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Reasonable and Accessible Judicial Credibility as a Criterion for Justice and Judicial Arbitrariness

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This article based on the example of a criminal case (which is not exceptional in domestic criminal procedure) declares a problem which main point in authors opinion is: benefit generated by the judicial arbitrariness has narrow limits, while the threat posed by the judicial arbitrariness , has no limits. The most important criterion of justice must be reasonable and accessible judicial credibility.

Keywords: justice, criminal law, judicial credibility.

Point. Justice is often interpreted broadly in legal theory as well as in legislation and includes the whole sphere of justice, including procedural and law enforcement activities. For example, in Russian criminal law the notion of crimes against justice encompasses both *pretrial* (inquiry and preliminary investigation) and *judicial* proceedings, as well as *execution of court decisions*. This is the broad interpretation of **justice**.

However the Constitution of Russia says that justice in Russia is administered only by courts (the definition of "justice" is not given though). The Federal Constitutional Law of the Russian Federation "On the Judicial System of the Russian Federation" in the article 4 also states: Justice in the Russian Federation is administered only by courts established under the Constitution of the Russian Federation and Federal Constitutional Law hereof. No establishment of the extraordinary courts and the courts not provided for in this Federal Constitutional Law is allowed.

Therefore the concept of "justice" in the legislation often includes only judicial proceedings to consider and adjudicate the various types of cases. This is the **narrow interpretation** of justice**.**

Many people believe there is no justice in Russia. However the Constitution of the Russian Federation establishes the general principles based on which it must be administered. At the same time the impressive list of court proceedings principles does not guarantee the formation of conditions for the true independence of the judges, which is the core of justice.

Example. Let's consider the case-law of the Vladimir region.

On the 29th of April, 2010 Z. was sentenced under the part 3 of article 30 and paragraph "b" of part 2 of article 228-1 of the Criminal code to six-

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year imprisonment to be served out in a maximum security penal colony by Frunze district court of Vladimir. The sentence came into force. The judge and the President of the Vladimir Regional Court rejected the case to be considered as supervision by the Regional Court Presidium.

According to the defense this sentence being illegal was a subject to change. In cassation according to paragraph 1 and 3 of part 1 of article 379 of the Code of Criminal procedure the reasons for change was stated as violation of criminal procedure legislation by the first instance court and non-compliance of the court's conclusion with the facts of the criminal case.

Defense opinion on non-compliance of the court's conclusion with the facts of the criminal case is a matter of academic interest.

In particular according to the defense the court founded its conclusion on Z. attempted illegal drug sale on the testimony of his old acquaintance K. which was confirmed by the testimony of drug control operations officers (Vladimir Region department of Federal Drug Control Service of the Russian Federation) and procedural papers executed exactly by them (operational search report dated August 08, 2009 among their number).

Recognizing the prosecution case compliant with the facts of the case that actually occurred the Court specified the following:

On August 8, 2009 officers of Vladimir Region department of FDCS of Russia decided to conduct an operational search activity called "Test purchase" in relation to Z. Being Z.'s longtime acquaintance K. has been involved. He agreed to collaborate, called Z. on mobile around 11 o'clock using his own mobile phone and asked Z. to sell him 2 grammes of cocaine. Z. agreed. After K. and Z. met about 20 min. past 12 o'clock they left in a car where K. handed Z. 10.000 rubles to purchase 2 grammes of cocaine. About 15 min. past 13 o'clock Z. dropped off K. near "Zarya" hotel on mountain Studenaya in Vladimir city and left in direction of "1001 melochey" shop situated on the Vladimir-Moscow road. All this time Z.'s car was under continuous field supervision conducted by the officers of Vladimir Region department of FDCS of Russia who conducted video recording. Z. sat for some time in the car near "1001 melochey" shop, met nobody and didn't buy drugs from anyone. After that he called K. about 35 min. past 13 o'clock and suggested meeting at "Krasnaya banya" near the village Dobroe in Vladimir (6 Krasnoselsky lane). He was arrested while drugs transfering at 13 o'clock and 55 minutes.

There are two essential moments in the prosecution's case in order to qualify Z.'s actions as attempted illegal drug sale:

1) the decision to conduct the operational search activity called "Test purchase" held on August 8, 2009; hence K. called Z. in the morning the same day and asked to sell cocaine and Z. agreed;

2) the officers of Vladimir Region department of FDCS of Russia kept Z. under continuous supervision after K. handed the money and got out of the Z.'s car. Z. met no one afterwards therefore he has the cocaine which means it belonged to him.

Z. recounted different version of the events during the preliminary investigation and court sessions:

He didn't deny the fact of purchasing cocaine for K. at his request and with his money though asserting that K. didn't called him on this subject in the morning of August 8, 2009. That day they met not on K.'s initiative but on his own in relation to other matters. K. didn't look well during the meeting, complained on illness and asked to get cocaine. Z. had a little cocaine himself (about 0.5 g) which he bought this night and used some of it and he was ready to share it with K. gratis since they have been

good friends for a long time so once in a while they shared cocaine with each other for free. Nevertheless K. insisted on him getting exactly 2 grammes of cocaine and put 10.000 rubles in the cup holder in his car afterwards. From "Zarya" hotel he drove without K. in the direction of "Torgovye ryady" which is opposite to "1001 melochey" shop. Somewhere near Vladimir's aeromechanical college on the Offitsersky Street (the district where the drugs are being usually sold) he saw a guy who sold him one gram of cocaine for personal use the night before. He asked to sell him 2 grammes of cocaine. The guy got into the car and took 10.000 rubles (ten notes with par value of 1.000 rubles). This happened around half past one in the afternoon. He called K. at once and suggested to meet at "Krasnaya banya" near the village Dobroe in Vladimir. He arrived at the designated place in 10-12 min. K. called back soon, they met and he handed K. cocaine, then he was arrested by FDCS of Russia officers.

Obviously the two versions have different criminal colouring therefore according to the defense court (held not in the accusatory manner) should adhere to the principle of independence and choose the version less controversial and the most confirmed by the evidence in the case.

According to the defence first instance court was reasonably confronted with a significant number of defects, inconsistencies and contradictions in prosecution case because this version was invented artificially from the origin and was not the result of establishing the facts of the case.

Attempted legalization of prosecution case which contradicted the facts of the case resulted court in forced violation of one of the criminal court proceeding principle that is presumption of innocence. This principle requires in particular to interpret any doubts of defendant's guilt in his favor unless resolved in stipulated procedural order and also prohibits the court to base sentense on assumptions.

Which facts of the case established in proceedings had to raise court's doubts? Which contradictions it had to pay attention to?

Court had to consider integrally all the evidence in the case which is relevant and admissible. For convenience it can be divided into three groups:

A) evidence confirming the prosecution case about Z. attempting to sell and not to buy drugs (art. 228-1 of the Criminal code of Russia);

B) evidence confirming defense story about Z. attempting to buy and not to sell drugs (art. 228 of the Criminal code of Russia);

C) evidence equally relevant to prosecution's and defense's story in this criminal case (e.g. money handing to K. by FDCS of Russia officers during the operational search activity, Z.'s arrest, detection of cocaine spilled particles in the car, K.'s issuing the drugs received from Z. etc.)

Integral consideration of the evidence in the case indicates that *prosecution case is based on the K.'s testimony and the testimony of FDCS of Russia operations officers*. The rest of the evidence including the one collected by the defence during proceedings refutes the prosecution's case and is fully consistent with the defense story (apart from the evidence equally relevant to prosecution's and defense's story in this criminal case).

The task of the court was to find a clear answers to the following questions:

1) Why *does not* Z.'s mobile phone statement dated 08/08/2009 and received by the court on defense initiative *comply and moreover refutes* K.'s *statements* and *testimony of FDCS of Russia officers* along with the *report* of August 8, 2009 on operational search activity called "Test purchase" compiled by FDCS operative D.A. Markov which establishes that on August 8, 2009 it was decided to conduct the operational search activity called "Test purchase" in the course of which K. himself

called his acquaintance Z. around 11 o'clock and asked him to sell cocaine which the latter agreed to? There were three communication session between K.'s and Z.'s mobile phones on August 8, 2009 as appears form mobile phone statement. The first one was at 10:53:31 but it came not from K. as state the reports and the testimony of FDCS of Russia officers who are the witnesses for prosecution. On the contrary the call came from Z. as he has stated. The second call came from Z. at 13:34:50 and only the third one came from K.

In this case it is not just a procedural error caused by K.'s and FDCS of Russia officers "forgetfulness" of who called whom but the report of the same day was compiled "in forgetfulness". Obviously prosecution case benefited from such progress of events when in the course of the operational search activity called "Test purchase" K. himself addressed Z. with a request to sell cocaine which must have been confirmed by a whole number of evidence listed above. As regards to mobile phone statement being an objective evidence it is no concern of investigation because a few authority granted witnesses are enough for modern domestic criminal proceeding to convince court that the version convenient to operatives and investigation is true.

2) Why the objective evidence obtained in the course of operational search activity was not attached to the case and K.'s statement along with FDCS of Russia officers statement and papers were enough for the investigation?

Particularly to establish the facts of the case it would be appropriate to examine:

- the content of monitored phone calls (especially of the first K.'s call which according to prosecution case was made in their office and in the presence of the drug control operations officers);
- field supervision records of Z.'s car movements which was made according to FDCS of Russia officers.

This evidence could be convincing proof for the prosecution case provided that prosecution case corresponds to the facts of the case.

Instead court modestly assumes for the basis the testimonial assertion of FDCS officers according to which video record could not be shown due to some top-secret features of the recording equipment and the phone call between K. and Z. made by K. in the FDCS of Russia office was not recorded as there was no reason to do it as described in the report on operational search activity.

3) Why 10.000 rubles were not found with Z. during his arrest and search whereas money had to be with him?

The witness K.J.'s argument on why 10.000 rubles were missing during Z.'s arrest and search when they were specifically handed by FDCS officers through K. to buy cocaine is a matter of special aesthetic stimulation.

Court's violation of presumption of innocence will be a telling illustration in the relevant course of lectures as court in all seriousness lists the assumptions explaining the metamorphosis: there was money, officers observed Z. continuously and did not let him out of the sight, Z. met no one then was arrested but there was no money with him (for the reference see penultimate paragraph on the page eight of the sentence).

How did Z. tricked the drug control operations officers? Very simple indeed. An excerpt from the sentence says: "The defendant had the opportunity to put money into the hidden cavities of the car which were not opened for search, he could throw it out of the window to pick it up later or get rid of it in any other way as money could prove defendant's guilt in illegal drug sale for profit". So that's the way it is and not the other way around.

And this statement is not made in private conversation, this statement is made in the

sentence passed imperatively on behalf of the state as the criminal procedure law requires it.

Is this the modern domestic justice?

4) Why there is no data in the materials of the case except K.'s allegations and allegations of drug control operations officers about Z. selling drugs?

5) And finally there is very important question **why:**

After FDCS officers were interrogated in the court's room and for no reason classified and confidential witness "Andrianov" was interrogated in the corridor it became clear to defense that K. "Andrianov" hides the truth being addicted to drugs and dependant on drug control operations officers. The latter hold back the truth having the false concept of professional duty and honour, using high social importance of combating the illicit drug trafficking as a cover.

As justice nowadays is administered in accusatory manner, the statements of the witnesses indicated above are enough to find Z. guilty of illegal sale of cocaine disregarding contradictions listed above. It was important to find the evidence that will put everything right in Z. prosecution. Z.'s mobile phone statement together with information about initial base transceiver station on every call could be relatively objective evidence being free from the human factor which is the principal failing of testimony given by people.

Court requested the relevant information on application of the defense. The information received (time of calls, subscribers, the addresses of the initial base transceiver station during Z.'s calls) allowed defense with the use of a large-scale map of Vladimir to restore the actual data of Z.'s movement, ie the facts of the case. The large-scale map of Vladimir with initial base transceiver stations marked on it by defense was attached to the case. It more than obviously confirms Z.'s testimony on his car movements and completely refutes the prosecution case.

In particular the map shows Z.'s movements almost to the minutes. He was on mountain Studenaya near "Zarya" hotel at 13:14:04. According to prosecution case Z. dropped "Andrianov" off near "Zarya" hotel and left in direction of Vladimir-Moscow road then he stopped near "1001 melochey" shop for some time (for quite some time as stated by FDCS officers). However according to objective information in 5 minutes after communicating with a mobile network near Studenaya mountain Z.'s phone appeared to be near 2 Podbelskogo street which is in the opposite direction of where Z. left according to prosecution case. Less then in three minutes Z.'s phone appeared near the Drama Theater (4 Dvoryansky street) situated far from the place designated by prosecution. Z. was near aeromechanical college (11 Offitsersky street) at 13:34:50 when he called K. ("Andrianov") and informed him on buying cocaine. He then suggested K. meeting at "Krasnaya banya" near the village Dobroe (the address of the initial base transceiver station is Detsky odezhda LLC at 8 Dobroselsky street) where he arrived around 13:47 (there was incoming call lasting 157 seconds).

If Z. called "Andrianov" from his own phone which is an unquestionably established fact and if he had this phone with him at the time of parting with "Andrianov" and also being arrested (ie he didn't hide the phone in the container and threw it out to pick up later), if he didn't meet anyone meantime and gave his phone to no one (according to operatives observing Z.'s movements) then one can conclude that Z.'s phone movements define Z.'s movements itself.

Relying on this information (received from sources lacking sense of humor unlike "Andrianov" and his FDCS vis-à-vis) court had to follow the basic rules of formal logic and in accordance with the rules of criminal procedure

had to find out – why did it happen and how was it possible that the initial base stations Z.'s phone was communicating with were dozen stations away from the one where Z. waited due to the prosecution case (ie near "1001 melochey" shop). Instead page 10 of the sentence says that objective facts on Z.'s phone communicating initial base stations do not refute witnesses' testimony and do not contradict operative supervision data.

Simple and elegant without further explanations.

How was it possible that at 13:14 Z. was on mountain Studenaya (near "Zarya" hotel) then left in direction of Podbelskogo street where he made a call at 13:19 but between here and "1001 melochey" shop (where the defendant "was" sent by the prosecution after he drove off "Zarya" hotel) there were dozens of base stations which had to be the initial ones if Z was in the area they covered. Nevertheless Z.'s phone broke the laws of physics to please prosecution and was stubbornly refusing to communicate with stations situated near "1001 melochey" shop.

This data is suffice to ordinary logic unburdened with political and legal commitments to reach an unambiguous conclusion on Z. never appearing near that shop.

Another example. The same tenth page of the sentence says: "*Defense's statement on Z. dropping "Adrianov" off at 13 o'clock 14 minutes contradicts the testimony of witnesses on "Adrianov" getting out of the car near "Zarya" hotel at 13 o'clock sharp"*.

Well, that's understandable. If witnesses say about one o'clock then so it is. Can there be any doubts about witnesses' accuracy? It's not appropriate even if from 12:14 to 13:03 (according to mobile phone statement requested by court and attached to the case) Z.'s phone communicated with initial base stations situated at numbers 3, 26, 28 on Kuibysheva street which is crosstown (near Bogolyubovo village) to put it mildly. Thus Z. could not be in two different ends of the city at once. At the same time at 13:14 Z.'s phone signal (according to communication traffic) was received by the base station near "Zarya" hotel. Yet this contradicts FDCS officers testimony. Too bad for communication traffic then and so much the worse for the laws of physics.

Objective case evidence indicates that Z. followed exactly the route he described to the investigation and then to the court. When he was near aeromechanical college he bought cocaine for K. ("Adrianov") on his request and with FDCS's money. For this reason he did not have 10 notes with par value of 1.000 rubles. He did not threw money out of the car window. He was not near "1001 melochey" shop.

Foregoing completely attests to the fact of miscarriage of justice.

And what about the second instance court? How did it reacted to permanent contradictions in the case which shall be interpreted in favour of the defendant (accused)?

It did not reacted at all. Hence the cassation "passed" this contradictions over in silence or "suppressed" them.

Procedural consistency of Vladimir Regional Court supervisory judge succinct answer on the legality of judicial decrees was confirmed by Vladimir Regional Court President's message.

Deal is done.

And what about justice?

Resume. It is quite clear that justice will triumph only when judicial credibility is clear to the common sense unburdened with political guidelines and having first-order representation of logic; hence judicial credibility will be accessible and reasonable.

And the time has come for concrete proposals on the legal mechanism minimizing the number of judicial decrees which surprise with ingenuous (ie prejudiced) consideration of evidence in the case. The author appeals to all academic theorists

and practitioners who understand the social danger of political and legal arbitrariness of any kind but especially of judicial one, even if this arbitrariness is called into existence to achieve momentary social goals and objectives. The benefit generated by the arbitrariness can not go beyond the narrow limits (in shrewd observation of Jeremy Bentham, the eminent figure of the Age of the Enlightenment), while the threat posed by the judicial arbitrariness has no limits and therefore the menace of judicial arbitrariness has no limits as well.

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Разумная и доступная судебная достоверность как критерий правосудия и судебный произвол

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В настоящей статье на примере одного уголовного дела (оно не является исключением отечественного уголовного судопроизводства) заявлена проблема, тезисом которой является авторское утверждение: порождённое судебным произволом благо имеет узкие границы, тогда как угроза, которую несёт в себе судебный произвол, не имеет пределов. Важнейшим критерием правосудия должна служить разумная и доступная судебная достоверность.

Ключевые слова: правосудие, уголовное право, судебная достоверность.