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Procedural issues of proving in activity of a counsel-defender in the criminal proceeding

Abstract: Defendant is entrusted with specific obligations to implement of which he is authorized with specific rights. Fulfillment of the obligations and using with the rights is carried out on discretion of a defender, under which is understood an initiative in choice of means and ways not forbidden by the law.

It is considered an issue "an asymmetry of the rules of admissibility of the evidence", using of non-reliable proofs.

Keywords: proving; a lawyer; defender; criminal proceedings; admissibility of the evidence; pre-trial production; court proceedings.

According to article 85 of CPC of RF proving are a collection, examination and assessment of the evidences in purpose of establishing of the circumstances provided by article 73 of the Code. Subjects of this activity are an inquirer, investigator, prosecutor and court. But, unlike to the indicated officials, participating in process of proving a defender does not have necessary powers (25, p. 156-158; 35, p. 298; 5, p. 12; 13, p. 605). Therefore, an issue about providing to a counsel-defender with the right independently collect evidences on equal terms with the prosecution party (to carry out its "parallel investigation") had been ever risen in the project of Common part of the CPC of RF in 1994, which was prepared by the State-legal Department of Presidential administration of the RF.

Participation of the counsel-defender in proving is determined with following: at first, he assesses the evidences in purpose of defense the rights and legal interests of a client, and his activity has one-sided nature; at second, the results of activity on assessment of the evidences are expressed in the petitions, statements etc. with the

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goal to convince of an investigator, prosecutor and court in rightfulness of his position, and the results of such activity is clothed in procedural documents (decisions, rules etc.), determining the further movement of criminal case and are subjected to execution (31, p. 117; 35, p. 442-443; 2, p. 110; 32, p. 251-255; 6, p. 51-57); at third, he is not indicated in articles 17 and 88 of CPC as a subject of the evidences assessment.

One of the discussible issues of the theory of criminal process is the following: does a defender have the right and obliged to participate in proving of the criminal proceedings?

Ones authors think that a defender has the right to take a part in proving (14, p. 127; 1, p. 18; 34, p. 252-253; 15, p. 198-206); others ones suppose that he is obliged to participate in proving process (37, p. 10-26; 20, p. 104; 12, p. 52; 16, p. 95-96, 207-208).

Part 3 of article 15 of CPC says: "A court creates necessary condition for the performance by the parties their procedural obligations and execution of the rights that they are provided". One of the subjects of a defense party is a defender (§46, p. 1 of art. 5 of CPC). Consequently, he has also to have the procedural rights and obligations. According to part 1 of article 49 of CPC, a defender is a person implementing in established order the defense of the rights and interests of suspected and accused individuals and providing them the legal assistance upon production on the criminal case. In common form the article provides to a defender with powers of the right-binding nature. Their essence is in that it is necessary simultaneously in respect of the same actions to indicate to a defender what is permitted him and what he is obliged to do. In addition, it is not possible and reasonable to do it simultaneously under the regulating of specific situations. Therefore, in this case a lawmaker did not use the terms "has the right" and "is obliged", and had used descriptive way of regulation. Thus, the lawmaker determines necessary general line of the defender's behaviour – his obligation to act in direction of protection the rights and legal interests of a client. Placing of the general obligation is allowed to a lawmaker to use also such way as providing to a defender with the means and

methods of s defense that are not forbidden by the CPC (art. 53). By this token, in part 3 of article 15 of CPC is indicated that a court creates the necessary conditions for implementing by the parties provided them rights, including to a defender.

Thus, a defender is entrusted with specific obligations to perform of which he is given certain powers (the rights). Usage of these powers is and simultaneously his legal duties and he cannot evade of fulfillment of these obligations. A defender does not have a freedom to choice a way of his behaviour. He has what usually is qualified as discretion. Under this is understood a manifestation of a defender an initiative during a choice of the means and methods of the defense (not forbidden by the law) if the bounds of execution by him a protection the rights and legal interests of a mandatory.

Consequently, it is placed of a lawyer the general obligation to use all not forbidden by CPC (art.53) means and methods of protection the rights and legal interests of a client (13, p. 605).

This position is confirmed also in the Federal law "On the Lawyer's activity and Advocacy in Russian Federation" from 31 May 2002, No. 63-FZ (further – Law on the lawyer's activity), which is obliged a lawyer honestly, reasonably and painstakingly defend the rights and legal interests of a mandatory with all means that are not forbidden by the legislation of the RF (§1 of part 1 of article 7). The same point of view is adhered advocacy society of Russia, which in the First All-Russian conference of the lawyers (31 January 2003) adopted the Code of professional ethics. According to §1 of part 1 of article 8, "during performance of professional activity a lawyer honestly, reasonably and painstakingly, qualifiedly, principally and timely executes the obligations, actively defends the rights, freedoms and interests of the clients with all legal means and guiding by the Constitution of Russian Federation, law and the present Code". The more so that according to part 2 of article 7 of the Law on lawyer's activity, for non-performance or improper execution his professional duties a lawyer bears responsibility provided by this Federal law.

If on a counsel-defender is placed general obligation to use all not forbidden by the CPC means and methods of protection, i.e. the rights (art. 53 of CPC of RF) in

order to defend the rights and legal interests of a client then it is arisen a question, what way is a presumption of innocence applicable in this case at?

If a defender does not have the exculpatory evidences testifying about innocence or at less guilt of a client in brought accusation, then it does not mean that the guilt of his client in this case will be proved and the counsel-defender has not fulfilled his duties on participating in the proving process. In this case the defender is just obliged to use the presumption of innocence, when "a thesis non-guilt is proved with a way of indicating on the groundlessness of the thesis of guilt that brought by a prosecution, in particular with method of critics of the evidences laying on the basis of accusation, indicating on the versions refuting of a version of prosecution in full or partially, or with indicating of insufficiency of the evidences laying on the basis of accusation" (19, p. 553). It is not accidently, from the presumption of innocence (art. 49of the Constitution and art. 14 of the CPC) follows that: a) an accused is considered innocent until his guilty in committing of crime will not be proved in an order that provided by the present Code and established entered in legal force of a court sentence; b) an accused is not obliged to prove his innocence; c) a burden of the accusation proving and arguments' refutation of an accused person are the duty of prosecution's party; d) all doubts in guilt of an accused individual, which cannot be eliminated in an order that established by the present Code are interpreted in favour of the accused; e) a verdict of guilty cannot be based on the suppositions.

The one more problem is "an asymmetry of the rules of admissibility of the evidence", when the rules about the evidence's admissibility is related only to the accusative proofs; acquittal evidences received with violation of the law may used the defense party (26, p. 184; 27, p. 75-76; 3, p. 523, p. 43). The first time this term was introduced in juridical lexicon by A.M. Larin (33, p. 303). Undoubtedly, "an asymmetry of the rules of admissibility of the evidence" in criminal proceeding is useful for the counsel-defender. Besides, it should not forget that a lawyer acts in the legal reality and consequently he has to take into account a correspondence of this rule to the legislation of the RF. In connection with this, P. Sergeyich justly noted: "The best defense is the protection by the law; it adventures is in what, if a defense

has found legally right provision - it is mandatory for the judges" (29, p. 38). What are the arguments of the supporters of "an asymmetry of the rules of admissibility of the evidence" and whether they correspond to the Russian legislation?

Provision of the part 1, article 75 of CPC should be interpreted only the essence that an inadmissible are recognized the evidences obtained with violation of the law requirements, and consequently they cannot be put on the basis of accusation (28, p. 105-106). Moreover, it is important to comprehend a content of all legal norms, but not its fragment: inadmissible evidences do not have a juridical force and cannot be put in a base of accusation, and also are used for proving of any from the circumstances provided by art. 73 of CPC (part 1 of art. 75), i.e. including those circumstances, which: a) exclude criminality and punishment of a deed (§5, part 1 of art. 73); b) mitigate of punishment (§6, p. 1 of art. 73); c) are caused of releasing from criminal responsibility and punishment (§7, p. 1 of art. 73). This means that evidences received with violation of the law cannot only be put in a base of accusation, but also in a basis of defense. Consequently, this argument is unfounded.

In opinion of some lawyers, "proofs obtained with violation of the law or the rights of an accused and therefore recognized inadmissible may be (for some exceptions) used in the interests of a defense. If deprive a defense party of such right then it would be that the negative consequences of the law violations made during receiving of the evidences, is brought an accused. It is essentially, the responsibility for such violations is brought an accused and his defender" (11, p. 39). For substantiation of their position they give the following example: "On a petition of an accused individual the investigator interrogated of a witness who had confirmed a reference of the accused on alibi. Due to the investigator's careless, the witness was not notified about responsibility for giving false testimonies. If on some reasons it would not be possible repeated interrogation of the witness, could his testimonies be excluded from the evidences and not taken them into account under the assessment of proofs of the accused person's guilt? We believe that it cannot. In any case, a defender has the right to use these testimonies in substantiation of his position, which

is not excluded necessity of checking of reliability of the indicated testimonies on a level with other evidences" (11, p. 40).

Indicated substantiation of "an asymmetry of the rules of admissibility of the evidence" is the most widespread in the lawyer's environment. I suppose that with point of view of the law and presumption of innocence, recognition of acquitted proofs is inadmissible or its absence should not and cannot bring any negative consequences for the defense. Therefore, as it noted, in case when the defense does not have acquitted evidences it does not mean that guilt of a client will be proved since the thesis "non-guilt" is also proved by the way of indication on non-groundless of the thesis "guilt" brought by the prosecution's party through refutation of the versions of accusation's party in full or partially.

Other issue - an issue of prejudiced attitude to a client from side of prosecution and court which is expressed in that the versions of an accused and a defender are not taken into account, ignored. Therefore, it is understandable a wishing of the lawyers to have in a case as much as possible acquitted proofs allowing "to neutralize" accusation. In addition, this problem is the problem of appropriate public institutions and their officials carrying out a criminal prosecution and justice. Consequently, the question is not in the provisions of the criminal-procedural law, but in its right application, and in desire of defenders, except the presumption of innocence, to have in an arsenal of the defense also acquittal evidences including and for the more persuasiveness and clarity of defending position.

In juridical works are existed such idea that "an asymmetry of the rules of admissibility of the evidence" is possible since an accused individual cannot bear responsibility for the mistakes of an investigator "killed" acquittal proof (17, p. 371-372). Any other decision will be meant a deviation from the judicial practice of the competitive process (18, p. 99-100). The USA is the brightest representative of the modern competitive process. Article 105 of the Federal Rules of usage of the evidences in the USA courts as by the judges so and magistrates says: "If a proof admissible for one party or for one purpose and inadmissible for other party or other goals is accepted as admissible then a court on an appropriate petition should limit

the examination of this evidence up to proper bounds and to make an appropriate instruction to the jurors" (8, p. 101-102). Thus, the American Rules establish the equal legal regime admissibility of the evidences as for the prosecution party so and for the defense party which is found its reflection in the juridical practice. It is not accidentally, as any modern competitive process supposes the equal rights of the parties (4, p. 22-24), in our case – the equal legal regime admissibility of proofs for the parties. Consequently, "an asymmetry of the rules of admissibility of the evidence" does not correspond to the legislation of RF, and therefore it is not acceptable it application in criminal proceeding (22, p. 148-149; 30, p. 24).

In the juridical science has been continuing discussions about the right of a lawyer to use or present acquittal proof in veracity of which he is in doubt. So, N.N. Polyansky believed that a lawyer could not use for the defense the evidences which are obviously imperfectly known for him. As for the proofs, the veracity of which are doubtful for him: a lawyer may use them since he "is obliged to provide a court with the arguments speaking in favour of reliability of the proofs in spite of level of his doubts in their veracity. As, a court has the right to expect that the participants of a process will present the evidences, state their ideas which are required for the detailed assessment of the circumstances of a case" (21, p. 69-71). Ya.S. Yakovlev thought that it is not acceptable using of the arguments at a distinct consciousness of unsoundness, at contradiction of the latter to the vital truth; it is acceptable to use such argument in the cases when are appeared some doubts in respect of reliability and at correspondence of an argument to the vital truth (9, p. 80-93). According to Yu. I. Stetsovsky, "a defender may not refer to the proofs in obvious falsity of which he is convinced. But it cannot demand on a defender that he would provide only truth facts as in differ on other participating in a process of the public organs the defender usually cannot in advance check his statements" (32, p. 252). That is, if a lawyer is only in doubt in reliability of acquitted evidence (argument) then he has the right to use it.

All these ideas have the general features: a) it is not acceptable of using by a lawyer the obvious false acquittal proof or contradiction of an argument to the vital

truth; b) it is acceptable to use such argument when are appeared some doubts in respect of reliability and at correspondence of an argument to the vital truth.

Absolutely opposite position on this issue had N.P. Kan: if a defender comes to conclusion about doubtfulness of reliability of the evidence then using them he risks turning from the lawyer of a client into a fighter against justice (7, p. 196-197). Here is conclusion: a defender cannot use acquitted evidence the reliability of which is doubtful for him. Counsel-defender can turn into "a fighter against justice" only when he will commit crime against justice provided by the Chapter 31 of Criminal Code, when he will falsify a proof (part 2 of art. 303 of CC), that is, for instance, during a trial investigation he will submit a petition about attaching to a case a document, material evidence knowing in advance that the proofs are not reliable (36, p. 399), and but not in case as N.P. Kan believes when a defender is used by the acquitted evidence in reliability of which he is in doubt.

Certainly, a counsel-defender does not have the right to use or provide obvious for him false proofs since this is criminally punished action (part 2 of art 303 of CC). As for the using of acquitted evidences in reliability of which the defender is in doubt then it is acceptable their using as it is not any ban in the law. In addition, in respect of the powers of a defender the criminal-procedural law establishes a permissive type of regulating; when it is permitted all that it is not forbidden. The only, that a lawyer should take into account is - not to cause of a client. As, during of examination the proofs can change their status and are turned into accusative ones. Consequently, it is necessary a special wariness when are using non-checked evidences and arguments.

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