Jamalov I.J. ♦

Criminalistical toolkit in criminal pre-trial production

Abstract: Most part of criminalistical recommendations on production of investigative actions and organizational measures contradict provisions of criminal process, and the latter are not ensuring their effective usage in course of pre-trial production.

It is considered correlation of procedural form and criminalistical contents of the main investigative actions.

Keywords: pre-trial production; criminal process; criminalistics; investigative actions; organizational measures; an investigator; interrogation; inspection.

Article 7 of the Criminal Code of Procedures (CCP) of Azerbaijan Republic does not contain a concept of investigative action, but article 124.2 of the CCP relates to them the next: inspection, testifying, identification of person and subject, seizure, search, arrest of property; arrest of postal, telegraph and other correspondence; interception of conversations conducted over the phone and other devices, messages, passed on communication canals and other technical means; interception of personal, family, state, commercial or professional secret, including information on financial operations, banks statements and tax payments; exhumation of corpses; interrogation; confrontation and checking testimonies at place; receiving samples for expertise or research; investigative experiment [8, p. 159].

The CCP also does not contain a notion of organizational measure, to which are related by criminalistics the following: procedural acts directed on: regulating process and completion of pre-trial production; ensuring of observance and realization of the rights of participants of criminal process; formation of procedural decisions accepted; expression of assessment of work's results on case [1, p. 11-14].

♦ **Jamalov Ilkin Jalil oglu** – PhD in Law, a member of Council of International Organization for Legal Researches (Azerbaijan). E-mail: djamalov_i@mail.ru

Organizational measures are form of expression external managing aspect of an investigator; they are a means of organization of specific act of pre-trial production ensuring legality and efficiency of process of collection, examination, assessment and using of evidence in purposes of comprehensive, complete and objective clarification of case circumstances. Essence of organizational measures in process of pre-trial production is manifested in their ensuring nature under realization of the tasks of pre-trial production and receiving effective results of work on criminal case [1, p. 11-12].

There are few classifications of organizational measures in criminalistics based on application of various criteria: on source of legal regulation, on sign of their role in process of proving, on subjects and others.

Classification of organizational measures on the signs of their roles in proving process presents a certain interest, which includes the following: a) organizational measures determining the ways of evidence receiving as on whole case so and in certain situations (for instance, make up a plan of investigation); b) organizational measures ensuring indirect receiving of evidence, i.e. obtaining the evidence by subsequent actions (assignment of audit; evocation of items and documents); c) organizational measures ensuring direct receiving of evidence (measures on organization of separate investigative action) and d) organizational measures, which are not directed to proving (put a lien on property; seizure of property and passing it to storage) [1, p. 12-14].

Stated above and also made research and received results allow asserting that the most part of criminalistical recommendations on production of enumerated investigative actions and organizational measures contradict provisions of criminal process, and the latter do not ensure their effective usage in course of pre-trial production.

Below, we are giving the main systemic elements of criminalistical tactics of conducting and combination of separate investigative actions and organizational measures, comparison of which with provisions of criminal process will allow detecting essential and sometimes mutually exclusive contradictions.

Since, in compliance with procedural law, an investigative action of interrogations are to receive by an inquiry body the testimonies of interrogated person about known him facts, which are a subject of proving on criminal case.

Dependent on procedural state of interrogated person is distinguished interrogation of a victim, witness, suspected, accused person and expert. In addition, in dependence on age of interrogated person are distinguished an interrogation of adult, minor and juvenile; on sequence: initial and repeated, and from position taken by interrogated person – interrogation of a person giving true testimonies and interrogation of a person, who gives false testimonies. It should be especially distinguished interrogations of the dumb, deaf, blind, or a person suffering from other serious disease.

Goal of interrogation is to receive true testimonies, which objectively reflect actual circumstances of case. Therefore, interrogation should be objective, comprehensive, complete and planned, which is provided by thorough preparation of it [6, p. 12-14].

From position of criminalistics, preparation to interrogation consists on the following elements: summon for questioning; examination of materials of criminal case and information received from operational searching bodies; studying of special issues; preparation of place and material supporting of interrogation; drawing up of interrogation plan [4, p. 428-430].

Made examinations and received results allow asserting that some criminalistical recommendations relating to preparation to interrogation contradict provisions of criminal process, and the latter are not provided their effective usage.

So, according to article 226 of the CCP of Azerbaijan Republic, "… witness, victim, suspected, accused and other persons are summoned to investigator, which are passed them in person, and in case of their absence – to one of the adults of family's members, neighbours, representative of housing organization or their place of work or study. They might be summoned through telegram, telephone, and fax.

… It is indicated in subpoena, who and in which procedural status is called, and also where and when he should be come to investigator. Subpoena is pointed out that in case of failure to be appeared a person called can be subjected to forced deliver…

As rule, persons are not under the age of majority, are called through their legal representatives" [8, p. 245].

From the contents of article 95 of the CCP of Azerbaijan Republic is assumed that witness is a person knowledgeable about circumstances, which have any significance on case. Meanwhile, a person being called to an investigator as witness in course of questioning may declare about full absence of any information having significance on case. Question is appeared: whether calling of such persons as witnesses and granting them status of witnesses before determination – whether they are as such?

Studying of personality of interrogated in preparation for interrogation is carried out with purpose of establishing of proper contact to him, clarification his relations with other participants in order to choice the right interrogation tactics. This studying is begun as soon as an investigator makes a decision about interrogation and is lasted during whole this investigative action. Indicate process might be conditionally divided on the two stages: a) studying of personality before interrogation; b) studying personality in course of interrogation process.

Studying of personality before interrogation is carried out with detailed analysis of case documents, collection of information about this person in process of conducting other investigative actions, gathering information on place of residence, work, studying, familiarization with archive materials, card-files of criminal registration etc. [6, p. 27-31].

Some criminalists recommend studying data about personality of accused person, which is a separate research. So, P.P. Tsvetkov points out, that studying of personality of accused man should be comprehensive: personal information, criminal and legal signs, worldview, mental particulars, behaviour etc. [7, p. 76-80].

Naturally, that each interrogation cannot be prepared the similar way as it is required to spend a lot force, means and time. Therefore, main way of studying

personality before interrogation is an analysis of his personal data received under filling of introduced part of interrogation record.

According to article 230 of the CCP of Azerbaijan Republic, in introduced part of an interrogation record are indicated his name, time and place of birth, citizenship, education, place of work, kind of duties or position, place of actual residence and registration, information about relations with suspected, accused and victim, it is carried out the notes about clarification of the rights, duties, responsibilities and particularities of interrogation conducting.

In addition, interrogation records of suspected or accused persons (article 234 of the CCP of Azerbaijan Republic) are indicated availability of criminal record, state awards and other information that characterize of suspected or accused persons and having significance for a case.

It is presented that introduction part of a witness record should be supplemented with issues concerning nationality, pre-condemnation, family status, availability of dependents, state awards and scientific title, ID card, state of health etc. that will be assisted in quick establishment of psychological contact to him.

According to article 228 of the CCP of Azerbaijan Republic, witness not reached the age of 16 "… should be only clarified his obligation to say truth, but he is not notified about criminal responsibility for refusal to give testimonies, evasion to give testimonies or providing with obviously false testimonies" [8, p. 236-237].

This provision of the CCP is presented to be wrong as there is not obligation of minor to say the truth.

Proceeding from provisions of information' theory, interrogation might be imagined as procedural form of communication, contents of which is to receive information, which is relevant to investigated case. In result of communication between investigator, inquiry officer or prosecutor from one side and witness, victim, suspected, accused person from other one is carrying out process transferring and perception of information from speaker to listener [6, p. 7-11].

Passing information to interrogated person, investigator affects to his volitional decisions, puts before him mental tasks, and directs his mind. Being established

psychological contact and excited mental activity of interrogated person, an investigator is trying to receive information appropriating to objective reality, assists in remembering and reproducing of information forgotten [9, p. 5-7].

As rule, an investigator is constantly required to persuade the persons, which interrogated on a case, in necessity to give true testimonies, to refuse from chosen wrong tactics, and in dependence on as far as ably he possesses with means of influence, depends fulfillment of trial proceedings tasks. According to provisions of criminalistics, psychical impact on a person cannot be excluded from number of means applied under investigation of crime [2, p. 39].

Participants of criminal procedural activity bring each other appropriate moral pressure in course of execution of it, which is objective reality. Therefore, in order to protect interrogated from infusion the law prohibits formulation with guiding questions, no to assume external influence in interrogated person and indicates conducting of interrogation separately (art. 227.3 of the CCP), production of confrontation is at the same time allowed between only two persons (art. 235.1 of the CCP). But even the most accurate fulfillment all rules of interrogation conducting do not guarantee of interrogated person from mental influence at side of investigator. Any form of communication, more so, verbal, presupposes influence. All the more, even neutral mutual presence is already impact one man onto other one [2, p. 84-91].

An investigator has the right and is obliged to influence on the persons participants of case in order to execute the tasks, which might be appeared in course of investigation. He needs to persuade of accused man in necessity to give true testimonies, refuse on chosen wrong position. This is a psychical influence on interrogated person, which is permitted by the law; it subordinated to the purposes of establishment of the truth on a case. But, it is important to determine rightly the line between actions and methods of investigator, which is allowed by the law, morally and actions presenting a mental violence. If mental influence on a person is linked with coercion then such influence is considered to be inadmissible in criminal process. Psychological impact on accused person must be concluded in creation the most favourable conditions for mental processes and manifestation of positive mental

features of personality, in creation of situations for interrogated person, which allow receiving true testimonies of his. We are talking about inadmissibility of mental violence, but not about that whether application of mental influence is lawful. The influence of an investigator has a concrete task – receiving of the true testimonies [6, p. 21-27].

Theoretic base for the following development of tactical techniques is a working out the methods of mental impact under interrogation. Tactical techniques are a practical realization of impact methods. Criminalistics works out the techniques and methods of interrogation, which allow avoiding an inspiring influence of interrogator to interrogated person, one interrogated person onto other one, to avoid the prompt, distortion of the truth [6, p. 273].

The methods of mental influence in course of investigation are used in certain procedural frames and forms, are fulfilled in limited terms and applied, as rule, in combination. Concentration of few methods strengthens of impact's effect. In each separate case an influence is applied with considering of mental features of person [3, p. 88-92].

These all are criminalistical recommendations, and according to article 15 of the CCP of Azerbaijan Republic, under production of interrogation is prohibited the torture, usage of physical and mental influence, including medical substances, subjected to hunger, hypnosis, deprive medical care, to apply other cruel, inhuman or degrading treatment, to receive testimony by violence, threats, deception or other unlawful actions that violate the rights to interrogated persons.

In our point of view, a concept of physical and mental violence, and also deception in the CCP is interpreted wrongly and therefore they are subject to be corrected.

According to article 227.5 of the CCP, an interrogation begins with suggestion to say all circumstance, which is known to witness on case, after that he might be asked questions [7, p. 246].

This procedure is to be wrong as dependence on number of circumstances interrogation should begin from a question. In addition, in most cases, witnesses require to asking a concrete question.

Some provisions of articles 228 and 229 of the CCP contradict article 95.2.1 of the CCP, which says that minor, persons with physical or mental disabilities rightly to perceive and reproduce the circumstances, which should be cleared under criminal prosecution, might not be called and interrogated as witnesses.

According to article 235.1 of the CCP, an investigator may conduct confrontation between two earlier interrogated persons, if they testimonies have essential contradictions. The questions are appeared: what contradictions are considered to be essential, whether an investigator may conduct confrontation if contradictions are insufficient and who determines essentiality.

Generalized criminalistical recommendations of production of investigative inspection also contradict criminal procedural instructions.

So, according to article 236.1 of the CCP, an investigator conducts inspection of a scene of action, premises, documents, items, man or animal's corpse in purposes of detection of crime's traces and other material subjects, which might be a source of evidence, establishing circumstances of crime commission and other circumstances that may have significance for a case. It is presented that not all objects of inspection are enumerated in the law, and there is not any need to enumerate all. In addition, it not all places of inspection is the scene of action.

Article 236.2 of the CCP says that inspection is conducted in daytime, except cases urgent inspection of scene of action at once it detection. The accent on daytime and inspection only scene of occurrence is considered to be wrong as in certain cases it might be appeared necessity to inspect other objects.

Concept "scene of occurrence" is absent among other concepts of article 7 of the CCP. Trunk of car, in which a corpse is found, is not always a scene of occurrence. In some cases this is just a place of corpse detection; therefore it is considered to be wrong its exclusion from the subjects of inspection.

Article 236.3 of the CCP says that there are minimum 2 (two) attesting witnesses take part in conducting a scene of occurrence. Similar accent creates an

impression that under carrying out other kinds of inspections the attesting witnesses might be less.

In addition, it is presented that provisions of article 236.5 of the CCP are subjected to more careful analysis as, in our opinion they are interfered in contents of other investigative actions.

Criminalistical recommendations of identification production are not also corresponded to requirements to criminal procedural law, at that the latter are not always true.

Article 239.1 of the CCP speaks on necessity to interrogate before identification of identified person about appearance and signs identified man, circumstances, under which an identifier saw identified person; and it is drawn up appropriate record about it. Obviously, it would be true to make also clear ability and desire of a person to identify somebody, otherwise production of this investigative action will be objectless.

According to article 239.4 of the CCP, an identifier is notified in advance about criminal responsibility for refusal to give testimonies, evasion to give testimonies, giving obvious false testimonies, and also his right not to testify against himself and his close relatives when he is recognized with witness or victim. Whereas, article 241 of the CCP says that identification record is drawn up after its production and note about clarification to a person-participant of identification process his rights, obligations and responsibility are indicated in it.

From contents of article 239 of CCP proceeds that statements of an identifier under production of identification are related to testimonies and therefore, it is appeared a question about kind of evidence that received in course of this investigative action.

On understandable reasons a lawmaker established an order of identification production without participation of attesting witnesses that contradicts criminalistical recommendations and is presented to be wrong.

According to article 239.8 of CCP, identification is not carried out, and produced identification might not be recognized if an identifier did not indicated

signs sufficient due to its uncertainty for identification of personality of identified man. Whereas, not all people are distinguished with specific distinctive signs, and according to provisions of criminalistics, identification is produced by identifier, but not an investigator.

Similar situation with criminalistical recommendations on production of search as in some cases, procedural instructions are not corresponded to or contradicted them.

So, according to article 242 of CCP, search might be implemented in some premises, office or production area or other place or person [5, p. 261]. Article 7.0.34 of CCP gives definition of a concept dwelling and enumerates all possible, from point of view of a lawmaker, rooms, used to live one or few persons.

In our point of view, similar enumeration is wrong as contemporary development of humanity will be systematic and constantly develop this list that stipulate necessity of frequent changing of legislation. So, nowadays some persons have private planes, helicopters, and dirigibles etc., which are not got in the list of dwelling concept.

Here, it should stop in correlation of search and seizure, which according to article 242.3 of CCP, might be produced upon availability of information about place of location of specific items and documents. But, notion "place of location" is not specific and if a flat is as such then in all cases under refusal to give required, an investigator is needed to search of it, and this is already search, but not seizure.

As rule, search must be produced by court's decision, but according to article 243.3 of CCP, under urgent circumstances an investigator may carry out a search on his decision. The law relates to such cases (art. 243 of the CCP) the availability of true information about the fact that: items and documents, which were hidden in dwelling, testify on crime's commission against person or public authority or preparation to commission this crime; a person, who preparing, committing, committed this crime, is hidden at dwelling; a person, who preparing, committing, committed crime against a person or public authority, and fleeing from prosecution,

is hidden at dwelling; there is a corpse (parts of corpse) of a man in dwelling; there is an actual danger for life and health of a man [8, p. 262-263].

It is presented that mentioned provisions of the law are wrong, contradict criminalistical recommendations and logics. So, a number of crimes did were not included in indicated list of circumstances, under investigation of which a search is an urgent investigative measure, ex. about illegal trafficking in narcotic drugs and psychotropic substances, against peace and security of humanity, in sphere of economic activity etc. This case, following to letter of the law is fraught with the loss of evidence and non-implementation of the objectives of criminal proceedings.

In addition, if a person, who preparing, committing or committed crime, is hidden at dwelling then it is necessary to arrest him, but not to search and not to endanger by assisting witnesses and other participants of investigative action.

According to article 244.2 of the CCP, a defender of suspected or accused person is entitled to participate under conducting search in respect of his client, if he notified by investigator in advance about production of this investigative action, if he desire to participate in search or seizure; an investigator should ensure his right [8, p. 263].

It is presented that this provision of the law should be worked out in details, i.e. following to it, a defender may notify his client or delay beginning of a search so that results of it will be negative in advance.

Let's image a situation, when an investigator notifies a defender regarding to outlined in 1 hour search, and the latter, being at the court, asks to postpone this investigative action for a later time and he will be right in this situation. If a defender is notified a few days before then this search loses its sense. If not to notify, nothing saying about purpose of meeting then the law will be violated as it enacts to inform to a defender about concrete reasons of his invitation to an investigator.

As for investigative experiment, the law does not stipulate mandatory participation of assisting witnesses in it. It is presented wrong, i.e. it increases subjective beginnings at criminal proceedings.

The same as under other investigative actions, a record of investigative experiment is prepared after completion of it, which is also to be wrong.

The CCP says nothing about the right to representatives to participate in investigative experiment that influence strongly to ensure the rights of potential accused persons, who are stayed long time in status of witnesses.

It is not determined an order ensuring defender's participation in investigative experiment, is not stipulated whether a defender of suspected or accused person has the right to take part in investigative experiment with participation of a witness; this point has essentially significance for a client.

Bibliography

1. Almarik G.I. System and structure of criminal code of procedures. M., Amalteya, 2006.
2. Criminalistics. Short encyclopedia. Team of authors. M., 1993.
3. Criminalistics (actual issues) Team of authors. M., 1993.
4. Criminalistics. Textbook for Universities. Ed. by Suleymanov J.I. Baku, Ishig, 2000.
5. Levchenko O.P. Investigation of murders committed by motives of the blood feud. M., Yurlitinform, 2004.
6. Porubov N.I., Rahimov I.M., Suleymanov J.I. Tactics of interrogation of accused in conflict situation. Study guide. Baku, SMC, 1993.
7. Guideline on crimes' investigation. Editors I.I. Karpets, G.I. Kocharov. Yuridicheskaya literature. M., 1967.
8. Criminal Code of Procedures of Azerbaijan Republic. On condition on 10.01.2010, Baku, Ganun, 2012.
9. Yusubov S.S. Investigation of murders. Nalchik, Temp, 2008.