



Expertise and Procedural Position of Expert's under the Kosovo Code of Criminal Procedure

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Abstract: The role of expertise in criminal proceedings is becoming more and more important. Achievements in different sciences are allowing the results of expertise and experts' opinions to be handled by courts as evidence equivalent to other evidence, in order to lighten a particular criminal case. For the purpose of harmonizing with international practice, the standards that apply to expertise under the current Criminal Procedure Code of Kosovo (2013) have changed. This study aims at analysing and examining the procedural aspect of expertise, expert's position and in the end, his/her opinion as evidence in criminal proceedings based on the Criminal Procedure Code of Kosovo. Through the analytical method, we ascertain the innovations offered by the Code to the parties in criminal proceedings regarding the expertise, appointment of expert and his/her opposition. The paper concludes that the Code does not give a special value to expertise in relation to other evidence in court proceedings.

Keywords: Code; Court Proceedings; State Prosecutor; Expertise; Expert's Opinion

1. Introduction

It is a basic duty of criminal proceedings in every court proceedings to prove all facts that matter to resolve a criminal case that is being tried. Verification of such facts is done by the court by analysing and examining various evidence. In a criminal proceeding, apart from the material evidence through which the facts are verified, personal evidence is important. They are the knowledge of individuals who are important in proving the right to a judicial proceeding. The importance of such evidence is augmented by the fact that the source of information is the man himself.

The Criminal Procedure Code of Kosovo (2013) expressly defines the procedural form of obtaining the expert's opinion as personal evidence (Articles 136-148). The truth is that judges have general knowledge as lawyers. However, when there is a lack of deeper scientific knowledge for a fair verification of certain facts in criminal

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proceedings, it is necessary to engage professional persons (experts) who have the qualities they have gained from their profession in other sciences. Such people, of course, using their professional skills help the court to conduct a fair trial. Thus, the expert in criminal proceedings is called upon to give a statement and opinion on concrete facts which in a litigation are disputable. Therefore, the importance of expertise and the expert's opinion in court proceedings is the reason to approach this study. Another reason is the novelties the Kosovo Criminal Procedure Code (2013) brings regarding the opposition to the state prosecutor by other parties (the defendant and the plaintiff) when he/she appoints an expert. Nevertheless, the reason to study the expertise and expert's position in the Criminal Procedure of Kosovo has a strong ground because the expert's findings and the opinion are considered as evidence in our criminal procedure which will also be discussed in this paper.

2. Assigning Expertise

Rules regarding expertise are provided in Articles 136-145 of the Code no.04/L-123, (2013). Who designates an expert and who orders expertise in criminal proceedings has been an issue that has changed frequently. Currently, in criminal proceedings in Kosovo, the expert is appointed by the state prosecutor (art. 136, paragraph 1). However, the defendant and the plaintiff may object the appointment of the expert by the prosecutor. In case of objection, competent to take a decision regarding the selection of the expert within ten days is the pre-trial judge (art. 137, paragraph 2 of Code no.04/L-123, 2013).

During a court proceeding, the defendant may also ask the state prosecutor to allow him/her to defend himself/herself as a defendant in favour of his/her defence. If the state prosecutor fails to respond to the defendant's request, the defendant may address the pre-trial judge with a request to object the prosecutor's decision (art. 141 paragraph 1 of Code no.04/L-123, 2013). The defendant may be allowed to appoint an expert at his/her own expense. When an expert is appointed by the defendant, the Code obliges him/her to compile a report on the expertise within fourteen days and send it to the state prosecutor (art. 141, paragraph 2 of Code no.04/L-123, 2013). Thus, in a judicial proceeding where the assistance of a specialized expertise is sought in connection with the guilt or innocence of a defendant, but also in cases where the court has to decide on the extent of the damage caused by a particular offense, the Criminal Procedure Code authorizes the state prosecutor to initiate expertise (Articles 136, 137, 138 & 139 paragraph 1 of the Code no.04/L-123, 2013).

While the defendant, his/her defence counsel, victim, victim's advocate (as noted above) have the right to object to the pre-trial judge the selection of the expert either due to his/her qualification or any other reason such as a potential conflict of interest. Expert is assigned to an expertise or even if the expertise is complex. If there is a professional body for a particular type of expertise, or expertise can be done within the state body for expertise, then this is done within the premises of these bodies.

3. The Procedural Position of Expert

In the theory of criminal procedure law there are different views regarding the definition of terms: expert, expert's statement and expertise. The differences exist mainly in content. Expertise is a scientific activity through which the evidence administered in a criminal case takes legal procedural form (Latifi, 2014, p. 249). Expert is a professional person who is summoned to a criminal proceeding to provide an ascertainment and opinion on concrete contested facts (Sahiti & Murati, 2016, p. 279). The duty of an expert is to assist the court on matters within its competences as an expert (Murphy, 2010, p. 452). By doing so, an expert performs procedural action of the expertise. The legal provision does not specify what degree of professional qualification an expert should have to be appointed as such.

This depends on what skills are required from an expert when he/she is appointed (Sahiti, 2006, p. 268). In common law, it is an early rule that for an issue requiring special knowledge and competence, witness testimony is accepted, which through the teaching or practice they have the necessary experience on a particular issue. Such witnesses are known as "experts" (Murphy, 2010, p. 450).

Qualification of an expert is a technical matter and the court should prove his/her qualification before he/she witnesses. One thing is known that the overwhelming development of various sciences, especially those of criminology, with different examinations whether they are traceological, ballistic, examination of documents, then the role of DNA etc., will make possible further engagement of experts and implementation of expertise in criminal proceedings. For this, the expert's opinion will still be considered as a separate evidence in court proceedings whereas, the procedural position of expert in criminal proceedings when giving his/her testimony is equal to other evidence, such as: with the witness testimony, the defendant's statement, etc., and should be treated as equal evidence in criminal proceedings. The procedural position of the expert takes shape with the compilation of the report as a result of the expertise. In this regard, the expert expresses his/her conclusion, but

should in no way express his/her opinion regarding the guilt or innocence of the defendant (art. 138 paragraph 2 of Code no.04/L-123, 2013). The Code explicitly considers the expert report to be inadmissible, which is not in accordance with the aforementioned provision (art. 138 paragraph 3). The expert's report is attached to the case file (art. 138 paragraph 4). Facts that have to do with the clarification and resolution of a particular criminal case and also the facts that contribute to the taking of a court decision are subject to expertise. From an analytical point of view, as objects of expertise in criminal proceedings can be presented the objects by which the criminal offense was committed, objects that have been the object of the committed criminal offense or objects in which evidence of a criminal offense are found, etc., when for the examination of facts in such items requires special professional knowledge (Sahiti, et al., 2014, p. 376). The object of expertise may be the biological or psychological condition of certain persons whereby facts are examined and verified, which relate to the subjective side of a criminal case. In details, the procedural rules on the objects of expertise, the manner of appointing experts, types of expertise, the expert-compiled report, and the questions asked and the experts' opinions are expressed as we said in articles 136-145 of Code no.04/L-123, (2013).

3.1. Expertise Procedure

The first step to accomplishing an expertise is to appoint an expert or a group of experts. If the issues that are the subject of an expertise are complex or require knowledge of some scientific disciplines, then the expertise is assigned to a group of experts (Meksi, 2007, p. 10). Based on Article 137 paragraph 1, subparagraphs 1.1, 1.2, 1.3 of the Code no.04/L-123, (2013), before engaging an expert, the state prosecutor issues a ruling in which he/she, 1) specifies the name of the expert and provides the basis for a specialized expertise by the expert including his/her education, experience and previous service as a court expert; 2) submits to the expert specific question in writing or a range of questions relevant to the guilt or innocence of the defendant or the extent of the damage caused by the criminal offense; and 3) provides to the expert access to the evidence required for specialized expertise. Before an expert is questioned by the court, his/her oath may be required. This is done by the single trial judge or the presiding judge (art. 340, paragraph 3 of the Code no.04/L-123, 2013).

The reason for which the oath is made is recorded in the court records. Subsequently, the expert looks at the items of expertise in the presence of the body conducting the procedure and the court recorder. He/she compiles a report with the results of the

expertise, where he/she also notes the methodology he/she used during the analysis and the conclusions (Sahiti & Murati, 2016, p. 282).

The Code provides that the report should be given to the defendant or his defence counsel as well as the plaintiff at least five days before the beginning of the expert's statement in the pre-trial proceedings, but no later than ten days after the state prosecutor has received the expert's report (art. 138 paragraph 5). In this case, if all the parties to the proceedings accept the expert's conclusions then he/she is not summoned for a statement in a preliminary proceedings. The expert may be summoned to provide his/her statement in a pre-trial procedure, if he/she provided the opinion supporting the outcome of the defendant's guilt or innocence or supports the conclusion on the identity of the defendant, the victim or other person that is relevant to the investigation (art. 140). The code allows the possibility to seek the opinion of entirely other experts in case of ascertainment of the engaged experts have substantial differences or their findings are unclear, incomplete or contradictory to the circumstances examined (art.142). The problems that arise in a court proceeding and for the resolution of which expertise is assigned are numerous. These are so numerous that there are so many problems of human activity in social life, in economics, science, art, culture etc. (Begeja, 2001, 170). For this reason we cannot mention all types of expertise. Some types that meet more in the investigative and judicial practice and for which the Criminal Procedure Code of Kosovo provides for specific provisions are: judicial medical expertise (it includes autopsy or examination of body injuries and physical examination); toxicological expertise; psychological expertise; molecular and genetic examination and DNA analysis; computer analysis as well as financial control (Articles 143-148).

3.2. Exclusion of expert

The defendant, defence counsel, victim or victim's advocate have the right to oppose an expert appointed by the state prosecutor (art. 137 paragraph 2 of Code no.04/L-123, 2013). The right of these procedural subjects for objection is based on the qualifications of the expert as well as in case of potential conflict of interest. As it is seen, the Code has foreseen the exclusion of the expert already in the appointment phase. As for the exclusion of the expert in the subsequent stages of the criminal proceedings, either the pre-trial judge, the presiding judge of the review panel or the appellate panel decide depending on what stage of the criminal proceedings the subject matter for review is (art. 45 paragraph 1).

4. Expert's Opinion as Evidence in Criminal Proceedings

The expert's opinion is one of the evidence through which the court establishes contested facts in a judicial proceeding. The experts' opinion or the results of expertise are also referred to as scientific evidence in a criminal proceeding. The scientific character attributes specific features to this evidence in relation to other evidence, although this evidence is assessed as any other evidence in criminal proceedings (Elezi, 2013, p. 310).

The expert's opinion, due to the application of the special professional knowledge, may have an influence on the correct verification of certain contested facts, but it must be subject to a free assessment of the evidence by the court. Lack of knowledge on scientific achievements from other non-legal sciences by a judge does not mean that the court should take the statement of the expert as indisputable. The court may reject the testimony of an expert on an issue if the scientific basis cannot be shown even though the expert may be a highly qualified person to give an opinion on the matter (Murphy, 2010, p. 458).

Assessing the opinion of the expert as evidence, the court must ascertain its objectivity and impartiality. To properly assess the opinion of the expert, the Code provides the possibility to question him/her not only by the state prosecutor, but also by defence counsel, victim and victim's advocates (art. 140 paragraph 4). However, the court assesses the expert's opinion by analysing it together with the other evidence and then draws its own conclusion on its value and contribution in lightening and resolving the criminal case, thereby determining the final probative value of the expertise on a certain criminal case (Sahiti & Murati, 2016, p. 288). We consider that the expert's opinion is an important evidence in a criminal proceedings, but the court should never rule out the possibility that this evidence as any other evidence can be accompanied by deficiencies which even compromise a criminal case during the trial. Therefore, the Code does not overestimate the expert's opinion as evidence compared to other evidence.

5. Conclusion

The Kosovo Criminal Procedure Code pays particular attention to the expert's, expertise and opinion as evidence. We maintained in this paper that expertise is considered as a subsidiary activity for the court when assessing evidence about a specific case being judged. Regarding the expert's opinion, we can say that it is a special evidence, which the court does not give special value in relation to other

evidence. Thus, the court analyses all the evidence provided one by one, but also compares them among themselves in order to ascertain the circumstances accurately under which a criminal offense was committed. The paper noted how to determine with specific provisions when a certain expertise may be required, who assigns the expert in a judicial proceeding, the content of the expert's report, the expert's opinion in criminal proceedings as well as the provisions relating to certain specific types of expertise (Articles 136-145 of Code no.04/L-123, 2013). The paper also witnessed the progressive spirit of the Criminal Procedure Code, which stipulates with special provisions the right of other subjects in the proceedings to oppose the appointment of an expert by the state prosecutor. While defendants in certain cases are allowed to appoint the expert in favour of their defence. Regarding the position of an expert in criminal proceedings, criminal proceedings in Kosovo do not favour the position of an expert in a judicial proceeding. His/her testimony is considered equally with the testimonies of other persons, for example with the testimony of the witness, the defendant's statement etc. The Court is therefore free to determine the final value of the expertise and to examine and analyse all the evidence in order to make a fair decision in relation to a particular criminal case.

6. Bibliography

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