



EVIDENCE LAW

-

THE LAW OF EVIDENCE

DAVID ČEP
Department of Criminal Law (Ph.D.)

Selected problems of Czech Criminal Law,

BASICS

Evidence Law

- ▶ Written law included in the Code of Criminal Procedure (CCP)
- ▶ Certain provisions representing (rational) instructions for investigative, prosecuting and adjudicating bodies (IPA bodies) when preparing the factual basis of their decision

Sources of (Evidence) Law

- ▶ Primary source of law is statutory law
 - ▶ state power (authority) may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law
 - ▶ IPA bodies are state authorities – thus, they can exercise their competences in criminal proceedings only when law allows them to do so

- When making their decisions IPA bodies are bound by **statutory law** (in general; police authority and public prosecutor are also bound by other sub-statutory regulations)
- **Courts** (judges) are bound only by
 1. Statutes and
 2. International treaties which are part of the legal order
- **Judicial decisions** (case law/judiciary) are not the source of law (there are no precedents)
 - Yet, they are used by court as basis of their decisions. Why?
 1. **Respect to legal certainty** of citizens based on the fact that the courts in factually similar cases will decide in similar way
 2. When the court ignores judiciary, there is high chance of giving a decision that will collide with it and such decision will be **overruled** by higher court (court of appeal)

EVIDENCE

Evidence (as an activity)

- ▶ **Activity** of IPA bodies regulated in CCP which is aimed at:
 - 1. Searching For And Collection of Evidence**
(finding a witness and bringing him or her to court)
 - 2. Obtaining of Evidence and Securing it Procedurally**
(protocol of witness testimony)
 - 3. Checking of Evidence**
(does the witness testimony correspond with other evidence in this case)
 - 4. Assessment of Evidence**
- ▶ Represents the **only way** in which IPA bodies can and must obtain the factual basis for its decision or for further actions

Basic Phases of Evidence

1. Searching for Evidence

- ▶ All IPA bodies are obliged to search for anything that may be used as a mean of evidence and which may contribute to clarification of the case (investigating/searching principle)
- ▶ E.g. questioning of the accused, questioning of the witness, examination of crime scene, wiretaps, etc.

Basic Phases of Evidence

2. Obtaining of Evidence and Securing It In Accordance with CCP

- ▶ Obligation of IPA bodies to produce all evidence and to secure them procedurally
- ▶ E.g. examination of crime scene itself and taking a protocol (transkript) on examination of crime scene, interrogation of witness and protocol about interrogation of witness (preliminary proceedings as well as proceedings before court)

Section 2 par. 5 CCP

IPA bodies act in accordance with their rights and obligations under this Act and with the assistance of the parties **so as to duly establish the facts of the case** (...) During the preliminary hearings, **IPA bodies shall ascertain all the circumstances for and against** the person against whom the proceeding is pending **with the same care and in the manner provided by this Act** even without proposals of the parties to an action.

3. Checking of Evidence

- ▶ Obligation of IPA bodies to check each evidence that has been found in details and subsequently also in mutual relations between all evidence
- ▶ **Correct and due performance** of the checking of evidence is a basic prerequisite of objective assessment of evidence
- ▶ E.g Expert Opinion is checked in general (if it has all requisities stated by law, if it was provided by expert who is written in list of experts), in its content and according to other evidence

4. Assessment of Evidence

- ▶ Centerpiece of entire evidence (activity), deciding whether certain fact that is important for the case happened and how it happened.
- ▶ **Legality, Relevance, Reliability and Verity** of Evidence

Section 2 par. 6 CCP

IPA bodies shall review (evaluate) the evidence according to **their discretion** based on **careful consideration** of **all the circumstances of the case separately and as a whole.**

BASIC PRINCIPLES OF EVIDENCE

Presumption of Innocence Principle

- ▶ Until guilt is declared in a final and conclusive sentencing judgment, the one against whom the criminal proceedings is conducted may not be considered guilty
- ▶ If there are any reasonable doubts about guilt of the accused and those can't be successfully removed by producing other evidence, then it is necessary to decide for the benefit of the accused - *Principle In dubio pro reo*

Article 40 par. 2 of Charter of Fundamental Rights and Freedoms

*A person against whom a criminal proceeding has been brought shall be considered **innocent until his or her guilt is declared in a court's final judgment of conviction.***

- In order to sentence the accused, his guilt **must be proved by IPA** (police auth. respectively by state prosecutor) as the accused is **not obliged** to prove his innocence or more precisely to prove any fact important for criminal proceedings
 - *Principle nemo tenetur se ipsum accusare a. k. a. Privilege against self-incrimination*
 - *Principle nemo tenetur edere instrumenta contra se*
- No conclusion regarding guilt may be deduced from activity or passivity of accused
 - Accused may remain silent and totally passive (it is his fundamental right) a. k. a. *the golden rule of accused*
 - Can we **deduce something** from silence of the accused?

Searching Principle

- ▶ IPA bodies are obliged to ascertain *ex officio* facts testifying for the benefit as well as to the detriment of the accused
 - ▶ E.g on the basis of their official duty and they do not wait for any activity/motion of the parties
 - ▶ „Indictment deviation“
- ▶ The accused **may suggest to obtain certain type of evidence**
 - ▶ E.g. clarification of a fact which is important in terms of his guilt and which may even testify for his benefit
 - ▶ Evidence can not be rejected just because it is suggested by the accused

Verbal Principle

- **Hearing before court** is verbal
- Evidence in form of testimony of witnesses, experts and the accused is usually given by their interrogation
- There is an opportunity to give an evidence by reading a protocol of prior testimony of accused or witness if:
 - a) He/she refuses to give a testimony before court
 - b) There are differences in their current and original testimony [It does not mean that an accused/witness is lying (ability to remember after a long time period)]
 - c) The witness testimony does not agree with the accused testimony (In order to find the reliability of evidence is necessary to remove these distortions)

Section 211 par. 2 letter a)

The protocol on the testimony of the co-defendant or witness can also be read if the **interrogation was performed** in a manner **consistent with the provisions of CCP**, and **such person has died or is still missing, is unreachable due to a long term stay abroad (...)**

Section 211 par. 4

The protocol on the testimony of a witness who **exercised their right to refuse to testify** under Section 100, during the main trial, may be read only if the witness was **duly instructed** on their right to refuse to testify prior to the interrogation and they **explicitly stated that they do not intend to exercise this right**, if the **interrogation was conducted** in a manner **consistent with the provisions of CCP**, and the accused or the defence counsel had the **opportunity to attend this interrogation.**

Principle of Directness

- ▶ When making a decision in the trial the court may consider only such evidence which was **given during the trial**
- ▶ The rule of **impossibility to change members of the court** according to which only the judge who was present at the trial from its beginning until its end may render decision

Example

*Witness testifies in favor of the accused but he is quite obviously sweating or nervous. Principle of Directness secures that judges may perceive such facts and according to them ask witness about other facts of case or reason for his or her behaviour. According to answer the **reliability** of evidence can be disproved.*

- ▶ General impossibility to postpone the trial to ensure that the court decides on the basis of perceptions following from facts learnt in the performed trial
 - ▶ However this does not mean that it wouldnot be impossible to postpone the trial in special cases (E.g. due to the provision of further evidence)

Principle of Discretionary Weighing of Evidence

- ▶ IPA bodies weigh the evidence according to their **internal belief** based on **careful consideration** of all circumstances of the case individually as well as whole
- ▶ This principle is built on the internal belief of IPA bodies which is not created as a manifestation of subjective arbitrariness
 - ▶ It means **strictly logically, based on the legal order, legal awareness, universal and logical weighing of evidence as well as the context of cases**, it must result in a belief about whether and how a certain act happened and how it should be legally assessed

- In the court decision must be specified :
 - Which facts are considered proven, which evidence it used as a basis of its factual findings, the existence of which facts it considers doubtful and what are the results thereof and which considerations the court follows
 - Only such decision is reviewable

Section 125 par. 1 CCP

If the judgment includes the justification, the court shall briefly explain which facts were deemed proven and which factual evidence supported their findings and which considerations they followed in the assessment of the presented evidence especially if they are mutually contradictory. The justification must be clear on how the court dealt with the defence counsel (...) what legal considerations were followed when it assessed the proven facts (...)

Principle of Ascertaining Facts Free of Justified Doubts

- Individual facts must be proven only in the extent necessary for a decision in terms of ascertaining the facts of the case for a specific decision
- CCP does not include the principle of the so-called **objective truth** which allows the court, when rendering its decision, to be satisfied with such facts of the case which both parties jointly recognize proven
 - What is the truth and is it possible to ascertain the truth
- **Confession** of the accused does not release IPA bodies from the obligation to examine all important facts of the case
 - Because the accused may defend in any way

SUBJECT OF EVIDENCE

- Circumstances important for the **decision on merit of case**
 - E.g. circumstances forming the elements of an offence which is allegedly the prosecuted act, circumstances suggesting or disproving that the offender is the accused, circumstances important in terms of imposing a certain measure on the accused
- Circumstances important for **further actions in the criminal proceedings**
 - E.g. circumstances justifying postpone of a trial, suspension of criminal prosecution, refusal of the obligation to testify
- Circumstances that **resulted in criminal activity or allowed its committing** and circumstances important for the **decision on assertion of a claim for damages**

THE SCOPE OF EVIDENCE

*In a criminal prosecution it is required to **prove to the necessary extent**, in particular:*

A) Whether an act is seen as a criminal offence,

E.g. whether the act was committed at all, the manner of its committing, circumstances of its committing as well as circumstances excluding unlawfulness of the act (e. g. self-defence, approval of the injured, admissible risk or authorized use of a weapon)

B) Whether the act was committed by the accused or based on what motives,

E. g. whether the act was committed by the accused, identification of specific offender (state authority person, soldier the mother of a newborn baby), his age (adult, juvenile) as well as motive

C) Significant factors affecting the assessment of the nature and seriousness of the act,

D) The relevant circumstances to assess the offenders' personal circumstances,

These are important for deciding on type of punishment (unconditional imprisonment, pecuniary sanction etc.)

E) The significant circumstances allowing the determination of the consequences, the amount of damage and unjust enrichment, caused by the criminal offence,

E.g. Assessment of damage or examining whether the damage has not been compensated (for purposes of application of diversions, application of effective remorse)

Minimum is 5.000,- CZK

F) The circumstances that led to the criminal activity or allowed it to be committed.

The facts which cannot (or don't have to) be proved

- It is not necessary to prove facts which are considered true on the basis of general human experience and there are no doubts about them
 - Should any doubts about those facts occur they would naturally be a subject of evidence
 - E.g. the accused was sane, a document delivered to an IPA body comes from the person specified therein as the sender or visual condition at certain hour in summer
- Those facts on which a decision was rendered in a manner binding for IPA bodies or on which other bodies than IPA bodies can decide

- ▶ Legal regulation of the Czech Republic published or notified in the Collection of Laws and international treaties
- ▶ Legal regulation published or notified in the Official Journal of the European Union
 - ▶ Principle that court knows the law („iura novit curia“)
 - ▶ Regulations which are not published in the Collection of Laws/Official Journal and therefore they are not generally known are the subject of evidence
 - ▶ E.g. various statutes, articles or measures
 - ▶ Non EU law is subject of evidence (documentary evidence)

MEANS OF EVIDENCE

Section 89 par. 2 CCP

Evidence (mean of evidence) **may be anything** that **may help to clarify matters**, in particular the testimonies of the accused and witnesses, expert opinions, items and documents relevant to the criminal proceedings, and examinations.

Each party may seek, submit, or propose the implementation of evidence.

The fact that the law enforcement authority did not seek or request it **is not** grounds for the rejection of such evidence.

Illegal evidence

- ▶ Each item of evidence must be searched for, obtained, procedurally secured and assessed in accordance with the law
 - ▶ If not, it would be obtained contrary to the law, and thus considered as **illegal evidence**
- ▶ Such evidence de facto exists but it cannot be used and it must be regarded as if it did not exist at all
- ▶ CCP does not include any positive definition of the term of illegal evidence

Section 89 par. 3 CCP

*Evidence obtained by **unlawful coercion or threat of coercion** may not be used in the proceedings **except** when used as evidence against the person that used coercion or threatened coercion.*

- Illegal coercion may take several forms, most frequently the form of physical and psychic coercion
- Such evidence suffers of a substantial defect which cannot be removed in any way during criminal proceedings and hence it may not be used within the proceedings (**absolute ineffectiveness**)
 - **Relative ineffectiveness** can be removed during criminal proceedings – e.g. deprivation of confidentiality of witness
 - The distinction between relative and absolute ineffectiveness is not accepted by all legal theory, because it is not in accordance with basic principle of discretionary weighting (evaluation) of evidence
- Illegal evidence may be used only as evidence against the person who applied such coercion or threat of coercion

Fruit of Poisonous Tree Doctrine

- ▶ If the first evidence is obtained illegally how is it with the legality of other evidence obtained on the basis of this evidence?

Example

During illegal house search was obtained bank account number of the accused under which was requested bank information in accordance with the law.

- A. If the tree is poisonous it means all its fruits are poisonous as well?
- B. Even if the tree is poisonous it does not mean all its fruits are poisonous as well?

Answer depends on **causality** between illegal evidence and new evidence.

Interrogation of accused

- ▶ Accused has a **right** but not obligation **to testify** and **to comment on all the facts**
 - ▶ Yet, he is obliged to obey order to attend before the IPA bodies
- ▶ Right to defend in **any way**
 - ▶ Accused can be criminally liable only for false accusation
- ▶ Possibilities how to **ensure the presence** of the accused to the acts of criminal proceedings
 - ▶ Summons of the accused or re-imposing of disciplinary penalty up to 50.000,- CZK
 - ▶ Presentation of accused (against his will)
 - ▶ Arrest warrant (conditions for custody, ultima ratio)
 - ▶ Custody (preventive, collusive or protective custody)

Interrogation of witness

- **Obligation** to testify
 - „The evidence which I shall give shall be the truth, the whole truth, and nothing but the truth“
 - The witness does not testify under **oath** but he is advised to tell the truth
 - Obligation to obey the order to attend before the IPA bodies

- Right to **refuse testimony** if the witness:
 - a) Has **duty** not to disclose/ pledge of confidentiality
 - He or she may testify only if deprived of this duty
 - b) Is in **relation** to the accused (sibling, adoptive parents, adoptive child, spouse or partner or common law husband)
 - CCP prefer protection of the family relationship
 - c) Can **cause** criminal prosecution of himself or next of kin (sibling, adoptive parents, adoptive child, spouse, partner or common law husband) or other members in family (cousin, aunt, uncle) or cause them harm, that he feels like his own (applicable towards corporations?)

- Possibilities how to ensure the presence of the witness to the acts of criminal proceedings
 - Summoning of the witness (volunteered to come)
 - Re-imposing of disciplinary penalty
 - Presentation of the witness (against his or her will)

SPECIAL METHODS OF EVIDENCE

- Evidence as a procedural activity is very closely related to **criminalistics**
- Criminalistic procedures and methods are directly presented when searching for, securing and providing various means of evidence
- CCP regulates only some of them
 - It does not mean that if a certain criminalistic method is not regulated by CCP it is illegal and therefore inadmissible from the procedural point of view
- The following methods are closely related with Principle of ascertaining facts free of reasonable doubts

Confrontation

Section 104a CCP

- ▶ If the testimony of the accused does not conform to the testimony of a witness or accomplice in significant aspects, the accused can be confronted with the witness or the accomplice face to face (*vis á vis*)
- ▶ If the testimony of a witness does not conform to the testimony of the accused or another witness, the witness can be confronted with the accused or another witness face to face

Recognition

Section 104b CCP

- Recognition is conducted if it is important to the criminal proceedings that the suspect, accused, or witness re-identify the person or the item and thus determine their identity
- Where a person is to be identified, the suspect, the accused, or a witness is shown to the person among at least three other persons who are not significantly different
- If it is not possible to show the person who shall be recognized, the recognition shall be carried out on the basis of a photography (with same rule of „3plus“)
- If the thing should be recognized it shall be showed in a group of things preferably of the same kind

Investigatory Experiment

Section 104c CCP

- ▶ The investigatory experiment is carried out if the circumstances ascertained in the criminal proceedings, eventually the new circumstances significant for the criminal proceedings, are **to be verified or specified**, by observation under **artificially created or permutated conditions**
 - ▶ Was it possible to shot the victim in that distance?
 - ▶ Could witness actually see the accused?

Thank you for your attention.

Are there any question?

**If not, please do not hesitate to contact
me via email.**

Mgr. DAVID ČEP

Assistant

**Department of Criminal Law
Faculty of Law - Masaryk University**

Veveří 70

611 80 Brno

The Czech republic

David.Cep@law.muni.cz