criminal Proceedings defines absolute prohibition on evidence made of statements concerning the act the accused is charged with made to an expert witness or a medical doctor while providing aid. However, the said absolute prohibition on evidence causes many difficulties of interpretation as to its scope. It should be noted that the legislator refers to the statements of the accused submitted to an expert witness. However, Chapter 22 of the Code of Criminal Proceedings enlists experts, translators and specialists. The question therefore arises whether the prohibition also includes the statements by the accused delivered to translators and specialists. It seems that the analysed prohibition includes also statements made towards them, as evidenced by the legislator's use of the word "or". The same scope of art. 199 of the Code of Criminal Proceedings. should include, for example, specialists performing unreproducible tasks, including visual inspection of scenes, things, people, collecting of blood or other body fluids, making records of these activities and others. The truthfulness of the presented view is justified by a functional interpretation that is in accordance with the axiology of the criminal procedure rules, which rejects a linguistic interpretation. However, practice provides many examples of defendants participation in procedures performed by specialists who are not expert witnesses but still have specialist knowledge within the meaning of art. 193 § 1 of the Code of Criminal Proceedings. Similarly, the role of translators should be assessed. In doctrine and judicature it has been repeatedly pointed out that if any fact is to be clarified by a criminal trial, even if it is irrelevant to the resolution of the case, but the relevant

authority has decided to determine it, contrary to the provisions of art. 170 § 1 point 2 sentence 1 of the Code of Criminal Proceedings, and thus it requires special information, then the authority is obliged to consult an expert witness or witnesses (see also: Urbaniak-Mastalerz, 2016).

The scientific aim of this publication was therefore to show that the group of entities defined in art. 199 of the Code of Criminal Proceedings is too narrow and requires significant expansion. This was done in the form of both judicial and doctrinal analysis. The Author did not fail to notice the basic principle of the criminal procedure, i.e. *nemo se ipsum accusare tenetur*, considered from the point of view of judicature, as well as of science. At the same time, the Author does not conceal his own opinion, i.e. the inclination towards the normative theory (see: Sobolewski, 1982, p. 130, Kmiecik, 1983, p. 129, Pawelec, 2010, pp. 107-109).

Scope of discussed regulations

Specialists who are not expert witnesses but possess special knowledge, have numerous times performed the activities mentioned above. It is enough to mention specialists who inspect the scene of a given incident, examine vehicles, make preliminary tests of cars technical state or carry out corpse examinations, collect blood or other body fluids samples. These specialists, as well as translators, in many cases have had direct contact with persons involved in specific incidents not yet recognised as consistent with statutory characteristics of a specific crime. They may have also provided medical assistance, e.g. to road accident participants. These persons have not been mentioned in the text of art. 199 of the Code of Criminal Proceedings, although they performed activities requiring special knowledge appropriate for experts. Consequently, the indicated specialists, as well as other people, including police officers, had direct contact with people involved in the incident, but not suspects or accused, suspected persons at most, which, if not detained and subjected to specialist research, did not have any role in the proceedings. Nevertheless, they were also concerned with the principle *nemo se ipsum accusare tenetur*, so information obtained from them in an informal manner by experts or specialists or translators justified the existence of a statutory prohibition on evidence referred to in art. 199 of the Code of Criminal Proceedings.

Similarly, knowledge obtained by a medical doctor providing assistance, as well as people supporting him or other emergency services, should have been assessed. This does not have to refer only to the doctor himself but also to other people who had participated in the rescue operation or were in contact with the individual who later becomes accused. These persons could not be released from the obligation to keep medical confidentiality pursuant to art. 180 § 2 of the Code of Criminal Proceedings, since art. 199 constitutes a *lex specialis*. Statements made to the doctor and other persons participating in the rescue operation, experts recovering evidence, specialists and translators, cannot become evidence even if they were submitted before the perpetrator was formally referred to as the suspect[1].

It is difficult to agree with the view of M. Kornak that from the content of art. 199 of the Code of Criminal Proceedings it follows directly that the prohibition refers to a doctor providing assistance (Kornak, 2012). One cannot, however, consider accurate the view that making a statement to third persons can be used as evidence by interviewing those persons as witnesses "by hearing". It seems that the *ratio legis* of this rule would suggest that it refers not only to a doctor providing medical help. This prohibition also applies to persons whose assistance in providing assistance was natural and necessary (e.g. nurse, ambulance driver, paramedic, member of the public asked to help, etc.). If, however, other persons who did not participate in the incident were present during the assistance, the defendant's statements made in their presence are not subject to the prohibition on evidence. It is arguable, therefore, that the prohibition should concern the statements made only to an expert or a medical doctor, regardless of how many other outside persons were present when it was uttered. A different view would be an obvious consent to substituting the illegal evidence with a legal proof, even though the criminal trial allows the use of indirectly illegal evidence, which is in sharp contrast with the principles of a fair trial (see also: Urbaniak, 2013).

Prohibitions on proving specific facts and prohibitions on proving by means of certain evidence have been introduced by the legislator in the system of the criminal proceedings. The latter was divided into two groups, i.e. absolute and relative prohibitions on evidence (more in: Pawelec, 2016, pp. 306-307). Therefore, the question should be asked whether evidence from an illegal source can be used to establish other evidence. The point is whether it will be possible to substitute the evidence, which has been evaluated and found illegal with other evidence obtained from it, which is, to some extent, the basis of factual findings. This is a matter of dispute for years, especially since there is no

[1] See also in: Szumiło-Kulczycka, 2015; Łódź Court of Appeal judgement of 5 December, 2013, II Aka 242/13, Lex no. 1439174; Katowice Court of Appeal judgement of 21 October 2013, II Aka 334/13, Lex no. 1422301; Gdańsk Court of Appeal judgement of 15 May 2013, II Aka 130/13, Lex no 1335619; Warsaw Court of Appeal judgement of 28 September 2012, II Aka 241/12, Lex no. 1238271; Lublin Court of Appeal judgement of 21 August 2012, II Aka 173/12, Lex no. 1237253, Supreme Court judgement of 24 January 2008, V KK 230/07, Lex no. 359261; Cracow Court of Appeal of 29 March 2006, II Aka 45/06, Lex no. 183429; Supreme Court decision of 28 March 2018, I KZP 14/17, Lex no. 2475059.

provision that would eliminate from the factual findings the evidence obtained illegally. Various views on this subject expressed in literature basically accepted the evidence obtained from the, so-called, secondary sources and granted them the function of evidence and the basis of factual findings.[2].

Therefore, accepting the admissibility of extending the applicability of the provisions of art. 199 of the Code of Criminal Proceedings over situations related to statements made to a doctor providing medical assistance to a person other than the defendant, e.g. a victim, distorts the meaning of the indicated regulation and is a circumvention of the said prohibition (see also: Gurgul, 2010, pp. 185-196). Therefore, one ought to share R.A. Stefański's view (Stefański, 1998, pp. 113-117), that in the proceedings the documents comprising information on defence secrets, confessions or medical documents containing statements about committing an offence or crime by persons with mental disorders (Huk, 2001, pp. 69-85, Augustynowicz, Wrześniewska-Wal, 2013, pp. 89-106, Jasiński, 2013, p. 9). It should be emphasised that the regulations of procedural law do not contain rules that, in principle, would exclude illegally obtained evidence. However, there are a number of regulations prohibiting the use of specific evidence in the Code of Criminal Proceedings (article 171 § 7, article 186 § 1 *in fine* or article 199). At this point, it is worth quoting the view of L. Paprzycki that all the statements of the accused (suspect) reaching a doctor providing medical aid relate, in fact, to the act he was charged with, which does not apply to the victim or witness[3]. This relates to a person who became an accused (suspect), regardless of whether he/she already had such a procedural status when he/she made a statement to the professional. This type of statement cannot constitute evidence, because it falls within the scope of prohibition, and furthermore, no other evidence can be based on such statements of the accused. It is, therefore, a statutory prohibition of interviewing not only an expert or a doctor, but also other persons who, for example, have heard or may have heard certain statements. Article 168a of the Code of Criminal Proceedings, being a general rule, cannot eliminate this prohibition (Pawelec, 2017, pp. 182-183).

It has already been established in the jurisprudence that if the evidence declared inadmissible has been obtained in violation of the provisions of the Constitution of the Republic of Poland (e.g. Articles 30, 47, 49 or 51), it cannot become evidence. In such a situation, the statutory limitation expressed by the phrase "solely on the grounds that it was obtained in violation of the provisions of the proceedings or by means of a prohibited action" (Article 168a of the Code of Criminal Proceedings) does not apply[4]. Judicial jurisprudence met with a full approval of the doctrine (Brzozowski, 2017, pp. 52-59, Brzozowski, 2016, pp. 60-74, Gruszewska, 2017, pp. 60-78, Rychlewska, 2016, pp. 11-18).

There can be no dispute that the expert's opinion in its entirety, including a medical doctor, is covered by secrecy and its disclosure is possible only to the parties and only for the purpose of a particular proceeding. The above prohibition on the evidence applies to all medical care staff who provided the accused (suspect) with medical assistance, as well as persons involved in issuing opinions by an expert in another specialty. It also extends onto the records in medical and other documentation (Stefański, 1998, pp. 113-117, Jasiński, 2013, Sowiński, 2003, pp. 31, and Kowalczyk, 2016).

In connection with the hereby discussion, the judgement of the Court of Appeal in Katowice of 6 March, 2014 (II Aka 33/14, Lex No. 1451618) seems to be highly controversial, as it comprises the following thesis: "In the light of the prohibition on evidence defined in art. 199 of the Code of Criminal Proceedings. stating that the accused's statements regarding the act he was charged with cannot constitute evidence, the Court of Appeal found that the above-mentioned absolute prohibition on evidence includes not only the testimony given by the doctor as a witness, but also the contents of the medical records. In that case, the Court did not oppose the use of the testimonies provided by the ambulance staff and the medical records as the basis for factual findings. The presented prohibition on evidence as a rule, which constitutes an exception to the general rule of admissibility of all legally obtained evidence, should not be interpreted broadly, beyond the scope strictly defined by the wording of of art. 199of the Code of Criminal Proceedings. It does not contradict the presented interpretation also the *ratio legis* of the legal regulation aimed at protecting the trust of a specific defendant receiving medical assistance to persons providing such assistance. In a situation where medical help is provided only to the defendant, her statements made to the doctor can be used as evidence against the co-accused who did not use such assistance, unless, of course, this will in no way affect the accused's trial situation, which was medical activities."

The motives of the verdict, unfortunately, do not contain satisfactory reasoning justifying the view presented in the thesis. It must be pointed out that the facts of the case, from the point of view of the procedural system, were not at all unequivocal. It was

[2] See also Supreme Court judgement of 18 November 1978, VI KRN 326/78, OSNPG 1979, no. 4, item. 67; Lublin Court of Appeal judgement of 25 September, 2013, II Aka 146/13, Lex no. 1378752.

[3] See also: Supreme Court judgement SN III KK 366/11, OSP 2013, no. 9, item. 86 with gloss of approval by M.J. Urbaniak, p. 620.

[4] Repeal SN of 23 March 2011, I KZP 32/10, Lex/el; Wrocław Court of Appeal judgement of 27 April 2017, II Aka 213/16, Lex no. 2292416; Warsaw Court of Appeal judgement of 13 June, 2016 , II Aka 133/16, Lex no. 21712522.

about the relationship of the later accused with the people closest to her. This person was not informed about the so-called right to remain silent or to refuse answering questions. The basis for the subsequent charging was doctor and medical staff's testimony, including statements regarding the person closest to her, who was also accused at a later stage of the proceedings. Therefore, in the light of the fragment of the quoted facts the view expressed by the Court of Appeal does not deserve to be supported. It constitutes a departure from the current, rational line of jurisdiction[5].

Undoubtedly, the future accused (suspect, suspected person) is in an unusual situation, especially when performing unreproducible activities, as regards perceiving the situation and the special role that may be played in the criminal trial, and in responding to it. Other persons involved in the incident are not indifferent, especially when they are friends and relatives of the future defendant. Honesty in such situations does not have to be a natural necessity at all. It is irrelevant, therefore, whether the doctor or psychologist provided assistance to such a person. In spite of the lack of physical injuries, such a person's psyche could have sustained serious harm that distort the real picture of the event and increase proneness to influence and suggestion. Hence, critical remarks on the quoted view of the Court of Appeal are justified (Kowalczyk, 2016, Roszkowska, 2015, pp. 366, Hołyst, 2018a, pp. 1039-1094, Hołyst, 2018b, pp. 35-37, 75-121 with the quoted literature).

The discussed issues, however, have a much wider sense. Expert opinions, including medical, psychological and other examinations, often contain information obtained from defendants, which may not be used as evidence according to art. 199 of the Code of Criminal Proceedings. (Komar-Zabłocka, 2018).

Final remarks

Attention should be also drawn to an important problem that has not been noticed in judicature, namely the fact that a protocol is taken from the collection of blood and other body fluid samples during the performance of unreproducible activities, although this activity is not performed by a law enforcement authority, but by experts, most often doctors. Therefore, it is unacceptable to read such a report at trial, when it contains information obtained from the accused referring to the circumstances of the crime attributed to him/her. A person who performs such examinations and who should not make a protocol, because it is inconsistent with art. 150 § of the Code of Ceiminal Proceedings, is not allowed to be interviewed as a witness. This ban is repeatedly not observed contrary to art. 199 pf the Code of Criminal Proceedings (Pawelec, 2014, pp. 106-107, Pawelec, 2013, pp. 208-209).

Another issue is the evaluation of the evidential value of an inquiry among the persons involved in the incident, including witnesses, and then documenting this activity in an official note drawn up by Police officers. It is necessary to agree with the Supreme Court's view expressed in the judgment of January 22, 1981 (II KR 404/80, OSNPG 1981, No. 5, item 52), that an official note may not be used as a basis for determining that the circumstances and facts described in it actually took place. Protocols have only procedural significance (Pawelec, 2014, pp. 111-113, quoted literature and case reports).

The judicature has established a view that making factual findings based on the testimonies of police officers who obtained information from the accused-to be during performing service duties may not be used as evidence. That would be a substitution of evidence from witness testimony or explanations of the accused with reports or notes, which has been considered as inadmissible (Pawelec, 2016, p. 220, quoted literature and case reports).

At this stage, it is worth to note the view of A. Gaberle, who did not see any obstacles for the police officer to be interviewed as a witness as regards the content of an informal conversation conducted with a subsequent defendant (Gaberle, 2007, p. 325; Pawelec, 2010, pp. 87-90). He emphasised, however, that it would only be the hearing of an ear witness. This view ought to be critically analysed, as it does not comply to art. 74 § of the Code of Criminal Proceedings. and is contradiction to a fair trial, because of an attempt to legalise evidence that was gained illegally. Practice, however, indicates that law enforcement agencies, especially in situations where the prosecution's version collapses in the course of court proceedings, often reach for this kind of evidence. In some situations witnesses appear somewhat "out of nowhere" as "defendant's comrades from prison", who testify that the accused confessed he had committed the crime he was charged with. In other cases, unexpectedly, there comes a police officer who has just remembered he had an informal conversation with the accused who admitted he was guilty. To avoid this kind of situations, it is worth considering the *de poste ferenda* propose to change the content of art. 199 of the Code of Criminal Proceedings by giving it the following wording: "the accused's statement made to an expert, specialist, translator or persons providing medical and

[5] See also; Łódź Court of Appeal judgement of 5 December, 2013, II Aka 242/13, Lex no. 1439174; Katowice Court of Appeal judgement of 21 October, 2013, II Aka 334/13, Lex no. 1422301; Gdańsk Court of Appeal judgement of 15 May, 2013, II Aka 130/13, Lex no. 1335619; Warsaw Court of Appeal judgement of 28 September, 2012, II Aka 241/12, Lex no. 1238271; Supreme Court decision of 28 June, 2012, III KK 366/11, OSNKW 2012, no 10, item. 10; Supreme Court ruling of 24 January, 2008, V KK 230/07, Lex no. 359261; Cracow Court of Appeal judgement of 29 March, 2006, II Aka 179/03, Lex no. 82899; Supreme Court decision of 28 March, 2018, I KZP 14/17, Lex no. 2475059.

psychological assistance, or other emergency services cannot be regarded evidence by law enforcement and the justice system representatives."

Should the proposed amendment become a fact the debates on the evidential value of official reports, informal conversations with possible defendants, as well as knowledge obtained by experts from the defendants during their activities might become pointless.

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