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THE ADMISSIBILITY OF EVIDENCE OBTAINED UNLAWFULLY IN THE CZECH CRIMINAL TRIAL

Abstract. The article about the admissibility of evidence in the Czech criminal trial deals with absolute and relative inadmissibility of evidence, presents legislation and case law relating to evidence obtained unlawfully in the Czech criminal trial and limits of so-called police provocation. Article also presents a case study and the importance of the poisoned fruit doctrine for the Czech doctrine.

Keywords: inadmissibility of evidence, Czech criminal trial, policie provocation, poisoned fruit doctrine.

Introduction

In practice, we are increasingly confronted with a weak evidence situation, that is not caused by a lack of evidence but by a lack of procedurally perfect evidence. In the Czech Republic, the issue of procedural (in)admissibility of evidence has come to the public consciousness based on a corruption case involving a former health minister David Rath. In pre-trial proceedings, the incriminating evidence on David Rath were wiretaps, which a court later did not accept as evidence.

It is typical for the Czech criminal law that many issues, including the procedural applicability of evidence, are not dealt with in the Code of Criminal Procedure, which, despite many amendments, is relatively outdated (act of 1961, recodification is underway), but in the case law. Czech law is typically a continental system, so it does not know precedents, but decisions of higher courts are respected for their persuasiveness.

The aim of this article is to briefly explain Czech approach to usability of proof obtained unlawfully and illustrate the implications of this approach in practice. Admissibility of evidence obtained against the law is one of the most actual issues in the Czech criminal proceedings.

In this article I will try to explain the Czech approach to the applicability of evidence in court, to distinguish absolutely and relatively inadmissibility of evidence, I will cite the case law of the Czech courts and the European Court of Human Rights on this issue and I will also deal with the admissibility limits of so-called police provocation. Finally, on the basis of the case of Member of Parliament David Rath, I will explain to what extent the doctrine of the fruit of the poisonous tree has been adopted in the Czech legal environment.

Defects in criminal proceedings and prohibition of evidence

To understand the Czech concept of (in)applicability of evidence it is necessary to present essential differencies between absolute and relative inadmissibility of evidence in the Czech criminal trial. Only an important

defect, a substantial defect can cause inadmissibility of evidence. A proof is absolutely inadmissible, if the defect cannot be removed. However, when the defect can be removed, we are dealing with the relative inadmissibility of evidence.[1] Best example of the relative inadmissibility is a witness statement. The witness can be bound by the law obligation of silence. His statement can be used as a proof at court only after the witness was released from the obligation of silence.

The Czech Criminal Procedure Code knows only one prohibition of evidence. However, there is no statutory definition of the substantial defect. This one prohibition of evidence should be considered absolute.

Section 89 paragraph 3 of the Czech Criminal Procedure Code provides:

Evidence obtained by unlawful coercion or by threat of coercion may not be used in the proceedings except when used as evidence against the person that used coercion or threatened with coercion.

The prohibition laid down in Section 89 paragraph 3 assumes the obligation arising from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 15) by which the Czech Republic is bound.[2]

The ban of forcing the accused to speak also known as right to remain silent is a manifestation of a broader principle that indicates: No one has to accuse himself.[3] The privilege against self-incrimination (nemo tenetur se ipsum accusare) has a foundation in the Czech Constitution. This principle results from article 37 paragraph 1 and article 40 paragraph 4 of the Charter of Fundamental Rights and Freedoms. Pursuant to article 37 paragraph 1 of the Charter everyone has the right to refuse to give testimony if he would thereby incriminate himself or a person close to him. The article 40 paragrapf 4 provides that, the accused has the right to refuse to give testimony; he may not be deprived of this right in any manner whatsoever. On the lawful level, this right of the accused is reflected in article 33 paragraph 1 of the Czech Criminal Procedure Code, which provides that, the acussed is not obliged to testify and also in article 92 paragraph 1 of the Czech Criminal Procedure Code according to which the acussed may not be forced in any way to testify or confess.

Summarising the case law of Czech courts it is obvious that, testimony of the accused is absolutely inadmissible in criminal proceedings, if it was forced by police or another person.[4] Forcing to testimony may take the form of classical physical or mental coercion or it may consist in intentionally created conditions, which have negative influence on psychical state of the accused for example interrogation of the accused at night in the presence of more people.[5] According to the case law also is inadmissible the testimony of accused, which was obtained by

[1] JELÍNEK, Jiří. Trestní právo procesní. 5. aktualizované a doplněné vydání. Praha: Leges, 2018. Student. ISBN 978-80-7502-278-3.

[2] ŠÁMAL, Pavel. Trestní řád: komentář. 7., dopl. a přeprac. vyd. V Praze: C.H. Beck, 2013. Velké komentáře. ISBN 978-80-7400-465-0.

[3] ZAORALOVÁ, Petra. Procesní použitelnost důkazů v trestním řízení a její meze. Praha: Leges, 2018. Teoretik. ISBN 978-80-7502-310-0.

[4] Nalez Ustavního soudu ČR ze dne 11. 6. 2002, sp. zn. II. US 291/2000.

[5] Usneseni Nejvyššího soudu ze dne 6. 3. 1989, sp. zn. 7 To 1/89.

police officers, who during former interrogation of the accused attacked him physically.[6] It is forbidden to motivate the accused to testify with the threat of arrest.[7]

Likewise, is not permissible to conduct re-interrogations of the accused only with the purpose to obtain the admission of guilt. In situation, when the accused wonrt refuse to testify, he neednrt answer every question asked. The accused can withhold to answer all the questions asked or one particullar question even after the general part of the interrogation. In this case it is not allowed to ask the accused the very same question, his refusal is final. The answer to such question would be absolutely inadmissible in the Czech criminal proceedings.[8]

From the silence of the accused, respectively from the fact, that the accused refused to testify and so he refused to explain for example what he was doing at the crime scene, no conclusion can be drawn about his guilt. In the case of Telfner v. Austria (case no. 33501/96) the accused denied that, he was driving and caused the traffic accident, but he refused to tell, where he was at the time of the crime. He was sentenced on the grounds that he did not sleep at home at the time of the crime and did not explain where he was. The European Court of Human Rights found a violation of article 6 of the Convention, because the evidence was weak and the court actually transferred the burden of proof to the accused.[9]

So the accused cannot be forced to active self-incrimination. On the other hand, the accused has to suffer actions at which he is passive, also when it comes to actions directed at his own body. The accused may even be forced to bear that kind of action delivered by police. Specifically it is allowed to impose a fine or physical restrict of liberty by holding the accused. According to the case law the accused has to endure the identification by recognition meaning he has to show himself, but not speak (he would be active showing his voice).[10] Further, the accused must bear physical examination and actions to verify his identity, i.e. photographing, measuring height, taking fingerprints, etc.[11]

The Czech Criminal Procedure Code literally provides that if not taken blood or another biological material associated with interference with physical integrity of the person concerned by such an act, police is authorized after the previous call to overcome the accused's resistance. This also happens when the accused's saliva is taken.[12]

The principle nemo tenetur se ipsum accusare is not boundless. Protecting society from crimes requires the accused to passively suffer reasonable

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[6] Usneseni Ústavního soudu ze dne 29. 1. 1998, sp. zn. I. US 484/97.

[7] Usneseni Městského soudu v Praze ze dne 15. 2. 1968, sp. zn. 5 To 11/68.

[8] VANTUCH, Pavel. Výpověď obviněného, jeho vyjádřeni k obvinění a přerušovaní výslechu. Bulletin advokacie. 2004.

[9] MUSIL, Jan. Zakaz k donucovani k sebeobviňovani (nemo tenetur se ipsum accusare). Kriminalistika. 2009, č. 4. 255 a 256.

[10] Usnesení Ústavního soudu ze dne 11. 10. 2007, sp. zn. III. ÚS 528/06.

[11] MUSIL, Jan. Zakaz k donucovani k sebeobviňovani (nemo tenetur se ipsum accusare). Kriminalistika. 2009, č. 4. 255 a 256.

[12] HERCZEG, J. Zásada „nemo tenetur" a práva obviněného v trestním řízení. Bulletin advokacie, 2010, č. 1, str. 38-47.

restrictions, typically collection of a saliva sample or an odor sample, taking photographs, and, if necessary, be forced to bear those restrictions.[13]

According to the case law of the Czech Supreme Court it is on the other hand inadmissible to force the suspect to give away stuff, which could be a proof in his case. So it is not allowed to impose a fine on the accused, because he refused to give away evidence. Such action would mean a compulsion to self-incrimination. Naturally of course it is allowed to get a court order and search the suspect's apartment.[14]

The case law of the European Court of Human Rights

The European Convention on Human Rights does not include provision corresponding with the principle nemo tenetur se ipsum accusare, it is, however, derived from the case law of the European Court of Human Rights. The International Covenant on Civil and Political Rights in article 14 paragraph 3 (g) provides, that the accused shall not be compelled to testify against himself or to confess guilt.

The European Court of Human Rights ruled that failure to respect the prohibition of self-incrimination may violate the right to a fair trial under article 6 of the Convention. In the case of P.G. and J.H. v. Great Britain (application no. 44787/98) was coertion of the accused to speak and provide a sample of his voice judged as a violation of the right to respect for family and private life under article 8 paragraph 1 of the Convention. In the case of Jalloh v. Germany (application no. 54810/00) the European Court of Human Rights evalueted the forced vomiting of drugs hidden in the accused's stomach (the accused vomited after he was forced to ingest a drug that causes vomiting in hospital) as violation of the prohibition of torture, and inhuman or degrading treatment or punishment under article 3 of the Convention. Quite extraordinary was the case of Gafgen v. Germany (application no. 22978/05). Gafgen kidnaped a child, police acted under a time pressure and forced him to tell, where the child was. The child was found dead and Gafgen was convicted. The European Court of Human Rights found a violation of article 3 of the Convention, but in this case the Court reflected the goal of use of unlawful coercion (finding a kidnapped child at risk of life) and great seriousness of the offense. The Court concluded that there had been no violation of article 6 of the Convention, since there were other incriminating evidence in the case than the forced confession of the accused, which in the light of that evidence appeared to be secondary.

According to case law of the European Court of Human Rights the promise of certain procedural advantages for admitting guilt and, at the same time, the threat of a higher penalty, if the accused does not admit, usually does not affect the admissibility of evidence thus obtained. The exception is a situation, when there is a greater disproportion between the penalty under the law and the penalty under the contract with the prosecutor. The contract with the prosecutor, which the Czech law allows, carries the risk of false confessions. According to available

[13] MUSIL, Jan. Zakaz k donucovani k sebeobviňovani (nemo tenetur se ipsum accusare). Kriminalistika. 2009, č. 4. 255 a 256.

[14] MUSIL, Jan. Zakaz k donucovani k sebeobviňovani (nemo tenetur se ipsum accusare). Kriminalistika. 2009, č. 4. 255 a 256.

statistics, 50-55% of the accused plead gilty in the Czech republic. The presented risk therefore should not be underestimated.[15]

The police provocation

A proof obtained on the grounds of the police provocation is absolutely inadmissible in the criminal proceedings against a provoked person. Czech courts in many cases dealt with the question what is and what is not yet the police provocation.

It cannot be considered as the inadmissible police provocation, if policie during a simulated transfer determined an amount, which the police agent pretended to buy from the perpetrator, if the formulation of this request was based on the information about prior planned or realized transfer (for example information gained from phone tapping).[16]

In general, a police authority cannot be allowed to act directly towards anyone in order to motivate him to commit a crime. When assesing the issue, if it was police, who triggered the crime, it is crucial to determine the (non)existence of offenderrs intention to commit a crime, which must be present from the very beggining. The criterion for assessing whether the crime was a case of police provocation is the fact, whether the offender intended to commit a criminal offense at the outset or he conceived the intention as a result of police activity. Police is not allowed to use methods, which lead a person directly to commission or completion of a crime (for example abuse of friendship, sympathy or a similar kind of affection, offer of some unusual benefits and opportunities, providing guarantees or convincing that the crime wonrt be punished etc.)[17] In order to exclude the police provocation the court has to find out in particular, how police obtained the information about commiting the crime, from whom was the information obtained and why police contacted the perpetrator.[18]

The police provocation is considered to be an active action of police, which leads to inciting a person to commit a specific crime in order to obtain incriminating evidence and cause a criminal prosecution, and which result is encouraging the intention to commit an offense by an instigated person, although this person had no such intention before.

The police provocation is also such active action of police, which is complementing the missing legal characters of a certain crime or which intentionally substantially increases the scale of the act committed by the instigated person or which other way alters legal qualifications of the commited act to the detriment of the instigated person, especcialy the circumstances which lead to the application of a higher penalty rate, even when the person was decided to commit a crime in general.[19]

The Constitutional Court ruled, that police authorities mustnrt provoke criminal aktivity or actively participate in the creation of an act in a way to

[15] ZAORALOVÁ, Petra. Procesní použitelnost důkazů v trestním řízení a její meze. Praha: Leges, 2018. Teoretik. ISBN 978-80-7502-310-0.

[16] Rozhodnutí Vrchního soudu v Olomouci ze dne 25. 8. 2011, sp. zn. 1 To 35/2011.

[17] Rozhodnutí Nejvyššího soudu ze dne 27. 6. 2012, sp. zn. 5 Tdo 497/2012; Usnesení Nejvyššího soudu ze dne 27. 2. 2013, sp. zn. 4 Tdo 107/2013.

[18] Usnesení Nejvyššího soudu ze dne 27. 2. 2013, sp. zn. 4 Tdo 107/2013.

[19] Stanovisko trestního kolegia Nejvyššího soudu ze dne 25. 9. 2014, sp. zn. Tpjn 301/2014.

incite, create or direct the perpetrator's non-existent will to commit a crime. The situation in which police authorities, as state authorities, encourage others to commit crimes, strengthen their will to commit or assist in any form whatsoever, is inadmissible. Activity of a police officer (or a private person controlled or instructed by police), although it necessarily represents one of the sub-elements of the overall course of events, mustnrt be identifiable as a determining or essential element of the offense.[20]

The Constitutional Court in his judgement mentions many decisions of the European Court of Human Rights (the case of Teixeira de Castro v. Portugal, the case of Bannikova v. Russia, the case of Grba v. Croatia), which inspired the court in his conclusions. However, the European Court of Human Rights has not yet dealt with the police provocation in relation to the Czech Republic.

The doctrine of fruit of the poisonous tree in the Czech criminal trial

The fruit of the poisonous tree doctrine is a metafor for an American doctrine, which deals with the issue of admissibility of evidence in the criminal proceedings. According to this doctrine unlawfully obtained evidence works remotely. So the use of a proof mustnrt be allowed, if a information about the existence of this proof has been obtained unlawfully. The fruit of the poisonous tree is always poisoned.

The Constitutional Court ruled, that in the case of an unlawful house search, all things that have been confiscated must be returned and the evidence situation must be restored prior to the search. In another judgement, the Constitutional Court expressed the view that, when a decision on further duration of custody is unlawful, all other decisions on custody, which follow up, are also unlawful.[21]

Does this construction also apply to evidence obtained on the basis of procedural ineffective evidence? Or is the other evidence already procedurally admissible in the Czech criminal trial? There is extensive case law of the Constitutional Court and the Supreme Court on the applicability of the fruit of the poisonous tree doctrine in the Czech criminal trial.[22] Continental criminal proceedings are based on both formal and material nature of the evidence (contrary to the formal rules of evidence applicable in the common law environment) and usually only such defects in the act that violate the right to a fair trial guaranteed by article 36 paragrapf 1 of the Charter and article 6 of the Convention, lead to ineffectiveness or inadmissibility of evidence. The Supreme Court therefore stated that the Czech criminal theory and practice have not yet adopted the Anglo-American doctrine of the fruit of the poisonous tree.

A case study

In 2012, one Czech Member of Parliament was charged with

[20] Nález Ústavního soudu ze dne 19. března 2018, sp. zn. I. ÚS 4185/16.

[21] HERCZEG, J. Zásada „nemo tenetur" a práva obviněného v trestním řízení. Bulletin advokacie, 2010, č. 1, str. 38-47.

[22] Nález Ústavního soudu ze dne 8. 3. 2012, sp. zn. III. ÚS 2260/10; Usnesení Ústavního soudu ze dne 19. 7. 2012, sp. zn. III. ÚS 3318/09; Usnesení Nejvyššího soudu ze dne 27. 3. 2013, sp. zn. 6 Tdo 84/2013; Usnesení Nejvyššího soudu ze dne 24. 6. 2015, sp. zn. 11 Tdo 122/2015; Nález Ústavního soudu ze dne 23. 10. 2014, sp. zn. I. ÚS 1677/13.

corruption. Former Minister of Health David Rath was caught red-handed, during the detention he had with him 7 million Czech crowns in boxes of wine. A further 30 million Czech crowns were found later during a search of his apartment. The video from the arrest of the Member of Parliament is not difficult to find on the internet, it has been the main sensation of Czech television at that time.

David Rath was sentenced by a court of first instance for eight and half years of imprisonment. The court of appeal used the doctrine of the fruit of the poisonous tree and canceled the case, because in his opinion wiretaps were obtained unlawfully, so he admitted neither evidence whose existence was inferred from the wiretaps.

The Czech Supreme Court dealt with the Memeber of Parliament's case on the basis of an extraordinary Complaint for Violation of Law from the Minister of Justice and rejected the doctrine of the fruit of the poisonous tree. Moreover, the court pointed out that the wiretaps were alright.

The Supreme Court ruled that the Czech criminal trial had not taken over the American doctrine of the fruit of the poisonous tree. The admissibility of each proof is determined individually by the courts depending on the nature and severity of the concrete defect in the evidence process.

The presented judgement of the Czech Supreme Court refers to a certain tradition. In 1966, academician Růžek presented the following case as an example of the admissibility of evidence obtained by wrong doing in practise. The accused was beaten up and forced to testify by police officers. The accused pointed, where he had hidden the body of his victim. The body was indeed found on this place. In those times, the doctrine coincided that it is not suitable to demand from police further action in order to obtain new evidence to find the corpse again. Such a procedure was considered absurd. Nowadays there is consensus about the fact that evidence derived from evidence obtained through the use of or the threat of unlawful coercion is inadmissible. In further cases, an individual approach to each case is in place.

It is worth noting that this is a sentence unfavorable to the accused, and thus an academic judgment under the Act. It is not clear at the moment what impact the judgment of the Supreme Court should have, when the Court of Appeal had to make a decision again. The Court of Appeal maintained on the legal opinion that the wiretapping was inadmissible, and therefore convicted the Member of Parliament David Rath only in part of the defendant's deeds and sentenced him to 7 years in prison. This decision was appealed to the Supreme Court. However, the judgment of the Court of Appeal is final and enforceable.

David Rath is already serving the sentence. But for the final imposition of a penalty on the Czech politician we are going to wait a little longer. How long exactly? No one knows.

It is a pity that we are waiting 7 years for the final conclusion of the case so clear, where millions of recipients have seen these bribes hidden in boxes of wine in the news on TV screen. This kind of cases cause that the Czech judicial system becomes illegible and unworthy of trust at least for the ordinary people without legal education.

Summary

Evidence obtained unlawfully leads to some kind of the inadmissibility in

the Czech criminal trial only, if the law was broken seriously. Czech criminal code does not provide too many clues for the inadmissibility of evidence. There is only one legal prohibition of evidence in Czech criminal trial. Evidence obtained by unlawful coercion or by threat of coercion is always unconditionally absolutely inadmissible in the criminal trial.

Most of the issues relating to the procedural applicability of evidence are settled in the case law. Czech courts often cite the case law of the European Court of Human Rights in their decisions. Especially in the case law of the Czech Constitutional Court, the influence of the European Court of Human Rights is apparent. Case law on this subject has evolved over time. In general courts nowadays do not accept any proof obtained by wrong doing to the accused (bad treatment, psychological pressure, interrogation after refusal to testify etc.) Accused has the right to remain silent, his silence does not prove him guilty in any way. Accused also has the privilege against self-incrimination. This privilege means that the accused cannot be forced to active action as speaking and moving during the the identification by recognition or giving away stuff that could be used as evidence against him, but he has to passively suffer some reasonable restrictions as collection of saliva, odor, photographing, taking fingerprints and even may be forced to bear this restrictions.

The limits of police provocation are settled by the case law of the Czech Supreme Court and the Czech Constitutional Court. The term police provocation is not mentioned in the Czech Criminal Code. Police authorities mustnŕt provoke criminal action of any person just as they are not allowed to actively participate in committing a crime, specifically police cannot act so as to encourage, create or direct the non-existent will of the perpetrator to commit a crime. Activity of a police agent necessarily represents one of the sub-elements of the overall course of events, but it mustnŕt be identifiable as a determining or essential element of the offense.

There has been many legal discussions about the fruit of the poisonous tree doctrine. Whether or not this doctrine should be used in the Czech criminal law. Th fruit of the poisonous tree doctrine however is not characteristic for continental law systems and it has not yet been accepted by the Czech doctrine. In the Czech republic, the admissibility of each piece of evidence is determined individually by the court hearing the case. Czech Courts take into account the nature and severity of the particular defect in the evidence process. In the concrete case the result obtained using the doctrine of the fruit of the poisonous tree and the result achieved using the Czech approach can be the same.

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Допустимість доказів, отриманих незаконним шляхом, у Чеському кримінальному процесі.

Анотація. У статті йдеться про допустимість доказів у чеському кримінальному процесі з абсолютною або частковою недопустимістю. Наведено законодавство та випадки, які стосуються доказів, отриманих незаконним шляхом, а також меж, так званої, поліцейської провокації. Стаття висвітлює тему дослідження та важливість доктрини «плодів отруйного дерева» у чеському судочинстві.

Ключові слова: неприпустимість доказів, чеський кримінальний процес, провокація поліції, «плід отруйного дерева».

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Допустимость доказательств, полученных незаконным путем, в Чешском уголовном процессе.

Аннотация. В статье говорится о допустимости доказательств в чешском уголовном процессе с абсолютной или частичной недопустимостью. Рассматривается законодательство и случаи, которые касаются доказательств, полученных незаконным путем, а также границ, так называемой, полицейской провокации. Статья освещает тему исследования и важность доктрины «плодов ядовитого дерева» в чешском судопроизводстве.

Ключевые слова: недопустимость доказательств, чешский уголовный процесс, провокация полиции, «плод ядовитого дерева».