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ENSURING OF EQUALITY OF PARTIES OF TRIAL IN THE PROOF OF FACTS

Realization of principles of contentionness and equality of participants of trial before a law and court creates maximally favourable terms for establishing truth and pronouncement of just sentence in criminal case. Socio-economic transformations of the last years and process of reformation of the criminal legal proceeding gave a powerful impulse to the objective necessity of research of important questions of the criminal-processing proving facts. In accordance with p. 4 p. 3 of article 124 of the Constitution of Ukraine before a court appear two sides which have even judicial rights and are provided with freedom in giving their proofs and proving before the court their persuasiveness. Item 261 of CPC of Ukraine also foresees an even right for the sides of prosecution and defence for presentation of proofs and participating in their research.

In obedience to a current legislation the side of prosecution on the stage of pre-trial investigation has a powerful arsenal of facilities from the assembly of proofs, and possibilities of side of defence – limited enough. Hereupon, the role of defender in a criminal process is erected, mainly, to that, to find out the lacks of work of investigator. At consideration of criminal case in a court a right for the participants of trial on proofs legislatively gets not each. A defender in this plan has far fewer a circle of rights it is compared to the public prosecutor. The resulted circumstances predetermine actuality of this theme that necessity of research of activity of defender for finishing telling at consideration of criminal case.

The purpose of the article is a decision of volume of right for a defender on presentation of proofs during consideration of criminal case in a court in the aspect of providing of equality of rights for sides in a court and development on this basis of recommendations in relation to perfection of activity of defender during realization of the legal proceeding.

A value is important for development of questions of participation of defender in the criminal-processual proof of facts on the different stages of the legal proceeding have works of such scientists, as T.V. Varfolomeeva, A.M. Biryukovoa, Y.M. Groshewa, Ya.P. Zeykan, T.V. Koreva, O.M. Larin, P.A. Lupinska, M.A. Markush, V.O. Popelyushko and others. However scientific research of judicial position of defender, realization of his professional activity in the criminal-processual proof of facts, going out from the problem of realization principles of equality of participants of trial are insufficient.

Analysing rights of defendant and victim during a judicial trial, which are fastened in the item of item 263 and 267 CPC of Ukraine, it should be said, that in the indicated norms a right on presentation of proofs is fastened for both participants of trial. At comparison of positions of p. 2 article 264 and p. 1 article 266 of CPC of Ukraine, rights for a public prosecutor and defender a defendant are regulated in which, accordingly, disparity of rights for a public prosecutor and defender takes a place in a judicial trial and, foremost, it touches a right on presentation of proofs. If a public prosecutor has a right to give proofs, defender only right on a solicitor about obtaining on demand and tacking to business of new proofs. Thus, as notices M.A. Markush, at presentation of such a solicitor, the information got a defender remain «materials» up to taking away of cramps of decision about confession their proofs. Causing for an interrogation in the judicial meeting of witness, a defender must ground accordance of testimonies of this person, them evidential value for the decision of criminal case. However and at presence of such arguments of solicitor of defender is for a court obligatory, if a chairwoman will estimate the evidential value of testimonies of this witness differently [1, p.146].

Such type of activity of defender, as presentation of proofs, foreseen in p. of 8 part 2 article 48 of CPC of Ukraine, thus on it a defender has a right not in the concrete stage of the legal proceeding, but from the moment of admitting of him to participation in business. P. 13 part 2 article 48 of CPC of Ukraine foresees the methods of collection of evidential information by a defender: to ask and get documents or their copies from citizens and legal entities, to meet at enterprises, at establishments, organizations, associations of citizens with necessary documents, except for those the secret of which is guarded a law, to get the writing conclusions of specialists on questions which require the special knowledges, to poll citizens. Among them there are not consequence actions, that such forms collections of information, for which with the observance of set by the judicial law of requirements can be got proper, and main is possible and reliable information. In this connection information which turns out a defender within the limits of his plenary powers can not be proofs, as an article 65 of CPC of Ukraine marks that proofs on criminal business are any fact sheets which are set: by testimonies, victims, suspected, defendant, by the conclusion of an expert, material proofs, protocols of consequence and judicial actions, protocols with the proper additions, by the made authorized organs as a result of operative-investigation measures, and by other documents. In addition, part 1 article 66 of CPC of Ukraine does not name a defender among the subjects of assembly of proofs.

Thus, a criminal-processual law does not confer the right a defender assembly of proofs, and from here and by an even right on presentation of proofs for defence of interests the client, although it is declared in an article 261 of CPC of Ukraine. But a

law determines the right for a defender on the receipt of information, which can be used as proof, and this circumstance it follows him to take into account and realize in full.

If by a defender defendant there is an advocate, in accordance with article 5, «On advocacy» he is conferred the right by Law to collect information about facts which can be used as proofs in the case, to ask and get documents or their copies from citizens and legal entities, to meet at enterprises, at establishments, organizations, associations of citizens with necessary documents, except for those the secret of which is guarded a law, to get the writing conclusions of specialists on questions which require the special knowledges, to poll citizens [2].

That an advocate can prosecute an advocate inquiry actually, and the got materials can be acknowledged proof and added to business. Advocate investigation, as a functional institute of the criminal legal proceeding, is derivated from the function of defence and carried out within the limits of its realization. It is carried out not out of pre-trial investigation or judicial trial of business, but exceptionally in connection with these realizations and in their limits [3, p.20].

With a concept it does not follow to equate «advocate investigation» «parallel investigation», a right on which is not used by an advocate in criminal business [4, p.71]. Essence of such investigation is understood as simultaneous consequence actions, conducted a defender from the exposure of excusatory or emollient responsibility of circumstances, with exposition of the conclusions in an excusatory conclusion or conclusion about softening of responsibility of defendant [5, p 22].

«Parallel investigation» means a concept that it is conducted or parallel with a person which conducts investigation, or it must pass ahead an analogical investigation action, conducted a subject which conducts a process. Thus a defender is not under an obligation to reveal to the subject which conducts a process, that he intends to conduct or prosecutes an own inquiry. A defender which prosecutes a parallel inquiry for example interrogation of person, has a right to fix this action, fastening information protocol [6, p.45].

In scientific literature an idea speaks out about introduction in a criminal-processual legislation, which touches activity of advocacy, such judicial figure as an advocate-solicitor which would be specialized on prosecuting a parallel advocate inquiry. Only in such case, in opinion of M.A. Markush, defence can effectively resist laying to the court [1, p.148]. In fact obvious is circumstance that the basic lack of side of defence in the process of collection and verification of proofs is absence for the defender of imperious plenary powers, and also judicial form of fixing and fixing of proofs.

N.A Gromov puts forward on objection of the indicated position. considering that parallel investigation an advocate can not be by the guarantee of rights for a defendant. It is a direct way to the most serious abuses and falsifications. Impermissible is a leadthrough private individuals, and interested in end-point businesses, such judicial actions as a search, coulisse, producing for recognition, investigation experiment, even in presence the worker of organ of pre-trial investigation. Consequence actions are indicated must be conducted specially empowered on that by public organs at presence of the proper judicial guarantees of authenticity of the got proofs, as a leadthrough of these consequence actions is related to limitation of constitutional rights for citizens and requires the perfect observance

of the procedure set a law [7, p.92].

Unfortunately, during the leadthrough of consequence actions not always it is possible the organs of pre-trial investigation to talk about the observance of constitutional rights for personality. Therefore consent with the opinion of Ya.P. Zeykan, which marks that a way, which passed advocate or person which takes part in case to the information generator, can be different, not always necessarily to report, what steps and methods information is got by. It is important only, that at a receipt and grant of proofs legality was observed, and information about fact sheets, which can be utilized as proof, answered the requirements of belonging and admission of proofs [4, p. 76].

On persuasion of A.M. Biryukova, on an advocate-defender it can not be fixed duty in relation to the assembly of proofs in criminal case in the stage of pre-trial investigation. His activity in this context as it follows to understand the subject of finishing telling only as a right and duty to report an investigator, public prosecutor, organ inquest fact sheets which justify defendant can soften his punishment or eliminate realization in criminal business [8, p.15-16].

A like idea holds V.O. Popelyushko. Thus, a research worker marks that in the case when the assembly of accusatory proofs would be included in a duty investigation, and in the duty of defender, – excusatory, about valuable defence speech did not go then, because possibilities of advocate-defender were in relation to the assembly of proofs in criminal business and public organs, provided with in this plan imperious plenary powers,, is and there will always be improportinate [3, p.20].

It should be noted that the criminal-processual legislation of countries of the CIS contains some innovations in relation to participating of defender in finishing telling. Thus, CPC of RF gives a right a defender to collect and afford proof (p. of 2 article 53, p. 3 article 86) [9].CPC of Kirghizia determines a right for a defender to collect materials in behalf of the client personally or with the use of private detective; to get written statements and explanations of witnesses, draw up private reports of review of locality; to afford proof on investigation and in a court (p. of p. 1, 2 article 3 article 48). Materials are collected a defender on his requirement obligatory for tacking to business. The usually given materials are acknowledged proofs only after their estimation by an investigator, public prosecutor, court [10].

Project of CPC of Ukraine № 9700 extends rights for the side of defence, including defender on the assembly of proofs. Thus, in accordance with p. 3.article 93 Projects side of defence, a victim carries out the assembly of proofs by obtaining on demand and receipt from the organs of state power, organs of local self-government, enterprises, establishments, organizations, official and physical persons of things, documents, information, conclusions of experts, conclusions of revisions, acts of verifications; and also by realization of other actions, which are able to provide initiator of leadthrough of consequence (search) actions, secret consequence (search) actions and other judicial actions presentation to the court of competent and possible evidences. In addition, in accordance with p.4 article 46 a defender uses judicial rights for suspected, defendant defence of which he carries out, and they in same queue have a right on collection and presentation to the court of proofs [11]. That Project of CPC № 9700 not only proclaims equality of rights for the participants of trial on presentation of proofs, but also considerably extends rights for the side of defence in relation to it.

Thus, despite the assigned equality of sides in relation to the presentation of proofs in operating CPC of Ukraine the side of prosecution and the side of defence come to the court with the different volume of evidential information. Thus, if a public prosecutor mainly presents in the court a criminal case with the line of accusatory proofs got in pre-trial investigation, a defender of the defendant only meets the charge, as he doesn't process sufficient excusatory cumulative evidence through narrow-mindedness of right on their collecting. In this connection achievement of equality in the court is bothered. Improving a situation in this direction is possible only by providing a right for a defender on getting proofs on the stage of pre-trial investigation through the judicial fixing by the organs of pre-trial investigation of the information produced by a defender, in fact only after this they will get the status of proofs. Thus, it is necessary to oblige the organs of inquest, of pre-trial investigation to attract all date given by a defender, and their evaluation, but the decision of question about admitting, belonging, sufficiency of proofs will be carried out by a court.

Literature:

1. Маркуш М.А. Принцип змагальності в кримінальному процесі України: [монографія] / Марія Андріївна Маркуш. – Харків: Видавець СПДФО Вапнярчук Н.М., 2007. – 208 с.

2. Про адвокатуру: Закон України від 19 грудня 1992 року № 2887-XII: [Електронний ресурс] // Режим доступу:

http: // www zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2882-12

3. Попелюшко В.О. Функція захисту в кримінальному судочинстві України: правові, теоретичні та прикладні проблеми : автореф. дис. на здобуття наук. ступеня доктора юрид. наук : спец. 12.00.09 «Кримінальний процес та криміналістика; судова експертиза; оперативно-розшукова діяльність» / В.О. Попелюшко. – К., 2009. – 38 с.

4. Зейкан Я.П. Перешкоди правосуддю, або Хто попереджений – той озброєний : [практичний посіб.] / Я.П. Зейкан. – К.: КНТ, 2009. – 256 с.

5. Горя Н. Принцип состязательности и функции защиты в уголовном процессе / Н. Горя // Советская юстиция. – 1990. – № 7. – С. 21–24

6. Корчева Т.В. Проблеми діяльності захисника у досудовому провадженні та в суді першої інстанції / Т.В. Корчева. – Х.: Видавець ФО-П Вапнярчук Н.М., 2007. – 200 с.

7. Состязательность и равноправие сторон в уголовном судопроизводстве: [учеб. пособие]. / Н.А. Громов, Т.Т. Алиев, Л.М. Зейналова, Н.А. Лукичев. – М.: «Приор-издат», 2003. – 112 с.

8. Бірюкова А.М. Забезпечення адвокатурою конституційного права обвинуваченого на захист у кримінальному процесі України : автореф. дис. на здобуття наук. ступеня канд. юрид. наук : спец. 12.00.09 «Кримінальний процес та криміналістика; судова експертиза» / А.М. Бірюкова. – Одеса, 2006. – 22 с..

9. Уголовно-процессуальный кодекс Российской Федерации 22 ноября 2001года [Электронный ресурс] // Режим доступа:

http://www.roskodeks.ru.

10. Уголовно-процессуальный кодекс Киргизии: от 30 июня 1999 года № 62 [Электронный ресурс] // Режим доступа:
http://www.legislationline.org/ru/documents/action/popup/id/14306/preview.

11. Проект Кримінально-процесуального кодексу України №9700 [Електронний ресурс] // Режим доступу:
http://w1.c1.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=42312