PalArch's Journal of Archaeology of Egypt / Egyptology

THE EVIDENCE OF PRACTICE AS THE MAIN ELEMENT OF A UNIFIED FORM OF ACTION IN PRE-TRIAL PROCEDURE REALIZATION

Sergey I. Girko[1], Sergey V. Kharchenko[2], Mikhail A. Samelyuk[3], Alexander A. Dolgopolov[4], Altynbek M. Kambarov[5]

[1]Honored Scientist of the Russian Federation,Chief researcher of the Federal State Institution Research Institute of the Federal Penitentiary Service Russia, Moscow, Russia

[2]Department of ORD IPD Institute of Law Enforcement Activities of the Russian Customs Academy, Moscow, Russia

[3]Department of operational-investigative activity of IAPS Institute of Law Enforcement Activities of the Russian Customs Academy, Moscow, Russia

[4]Department of administrative and financial law of the Kuban state agrarian University named after I. T. Trubilin, Krasnodar, Russia

[5]Department of Criminal Procedure and Operational Investigation Activities of the Kaluga Institute (branch) of the All-Russian State University of Justice (RPA of the Ministry of Justice), Kaluga, Russia

[1]syvorina959134@mail.ru. [2]dsb111@yandex.ru. [3]x.s.v.l@yandex.ru.

[4]Aadolgopolov1@mail.ru. [5]Kambarov75@mail.ru

Sergey I. Girko, Sergey V. Kharchenko, Mikhail A. Samelyuk, Alexander A. Dolgopolov, Altynbek M. Kambarov. The Evidence Of Practice As The Main Element Of A Unified Form Of Action In Pre-Trial Procedure Realization-- Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(3), 1426-1435. ISSN 1567-214x

Keywords: Differentiation Of The Form Of Action Of Pre-Trial Proceedings, Unified Form Of Action, Evidence, Evidence Of Practice, Sources Of Evidence, Actual Data, Any Information.

ABSTRACT.

The problem of differentiation of the form of action during preparation of materials at pre-trial stage. The Soviet criminal procedure has passed its way from the actual separation of the form of action to a dual criminal procedure form of pre-trial proceedings. These forms were similar in many respects, except for a few minor differences in inquiries and preliminary investigations. In the 1980s, a protocol form of pre-trial criminal proceedings had been introduced into the criminal procedure, and then applied to a small number of crimes, both obvious or insignificant. Law enforcement government agencies - mainly the police - quickly mastered the fast-track and simplified proceedings. Currently, the Code of Criminal Procedure of the Russian Federation have regulated the new form of action of pre-trial proceedings, which represents shortened form of the inquiry. However, is this form differentiated in its content? In this article, we come to the conclusion that, according to the Code of Criminal Procedure of

the Russian Federation, the differentiation of the form of action is not adequate. This conclusion is made on the basis of the analysis of the provisions of the Russian criminal procedure legislation of different periods (1923, 1960, 2001) regarding the regulation of the concepts of 'evidence', 'source of evidence', the legal status of the shortened form of the inquiry and preliminary investigation (inquiry and preliminary examination). In particular, as for a unified inquiry, the formation of sources of evidence inherent to it is not completed, and such sources are not isolated in the corresponding section of the Code. The article proposes a solution to these problems.

INTRODUCTION.

Sources from which the subject of investigation receives information about the circumstances of past events are one of the most important elements of the system of procedural activities related to evidence in criminal proceedings. Such sources are also called evidence of practice. According to the Great Legal Dictionary, the evidence of practice are 'the methods of obtaining factual evidence provided by the criminal procedure law, that confirm or negate the facts that are important for the Court' [1, 584]. For our further conclusions it also matters that the named dictionary refers to the evidence of practice as an 'explanation of the parties to the proceedings and third parties'. With that, the purpose of this study has been to characterize and assess the adequacy of legal confirmation of sources of evidence in a unified inquiry. As an example, we used the shortened form of the inquiry, regulated by the Code of Criminal Procedure in Chapter 32.1.

RESEARCH METHODS.

Analysis of the retrospective and the criminal procedural legislation in force at the time of preparation of the article, and rules governing the fast-track pretrial proceedings, the **synthesis and comparison** of individual legal structures regarding the sources of evidence or evidence of practice confirmed in the legislation of different time periods, **abstracting and setting of the target** associated with the need for further unification of the proceedings, **formation of the research hypotheses** that the evidence of practice used in the unified pre-trial proceedings are not individualized to the extent necessary for this form of action, **concretization and monitoring** of legal regulation and the practice of using unified proceedings in terms of using evidence in various stages of development of the Russian criminal procedural legislation, a study of its **historiography**.

DISCUSSION.

According to the current Code of Criminal Procedure of the Russian Federation (hereinafter – CCP) 'any information' on the basis of which the subject of investigation, in the established procedural order, establishes the presence of circumstances that are part of the evidence procedure, is recognized as evidence. For obvious reasons, it is completely individual, based on the category of the criminal case and the form of action within which pre-trial proceedings are carried out.

The evidence must meet a number of features, which are listed in the CCP. Based on them, the obtained information is evaluated according to the categories of relevance, admissibility and reliability. Among them, reliability plays a

central role, since, according to the law, it is the basis for assessing the totality of the evidence collected in a case.

Reliability thus is the main quality of evidence necessary for the correct detailing data on facts, or the facts themselves that characterize the circumstances of the case.

Many scientists ambiguously interpret the term ‘reliability’. According to M.S. Strogovich, ‘we have the right to identify the concepts of reliability and truth’, or ‘reliability is the same as true; reliability means truthfulness’ [2, 99-100].

There are other views on the essence of the term ‘reliability’. For example, researchers A.R. Ratinov [3, 107] and A.A. Eisman [4, 92] and some other specialists expressed opinions different from the one above. Without going into too much details, which is beyond the scope of our research, we find adequate the notion of M.S. Strogovich. There is all the more reason for this as it fully coincides with the interpretation of the term ‘evidence’, contained in the reference literature of different times. According to V.I. Dahl, ‘reliable means seemingly probable, quite correct, true, certain’ [5, 537]. According to the authors of the Soviet Explanatory Dictionary, ‘reliability is a form of existence of truth justified for the cognizing subject in any way (by experiment, logical proof or otherwise)’ [6, 414]. And, finally, ‘the reliability of evidence means their correspondence to reality’ [1, 180].

As for the concept of evidence, it had been embodied in the criminal procedure legislation in different periods of the formation and development of the Russian state.

The first attempt to codify the Russian criminal procedural law was made on May 5, 1922, when the first Code of Criminal Procedure of the RSFSR was adopted, ‘which was valid for only one year’ [7].

On February 15, 1923, the All-Russian Central Executive Committee (VTsIK) adopted a new CCP of the RSFSR (hereinafter - the Code). Article 58 of the Code stipulates that ‘testimony of witnesses, expert opinions, material evidence, examination reports and other written documents and personal explanations of the accused form the evidence’ [8].

According to the provisions of the Code, inquiries in criminal matters were carried out by the inquiry bodies, which included the ‘police and criminal investigation’ authorities. The preliminary investigation was carried out by investigators, respectively, which ‘means examining magistrates, senior investigators - members of provincial courts, investigators in critical cases at the People’s Commissariat of Justice and the Supreme Court and investigators of military and military-transportation tribunals’. According to the Code, these bodies had the exclusive right to conduct investigative activities. They were also sources of evidence in cases regarding which a preliminary investigation current at that time was carried out. Also, the inquiry bodies had the right to carry out investigative activities only upon obtaining the consent of the prosecutor and in the presence of the investigator.

What evidence of practice did the inquiry bodies of that time have at their disposal? The answer to this question was contained in Code 99, which stated that ‘suspects and witnesses may be interviewed in the process of conducting inquiries’. Searches, seizures, examinations and examinations were also included in the scope of procedural means when conducting the interrogation, but only when ‘there was sufficient reason to believe that the evidence of the crime or other material evidence can be destroyed or hidden’. The inquiry authorities should have immediately informed the prosecutor about such actions. In such a way, the mechanism of such relations between the police and the prosecutor’s office was regulated quite clearly. Therefore, the mentioned procedural means can also be safely included in the scope of the interrogation means.
The jurisdiction of the inquiry bodies was also determined quite specifically: crimes with the maximum sanction ‘up to one-year imprisonment’.
The legislative bodies of that time did not mix the interrogation and preliminary investigation forms of action. Both procedures were regulated by independent chapters of the Code - VIII ‘On interrogation’ and IX ‘General conditions for the preliminary investigation’, respectively. For both procedures, there were separate systems of evidence, the evidence of practice for which were sufficient for the proceedings and were the basis for further procedural actions of the prosecutor and the court. According to the Code, the prosecutor, having received the materials of the interrogation, examined them for the purpose of ‘sufficient clarification of the case’. Then, the prosecutor ruled on ‘commitment of the accused for trial’, and the judge in the People’s Court, having received the case from the inquiry bodies, ‘brought the case to the court for examination on the merits’. Subsequently, the court ‘passed the judgment’.

It is noteworthy that the Code did not contain a definition that disclosed the concept of ‘evidence’, which, as we believe, did not contribute to a correct understanding of this legal institution.

The results of our study showed that the emergence of a dual-purpose form of action of preliminary investigation occurred with the adoption of the new Code of the RSFSR by the Law of the RSFSR of October 27, 1960. This procedure included interrogation and preliminary investigation and relied on a single system of evidence, elimination of a unified pre-trial procedure, clarification of the conceptual apparatus for generating evidence and their sources.
For the first time in its history, the concept of evidence had been confirmed in the Code. It came to mean ‘any evidence’, on the basis of which the subjects of the investigation and the court established circumstances relevant to the case. The entire fifth chapter of the Code was dealing with evidence.

According to the Explanatory Dictionary of the modern Russian language, the term ‘fact’ (from Latin ‘factum’ - ‘made’) means a true event, a real occurrence or phenomenon’. ‘Actual data’ means ‘reflecting the actual state of something which corresponds to the facts’ [9, 886].

From the moment of its adoption, the Code refrained from the unification of the form of action, in regulating almost identical procedures of interrogation and

preliminary investigation. Based on a unified system of evidence, these procedures were guided by a single procedure for investigative and legal proceedings, using procedures for investigating criminal cases of various complexity and gravity that are similar in their essence.

The only derogation from such procedure in the Code was made for the stage of consideration of statements and reports of crime. There, prior to the initiation of a criminal case, in order to clarify the circumstances of the crime, the subjects of the investigation were allowed to request the necessary materials and receive explanations without any investigative activities.

However, is it possible to consider the sources of factual information mentioned above as independent evidence of practice? In our opinion, it is very unlikely. If the verification of a crime report led to a decision to refuse to institute criminal proceedings, then such materials were not checked by the court, and they did not constitute the basis for accusing a person of a crime. In rare cases, such sources of information formed an evidence as 'other documents' when they contained evidence and were irreplaceable for various reasons. More often, when a criminal case was opened based on the inspection results, the materials of the pre-investigation inspection were ignored and re-issued through additional investigative measures: inquiries - by examinations, acts of specialist research - by experimental testimonies, seizures - by searches and seizures.
Yu.K. Yakimovich, the famous researcher of pre-trial procedure, in interpreting the above problem, gave his assessment of the conditional differentiation of the preliminary investigation of that time. He described this investigation as 'extremely' monolithic and practically non-differentiated, without revealing any significant differences in the current inquiry and preliminary investigation procedure. In discussing about what is the difference between the inquiry and the investigation, he concluded that it is 'almost nothing' [10, 203-208].

Also, among the researchers of the pre-trial proceedings of the 1960-1970s, supporters of the dual form of action prevailed. They sought to empower the preliminary investigation bodies of the Ministry of Internal Affairs system and to form independent investigative units in the department. And it is what finally happened.

We believe that the possibility of real differentiation of the form of action of pre-trial proceedings arose only when the protocol form of pre-trial preparation of materials (protocol form) was introduced into the criminal proceedings of Russia. This did not happen immediately: first, this form was applied to cases of hooliganism[1], and then, for minor larceny of state or public property[2]. The introduction of the protocol form into the Code was followed by the inclusion of so-named Section 9 and Chapter 34. In the Chapter 34, a system of evidence and a procedural procedure had been formed, specific and unique to the unified form of pre-trial proceedings above.

In particular, in such cases, the following were allowed as a means of obtaining information about the circumstances of the crime: explanations from the

[1] Vedomosti of the Supreme Soviet of the Soviet Union, 1966. No. 30. Article 595.
[2] Vedomosti of the Supreme Soviet of the Soviet Union, 1977. No. 51. Article 1217.

offender, eyewitnesses or other parties, and the demand for materials relevant to the consideration of the case in court.

Let us note here that the protocol form was not a differentiated version of the preliminary investigation. A criminal case based on materials submitted to the prosecutor and submitted to the court was initiated by the judge. In practice, during the trial, the judge was normally restricted to sources of factual information on the protocol proceedings, where, first of all, there was a confirmation of the crime by the offender, and also, information about the crime and other circumstances of the case. In summary, the sources of information admitted to the protocol proceedings also formed evidence of practice. In court, they served as the basis for sentencing.

The same idea is contained in a study conducted by our research team. We conclude that 'the collection of evidence is carried out by demanding of objects and documents and obtaining explanations from institutions, enterprises, organizations, officials or individuals, and by presenting evidence by these parties' [11, 22-23]. We also conclude that 'with the protocol form, one of the main ways to obtain factual information about a crime and the person who committed it is to obtain explanations from the offender, eyewitnesses or other parties'. The same circumstances are also indicated by the authors of the Commentary to the Code of the RSFSR [12, 484-486].

We find it fair to say that the protocol form was quickly mastered by law enforcement bodies, and mainly police officers. This pre-trial proceedings form of action allowed various categories of police officers to quickly and efficiently cope with the preparation of materials about massive - minor and obvious - crimes. It also greatly contributed to the takeover of the 'crime wave' risen of the 1990s. It seems that the tasks the named form of action faced were largely implemented. This problem was developed in detail in many of our previous publications, so we will not dwell on this subject now.

We believe that, in forming the legal basis of the protocol form, the legislative bodies quite rightly allocated an independent section of the Code for the purposes of regulation of this procedural institution. However, this task was not completed, since the sources of factual information, individualized for the given form of action, were not confirmed as full-fledged evidence within the framework of the protocol form. The legislative bodies did not go beyond the limits of traditional attitudes that had been formed in the Soviet and then Russian criminal process and, in particular, were not able to overcome conservatism in their approach to the full unification of procedural proceedings. Unfortunately, when solving this problem, neither the experience of the Russian Empire in the regulation of police inquiry, nor the foreign experience of unified pre-trial procedures, which are fundamentally isolated from the legal order of a full investigation, had been taken into account.

As for the state of simplified and expedited pre-trial proceedings, the only form of action that meets the necessary requirements could be, in our opinion, a shortened form of the inquiry. We also would note that the aforementioned unified pre-trial procedure was introduced into the Code 15 years after the

termination of the procedural activities in the protocol form. This happened mainly as a response of the legislative bodies to the constant requests of practical bodies - especially the police - to search for a 'legal tool' for pre-trial processing of cases of obvious crimes that did not constitute a significant public danger or cause substantial harm to the interests protected by law. Therefore, such an institution was regulated in the Code.

It is noteworthy that is disclosed in a special chapter 32.1 of the Code – A shortened form of inquiry, - as the protocol form was in the past.

In general, the unified form of action confirmed in the Code of Criminal Procedure largely meets the requirements for such institutions and international standards for such pre-trial proceedings. In particular, for the shortened form of inquiry, an individualized fact in issue, jurisdiction, a special process of evidence and other fundamental differences of the proceedings have been formed.

In our opinion, a substantial deficiency of the given form of action is that the legislator refrained from assigning specific, unique, immanent evidence of practice to the shortened form of the inquiry.

We would also note that the Code has replaced the usual and quite substantial wording used to characterize the evidence ('factual evidence') with a rather abstract one ('any information'). However, some researchers have found such a change reasonable. [13, 51]. Nevertheless, the essence of the fact that this information should contain data on the circumstances of a criminal event, has remained unchanged.

Which of the sources of 'any information' does the subject of the shortened form of the inquiry? And what properties must these sources have in order to be considered evidence?

Regarding the latter circumstance, researcher A.B. Soloviev expressed the following opinion which became traditional in this field: 'Reflecting in the world around, the event of a crime gives rise to diverse prints in it - traces (both on material objects and in the minds of the parties involved in the event). The evidentiary value of the traces is determined by the extent to which the circumstances of the event under investigation were reflected in them' [14, 18-19].

We would also add to this that traces on material objects can be present both on the documents themselves, on their surface - and then they constitute material carriers, - or be hidden - and in these cases, they constitute intellectual trace carriers. This circumstance is relevant only in one case - when choosing a special study to which the document must be subjected, so that the evidence contained in it or present on its surface is discovered and made available.

What independent sources of information can be counted on, when conducting a shortened form of inquiry, without resorting to investigative actions?

Such sources include procedural means contained directly in the section of the Code of Criminal Procedure which is related to the form of action above.

First of all, among these sources there are explanations from the parties participating in the case. According to law, data obtained from them may be used as independent information, i.e. sources of evidence, and the parties may be interrogated only in certain circumstances.

We believe that an explanation, as a source of evidence, which the Code often takes into account only as 'other document', can be given the status of an independent and full-fledged evidence of practice within the framework of the given form of action, without any concerns.
Opponents of differential approach are most likely expected to raise their objections to the fact, that, during the interview (meeting with a purpose of explanation), a person is not warned about criminal liability for giving false testimonies, as this happens during the investigative action.

O.A. Malysheva gave a comprehensive answer to this question in her monograph. She proposed to strengthen the evidentiary power of information from 'parties whose explanations may be relevant to the case, in providing for such a warning in the Code of Criminal Procedure of criminal liability for refusing to give an explanation and for intentionally making a false statement' [15, 107]. With that, O.A. Malysheva proposed the introduction of appropriate amendments to the Criminal Code of the Russian Federation.

The Code also regulates the right to confine oneself to expert opinions and not to initiate the conduct of forensic examinations, under certain conditions. We believe that the named means of evidence should also be considered as immanent to the fast-track inquiry form.

With that, the law prescribes 'not to carry out other investigative or procedural actions', when information on the case is contained in 'materials for verifying the report of a crime and complying with the requirements for evidence'. We believe that the main such requirement is the reliability of the information obtained.

What sources of evidence are meant in this case?

According to the Code, when controlling a report of a crime, the subject of investigation is given the right to receive 'any information' using the following procedural means: explanations of the participants; samples for comparative research; documents or items; opinions of forensic experts and specialists; on-site inspection reports; scene, documents, objects or corpses inspection reports; protocols and acts of inspection, documentary checks, revisions, documentary or corpses researches; data of the inquiry bodies based on the results of the execution of orders to conduct operational investigative measures.

RESULTS
Based on the study undertaken, we may conclude that the shortened form of inquiry, as a form of action of pre-trial proceedings, corresponds to the

characteristics of differentiation in many respects. Nevertheless, it needs to be clarified, since both the system of evidence and the evidence of practice - sources of evidence information used precisely in the conditions of this form of action - requires individualization. We also propose solution to this problem.

CONCLUSION

We believe that the above sources of information about the circumstances of the crime let us to detect and consolidate any material, subjective and intellectual traces of crimes, the production of which is carried out as part of the fast-track inquiry form, without resorting to the production of investigative actions.

We may conclude from the foregoing that it would be correct to confirm these traces in the special norms of Chapter 32.1, as independent sources of evidence in the conduct of a shortened form of the inquiry. They will be thus given the status of evidence in the framework of the named unified form of action of pre-trial proceedings. In addition, such a decision will provide a possibility for real differentiation of forms of action in the Russian criminal proceedings.

If the conceptual approach proposed by us is adopted, the above sources of information about the circumstances of the crime in the format of a preliminary investigation will still be able to play the role of 'other evidence', when the need arise.

REFERENCES:

Great Legal Dictionary/Ed. by A.Ya. Sukharev and V.G. Krutskikh. - 2nd ed., revised and enlarged. - M.: INFRA – Moscow, 2002.
Strogovich M.S. Real or substantive truth and judicial evidence in the Soviet criminal process. Moscow, 1955.
Ratinov A.R. Issues of knowledge in judicial evidence. Soviet state and law, 1964, No. 8.
Eisman A.A. The ratio of truth and reliability in criminal proceedings. Soviet state and law, 1966, No. 6.
Dal V.I. The Explanatory Dictionary of the Living Great Russian Language/Vladimir Ivanovich Dal: 4 volumes. - Vol. 1: A-Z. - Moscow: RIPOLL classic, 2006.
Soviet Encyclopedia, Moscow, 1981.
1922 Code of Criminal Procedure of the RSFSR. Web resource https://studme.org/236562/pravo/ugolovno_protsessualnnyy_kodeks_... a request as of April 08, 2020.
1923 Code of Criminal Procedure of the RSFSR – Web resource: https://музейреформ.рф/ node/13986 as of April 08, 2020.
Explanatory Dictionary of the modern Russian language / Ed. by S.A. Kuznetsov. - Moscow: Reader's Digest, 2004.
Yakimovich Yu.K. Bulletin of the Udmurt University: Economics and Law. 2013. Vol. 2.
Lekontsev Yu.A., Vlasova N. A., Zuev V.L. Pre-trial preparation of materials in protocol form: a practical guide. - Moscow: Institute of the Ministry of Internal Affairs of the USSR. 1991.

Commentary on the Code of Criminal Procedure of the RSFSR / Ed. by V.M. Savitsky, B.T. Bezlepkin, P.S. Lupinskaya, and I.L. Petrukhin. - Moscow: 'Enlightenment', 1999.
Yakimovich Yu.K., Pan T.D. Pre-trial proceedings under the Code of Criminal Procedure of the Russian Federation (participants in pre-trial proceedings, evidence and proof, initiation of criminal proceedings, inquiry and preliminary investigation). – SPb.: Publishing house 'Press Legal Center', 2003.
Solovyov A.B. Evidence under the Code of Criminal Procedure of the Russian Federation (pre-trial stages). Scientific and practical guide. Moscow: 'Yurlitinform' Publishing House, 2003.
Malysheva O.A. Initiation of criminal proceedings: theory and practice: monograph. - Moscow: 'Lawyer' Ed. group. 2008.

LITERATURE:

Large legal dictionary/Under the editorship of A. Ya. Sukharev, V. G. Krutskikh. - 2nd ed., pereab. and add. - M.: INFRA-M, 2002.
Strogovich M. S. Material truth and judicial evidence in the Soviet criminal process. Moscow, 1955.
Ratinov A. R. Questions of knowledge in judicial proof. Soviet state and law, 1964, no. 8.
Eisman A. A. The Ratio of truth and reliability in criminal proceedings. Soviet state and law, 1966, no. 6.
Dal V. I. Explanatory dictionary of the living great Russian language/ Vladimir Ivanovich Dal: In 4 t. - T. 1: A-z. - M.: RIPOLL classic, 2006.
Soviet encyclopedia, Moscow, 1981, P. 414.
Criminal procedure code of the RSFSR of 1922. The Internet resource – https://studme.org/236562/pravo/ugolovno_protsessualnnyy_kodeks_... a request from 08.04.2020
Criminal procedure code of the RSFSR 1923-internetresource: https://музейреформ.рф/ node/13986 from 08.04.2020.
Modern explanatory dictionary of the Russian language / Chief editor S. A. Kuznetsov. - M.: reader's Digest, 2004.
Yakimovich Yu. K. Bulletin of the Udmurt University: Economics and law. 2013. Issue 2.
11.Lekontsev Yu. a., Vlasova N. A., Zuev V. L. pre-Trial preparation of materials in Protocol form: a Practical guide. - Moscow: Institute of the Ministry of internal Affairs of the USSR. 1991.
Commentary on the Criminal procedure code of the RSFSR / Ed. by V. M. Savitsky, B. T. Bezlepkin, P. S. Lupinskaya, and I. L. Petrukhin. - Moscow: "Enlightenment", 1999.
Yakimovich Yu. K., pan T. D. pre-Trial proceedings under the criminal procedure code of the Russian Federation (participants in pre-trial proceedings, evidence and proof, initiation of criminal proceedings, inquiry and preliminary investigation). – SPb.: Publishing house "Legal center Press", 2003.
Solovyov A. B. Proving under the criminal procedure code of the Russian Federation (pre-trial stages). Scientific and practical guide. M,: Publishing House "Yurlitinform", 2003.
Malysheva O. A. Initiation of criminal proceedings: theory and practice: monograph. - M,: Ed. Group "Lawyer". 2008.