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SOME ASPECTS OF EMPLOYMENT EXPERTS IN CRIMINAL ADJECTIVE LAW

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Abstract: *The law of criminal procedure of the Republic of Serbia gives an explicit norm of an expert witness, professional consultant, the specialist and the witness, i.e., it does not differentiate between the witness possessing general knowledge and the witness-expert. There is a sharp legal division between the expert witness, the professional consultant, the specialist and the witness as specific subject and bearers of different functions in the procedure. This division is not influenced by the possibility of examining the expert witness and the specialist as ordinary witnesses in the same criminal case, that is , by the possibility to appoint the witness and the specialist successively as expert by the possibility to appoint the witness and the specialist as ordinary witness and the specialist successively as expert witnesses, no by the possibility that the facts contained in the statement of the witness and the specialist become the subject of expert of expert witness's investigation.*

Keywords: *criminal procedure, expert witness, professional consultant, specialist, witness-laymen*

1. INTRODUCTION

The methods of obtaining knowledge employed by the criminal court so as to fulfill its task, i.e., to formulate the criminal case factually, can be described as using two kinds of previous knowledge unconnected with law: knowledge based on general education and experience of an average person (lay knowledge), and special knowledge on particular fields of science, technique, art, skill or craft (expertise).

Therefore, all facts to be established in the criminal procedure can be divided into those for whose establishment lay knowledge is sufficient, and those whose establishment requires necessary expert knowledge from a particular field. Therefore, all those subjects who, according to the way regulated by law, employ their expert knowledge and experience on any fields of science, technique, art or craft and in this way contribute to the establishment of facts, to the solution of particular technical or other unclear questions and to successful performance of criminal proceedings, represent experts in a wider sense in the criminal procedure (the expert witness, the professional consultant, the specialist, etc.).

Another question arises when considering possible use of other forms of expertise unconnected with law in the criminal procedure. Primarily, this refers to the subject who can also possess expert knowledge and experience in special cases, and who is a witness, i.e., witness-expert, in the criminal procedure. As the matter of fact, a witness is, as a rule, different from the expert witness and the specialist by possessing general, lay knowledge from the fields both connected and unconnected with law.

Therefore, a witness by definition is not an expert in the criminal procedure, although the activity of this subject in the criminal procedure is also exclusively connected to evidence and giving evidence. Only such a witness who actually possesses expertise in the criminal procedure (witness-expert) can be considered as an exception to this rule. The concept and the procedural position of such a witness is precisely defined and comprehensively determined in adjective law.[5]

2. THE DIFFERENCES BETWEEN WITNESS-LAYMAN AND WITNESS-EXPERT

Legislation of the Republic of Serbia does not recognize: this kind of experts as particular subjects, i.e. there is no distinction between witness-experts: and so-called witness-laymen; and the situation is much the same in the theory of adjective law. A contrary attitude on the part of the legislator is supposed to bring more complications into already complex area of expert evidence which is burdened by a multitude of unresolved questions and problems. However, there is a question whether this attitude is justifiable and whether it corresponds to reality.

The problem is further complicated by the possibility of successive appointment of the witness, or the specialist, as the expert witness in the same criminal: case, and by the possibility of interrogating the specialist and the expert witness as witnesses in the same case. Also, it is possible that the facts comprised in the statements of the witness and the specialist, including the statement of the specialist as a witness become the material for the expert witness's; investigation; Finally, the understanding of this matter is made more difficult by interpreting the legal nature the expert witness as a "science witness", and by interpreting the legal nature of the specialist as the witness-expert. Therefore, it is necessary to give a more elaborate account of certain controversial issues in this field.[3]

According to the legal definition, the witness is a physical person who is summoned to give a statement in the criminal procedure because he/she is likely to provide information about the crime and the perpetrator or about other important circumstances. The criminal court makes an autonomous assessment about whether it is likely that the damaged party or any other person will be able to provide information about important circumstances, and in this sense any person other than the accused can be the witness, under the condition that he/she perceived the facts by his/her own senses (so-called real witness), or that he/she learnt about these facts indirectly (so-called witness by hearsay).

Therefore, the witness is a person who perceived legally relevant and other facts in the past, as a rule at the time of the crime itself, always upon his/her lay knowledge and average experience, and only exceptionally upon expert knowledge, and who, at the time of criminal procedure makes a statement in which he/she reproduces the perceived facts. This leads to the conclusion that the witness and the experts (the expert witness, the professional consultant and the specialist) are' fundamentally similar because they are subsidiary subjects, i.e., participants in the criminal procedure, who to an extent also represent the assistants to the

criminal court, although the very content of the assistance shows the most important differences between them.

That is to say, the witness as the bearer of the information provides assistance in the factual formulation of the case, but his activity is always connected to the previous sensory perception. The activity of the experts, i.e., the expert witness, the professional consultant and the specialist, is as a rule also connected to the sensory perception of the facts important for the clarification and solution of the criminal case.

For example, a professional consultant is a person possessing professional knowledge in the field in which an expert examination has been ordered.[4] In any case, the criminal court does not perceive these facts directly, but these subsidiary subjects perceive them by their own senses directly.

3. THE DIFFERENCES BETWEEN THE WITNESS-LAYMAN, THE PROFESSIONAL CONSULTANT AND THE SPECIALIST

Contrary to this, the differentiating moments, i.e., the important differences between the expert witness, the witness and the specialist (and the professional consultant) are in the following: the witness perceives the facts upon his/her general, lay knowledge as a rule, while the expert witness and the specialist do this upon their expert knowledge and skills; the witness perceives in the past, while the expert witness and the specialist do this in the present; the witness is by definition irreplaceable, while the expert witness and the specialist are as a rule replaceable by other experts; the witness perceives things unintentionally and without special preparation, while the expert witness and the specialist perceive intentionally because the criminal court has previously explained the purpose of such perception and directed them in a certain way; the witness only reproduces the facts the way he has perceived or learnt them without drawing any conscious conclusions, while the expert witness and the specialist draw expert conclusions about the questions they have been asked etc. Therefore, there is clearly no ground for identifying either the expert witness or the specialist with the witness, since these subjects are completely different, each of them having a specific position and function in the criminal procedure.[3]

The witness-expert differs from an ordinary witness by possessing expertise and, in that sense, by being capable of perceiving facts or states that must be perceived through the application of such expertise, and he/she differs from the expert witness and the specialist by perceiving the facts at the time of the crime and not at the time of the criminal procedure, as well as because he/she makes a statement in the form characteristic of an ordinary witness. The witness-expert in this sense is recognized by German adjective law and criminal procedure as a special institute. On the other hand, a specific aspect of recognizing the witness-expert as a special institute can be seen in the Anglo-Saxon theory, i.e., the adjective law of England and Wales, Canada, the USA, Australia, Japan, and a number of other countries.

The analysis of the position and the legal nature of such a "witness-expert" undoubtedly indicates that it is not the witness, but the contradictory expert witness, i.e., the expert witness engaged by a party. According to the essence of the matter, such a "witness" is the expert witness because he/she perceives the facts in the present, and only presents, or can present them in the form of proceedings that is relevant to the witness.

That such a witness in the Anglo-Saxon law is really the expert witness can be seen from his/her position in the criminal procedure (for example, he/she is requested to be examined under oath in order to determine whether he/she is legally, expertly or technically

competent to give expert evidence-voice directs well as from the form of statement which is more characteristic of the expert witness's statement in the sense present at the Continent (written deposition of the expert witness) Besides, it is possible that the expert assistance such a "witness-expert" provides to the main subjects in the criminal procedure has' exclusively advisory character, i.e., be/she has the function of the specialist (expert advisor), when he/she is not summoned to give evidence at all.[1,2]

Apart from this, in certain, theory of adjective law person is, also regarded as the witness-expert when he/she does not have any information about the criminal ease, but he/she possesses expertise in the fields the court is interested in. [5] It is obvious that such persons express so-called general experience attitudes, and such an aspect of statement is considered the result of the specialist's activity in Yugoslav criminal procedure. Therefore, it is quite obvious that such persons are easily replaceable, and, consequently such "witnesses-experts" are no witnesses at all. Finally, we hold the view that the eyewitnesses also cannot be considered witnesses-experts because they make conscious conclusions connected to the phenomena they make the statements about - for example, evaluating the driving speed - unless they possess expert knowledge and experience adequate for perceiving and concluding in an expert way, like traffic policemen, professional drivers, etc. [7]

4. THE DOCTOR WHO EXAMINED THE INJURED AS EXPERT WITNESS

Accordingly, the witness-expert is only such a witness who ;by the application of expertise in the past, unintentionally perceived those facts and phenomena the perception of which necessitated such expertise, and who makes a statement in the present about them as a witness and, consequently, cannot be replaced by another person. The theory usually demonstrates such understanding of the witness-expert by using an; example of the doctor who examined the injured, since it is only him/her who can give competent-evidence about the state and injuries of the injured when he was brought to him/her.

German adjective law gives an example of the police officer as the witness-expert in the real sense, since he/she possesses expertise unconnected with law, under the condition that he is asked questions that can be answered only by an expert. Besides, a police officer can always be questioned about an expert matter in the edacity of a witness (witness-expert, even when he/she not accepted as the expert witness in the same criminal case. It. is understood that the police officer will give evidence according to the facts he learnt in the course of duty. [8]

Accordingly, the view that the expert witness cannot be a person who was examined as a witness is completely unacceptable; for example, that the doctor who had treated a patient and who was therefore accused of the crime of un conscientious medical treatment can under no circumstances be the expert witness, but he/she can be the witness.[6]

The doctor who had treated the deceased really cannot be appointed as the expert witness, but he can neither be the witness if he was accused of the crime of un conscientious medical treatment. The reason for this is, that Yugoslav criminal procedure does not recognize the institute of so-called giving evidence in one's own case, i.e., the functions of the accused and the witness are not compatible in the criminal procedure. The Anglo-Saxon legal system recognizes another possibility, but it is in any case impossible to accept the opinion that the expert witness cannot be the person who has been examined as a witness.

5. RESUME

At the very end, can conclude that regarding expertise in the criminal procedure even the witness-expert in the real sense, including here the type of the witness-expert met as a specific Subject; in the procedure in German adjective law (Sachverstandige Zeugen), is not an, expert in a narrower sense, Although it is obvious here that certain facts are perceived upon the knowledge of the rules, principles and experiences from particular fields of' science, technique art or craft, such perception still does not stern from previously anticipated and planned activity that should be performed by certain person because of his/her expertise, but it represents an integral part of the function of giving evidence in the procedure.

Therefore, we can state that the witness-expert in general represents an objective category that possesses important particularities, and is liable to more comprehensive and profound scientific research as one of the bearers of expertise unconnected with law in the criminal procedure: At the same time, there are no rational or procedural reasons that would require that this reality becomes recognized by the legislation in criminal procedure of the Republic of Serbia.

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