



Some comments on the opinion on the mental health of the accused in the area of sexual preference disorders

Niekoľko poznámok k stanovisku o stave duševného zdravia obvineného v oblasti porúch sexuálnej preferencie

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Abstract:

The criminal trial in its evidence layer is based, among others on evidence from an expert opinion. In the Polish criminal trial, an expert opinion helps the trial authority in settling a specific case. Pursuant to the Code of Criminal Procedure (CCP), if the statement of circumstances that are significant for the resolution requires special information, an expert or experts are consulted. The legislator in art. 202 § 3 of the Code of Criminal Procedure imposes on the court, and in the preparatory proceedings on the prosecutor, the obligation to appoint an expert sexologist to provide an opinion on the state of mental health of the accused in the event of suspected occurrence of sexual preference disorders. Modern scientific achievements and new research methods give better opportunities to learn the truth. However, the issue of issuing such an opinion still raises a lot of controversy in practice.

The considerations in this article relate to the issues and specificity of legal regulations regarding the issuing of opinions of a team of experts in crimes committed in connection with sexual preference disorders. The authors present practical aspects of opinions in this area, the functioning of legal provisions, as well as court ruling policy.

Keywords: *expert in criminal proceedings, expert opinion, mental health, sexual preference disorders, evidence in criminal proceedings*



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Abstrakt:

Trestné konanie v jeho dôkazovej vrstve je okrem iného založené na základe dôkazov znaleckého posudku. V poľskom trestnom konaní expertíza znaleckého posudku pomáha súdnemu orgánu pri riešení konkrétneho prípadu. Podľa Trestného poriadku, ak sa vyžadujú osobitné okolnosti, aby sa uviedli skutočnosti, ktoré sú relevantné pre vyriešenie prípadu, požadujú sa znalecké posudky. Zákonnodarca v čl. 202 ods. 3 Trestného poriadku ukladá súdu a v prípravnom konaní o prokurátorovi povinnosť vymenovať znalca - sexuológa, ktorý vydá stanovisko k stavu duševného zdravia obvineného v prípade podozrenia na výskyt porúch sexuálnej preferencie. Súčasné, moderné vedecké úspechy a nové výskumné metódy poskytujú lepšie možnosti na učenie pravdy. Avšak otázka vydania takéhoto stanoviska však v praxi stále vyvoláva veľa kontroverzií.

Úvahy v tomto článku sa týkajú otázok a špecifickosti právnych predpisov týkajúcich sa vydávania stanovísk znaleckých posudkov v prípade trestných činov spáchaných v súvislosti s poruchami sexuálnej preferencie. Autori prezentujú praktické aspekty stanovísk v tejto oblasti, fungovanie právnych predpisov, ako aj politiku súdnych rozhodnutí.

Kľúčové slová: znalecké posudky v trestnom konaní, znalecký posudok, duševné zdravie, poruchy sexuálnej preferencie, dôkaz v trestnom konaní

1. Introduction

Evidence is the foundation of the criminal trial. It is on their basis that the procedural authority bases its findings on the offense. The operation of procedural organs is aimed at learning facts related to the subject of the criminal process, which are important in order to establish the existence or non-existence of a prohibited act, decide on the issue of criminal liability and the perpetration of certain persons. The evidence law regulates the assessment of evidence by procedural authorities [1], while the Code of Criminal Procedure (hereinafter the CCP) contains provisions on searching, collecting, conducting, securing, preserving and verifying evidence [2].

There is no so-called formal definition of evidence, and therefore the subject of evidence may be all the circumstances that are relevant to the resolution of the case, leading to the implementation of the principle of material truth according to which the ruling is to be based on actual factual findings [3].

There are many ways to qualify evidence in the doctrine. The most significant is the division of evidence due to the nature of the source of evidence [4]. This criterion makes a distinction between:

- identity cards - the sources of evidence are persons (expert, accused, witness),
- material evidence - the source of evidence are things in the broad sense (documents, properties of the place and objects).

This division also takes into account mixed evidence: personal and factual, eg a document combining the features of personal and material [5].

It is worth mentioning that the properties of the human body are included in the classification of material evidence due to the fact that the source of evidence is the human body. The doctrine expresses the view that the properties of the human body are classified as personal sources of evidence, although it is not fully accepted.

Expert judgment is the specific evidence in criminal proceedings. If the finding of circumstances that are significant for the resolution of the case requires special knowledge, the expert or experts shall be consulted. Special messages, in accordance with art. 193 of the Code of Criminal Procedure may be specialist information from various fields of science, art, technology or craft, going beyond the knowledge generally available to an adult with relevant life experience and education [6].

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An expert with special knowledge has a very important role to play in the Polish criminal trial. Although the opinion prepared by an expert is subject to the assessment of an independent court, his knowledge and the opinion drawn up on its basis constitute a significant contribution to the process which is related to the final judgment. It should be emphasized that the opinions of experts, due to the fact that they come from independent persons not interested in the final settlement of the case, are important for procedural authorities [7]. In the event of total disqualification of an expert opinion, the court should first prove that it was based on incorrect premises, is contrary to the principles of logical reasoning or that it does not correspond to the current state of knowledge in a given field [8].

When making a decision on the appointment of an expert, the procedural authority takes into account not only the specific information held by a specific person in a given field, but also the possibility of a situation in which being an expert in a given case is impossible, thus excluding the expert [9].

It should be noted that the procedural authority is not able to influence the course of the test or the methods used by the expert, because experts in this area enjoy independence. However, the trial authority may reserve its presence when all or some tests are carried out by an expert, provided that this does not adversely affect the result of the test [10].

The purpose of the article is to analyze legal regulations regarding the issuing of an opinion on the mental state of the accused in the field of sexual preference disorders. The subject of the analysis is not only case-law policy, but also the practical functioning of legal provisions in this respect. In the authors' opinion, the issues raised are of great importance, because the victims of acts committed in relation to sexual preference disorders are usually minors, and the stigma of these events leaves effects on their psyche for life.

2. Appointment of an expert to give an opinion

In order to issue an opinion on the mental health of the accused, the court, and in the preparatory proceedings the prosecutor, appoints at least two expert psychiatrists. To participate in the issuing of an opinion on the mental state of the accused in the field of sexual preference disorders, the court, and in the preparatory proceedings the prosecutor, appoints an expert sexologist.

The Act does not specify when and in what case expert psychiatrists should be appointed to examine the health status of the accused. However, it is obvious that such an examination cannot be carried out in every case, but only if there are reasonable doubts about mental health [11]. These doubts should result from objective premises, therefore they must be based on specific evidence or result from the evaluation of evidence. Any information that is relevant to assessing whether there are doubts as to sanity should be carefully considered and independent of the parties' initiative in this respect [12]. In accordance with art. 193 of the Code of Criminal Procedure, if the statement of circumstances that are significant for the resolution of a case requires special information, an expert or expert opinion is sought. In addition, an expert or experts of other specialties shall be appointed to participate in the issuing of the opinion at the request of psychiatrists, and not at the request of a party to the proceedings, a party representative or ex officio [13].

Both the scope and research methods are determined by an expert. The parties do not have the power to decide which research methods, in order to determine the

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circumstances having an important impact on the resolution of the case, will prove useful in the case of using special messages that have appointed experts. It is worth noting that the necessary condition for an unqualified opinion by psychiatrists is the use of all data that is available regarding the state of health of the accused, especially the data contained in hospital information cards and medical records, as well as other medical documents, if such documents exist, regardless of own outpatient tests and data obtained from medical history [14]. In cases where there is a suspicion that the perpetrator has committed a criminal act in connection with sexual preference disorders in accordance with art. 202 § 3 of the Code of Criminal Procedure in the wording of the Amendment Act of 5 November 2009, the participation of a sexologist is obligatory [15].

3. Sexological expertise

Sexological expertise is an important element of the opinion on the mental health of the accused, but it is not an opinion independent of the opinion of expert psychiatrists regarding the mental health of the accused [16].

The subject of opinions on crimes committed in connection with the disorder of sexual preferences are: the personality of the perpetrator, the efficiency of the cognitive-orientation sphere, and also those properties of motivational processes that define and determine criminal behavior. The sexological diagnosis takes into account the biological nature of the deeds, their social and cultural conditions, as well as the role of personality disorders. Appropriate collaboration of experts is extremely important. The psychiatrist or psychologist should accurately assess the needs and expectations that an opinionating sexologist will have towards him. Accurate personality diagnosis is particularly important here [17].

Issuing judicial and sexological opinions in criminal matters is a multi-stage process. It consists of the following activities:

- detailed analysis of the case file,
- subject examination (sexological interview),
- physical examination (somatic examination),
- diagnostic examination,
- logical reasoning and conclusions.

The first step in the work of an expert sexologist is to analyze the case file. This operation provides a lot of information about the suspect (accused). It allows you to restore the image of the event, including the behavior of the examined. Shows the accounts of third parties, including victims. The files may also contain important information about the state of health of the respondent [18].

The next stage is subjective examination, i.e. sexological interview. As indicated by prof. Z. Lew- Starowicz should contain the following parts:

- general data - age, education, occupation, past diseases, operations, addictions,
- childhood period - among others characteristics of the family environment, assessment of parents' marriage, dominant positions in the family, emotional ties, description of material conditions, best remembered childhood scenes, course of sexual children's games, information about child masturbation,
- adolescence - the course of learning, contacts with teachers, biological adolescence, commencement of masturbation, attitude towards masturbation, methods, picture of emotional bonds before the first intercourse, description of subsequent

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sexual relations, frequency, dreams and fantasies accompanying them, confrontation of dreams and real relations,

- marriage or long-term relationship - description of meeting a partner, comparison of emotional relationship with the past, analysis of emotional relationship, detailed description of intercourse, methods of contraception, partner orgasms, problems and difficulties in sexual life, conflicts, parenthood, extramarital relationships,

- global assessment of sexual life - the level of sexual needs, the frequency of arousal, erections, favorite positions, caresses, oralism, analism, homosexual relations, deviant needs and contacts, self-esteem, the influence of alcohol and other addictive substances,

- other data - contact with pornography, the ideal of femininity and masculinity, the purpose of sexual relations, unfulfillment, the picture of ideal sex.

Somatic sexological examination is routinely carried out in criminal proceedings. An expert sexologist should know the basic principles of conducting neurological, gynecological, internal medicine and dermatological examinations. The study should include, among others structure of the reproductive system, abdominal and sling reflexes, pelvic sensation, groin [19]. Systemic disorders such as anemia, liver disease, chronic renal failure and thyroid disease are also important. Somatic examination provides a lot of diagnostic information. It allows to answer the question whether genital building or other diseases do not impair the sexual performance of the examined person. In many diseases of the endocrine, nervous and digestive systems, symptoms of sexual pathologies are revealed. They may be the result of the disease states themselves or a side effect of the medications taken [20].

Diagnostic examination is not routinely carried out by a certified sexologist. In the situation where the subjective and physical tests do not provide sufficient information to make a diagnosis, the expert may request the process authority to carry out additional tests, i.e. EEG (a non-invasive method for testing bioelectrical brain activity), computed tomography or magnetic resonance imaging, carotid flow analysis and vertebral, laboratory or phallography tests (it allows to assess the sexual arousal of a subject resulting from the images and sounds presented to him).

Based on the information collected during the above stages of work, the expert prepares a logical argument, which contains an explanation of the motives of the offender's actions and a picture of his sexuality. In his reasoning, the expert relies not only on collected information, but also on scientific literature from various fields.

For the trial body, the most important element of the opinion are the conclusions, because they are the answer to the questions posed to the expert. Due to the fact that applications are directed to people who do not have medical knowledge, they should be formulated clearly and comprehensibly. The diagnosis itself must result from the logical connection of all parts of the opinion together with a thorough analysis in terms of the sexual functioning of the examined person. An expert sexologist may, in his opinion, always include applications for the appointment of experts of other specialties or refer the patient to hospital observation or treatment in a center for people with sexual preference disorders.

4. Views of case law

The problem of giving opinions on sexual preference disorders raises problems both in the judicial and practical sphere. An important direction for the interpretation

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of provision 202 § 3 of the Code of Criminal Procedure indicated the Supreme Court (SN) in its judgment of March 13, 2013 (V KK 230/12). According to its content, if the court, and in the preparatory proceedings the prosecutor, sees the need to obtain an opinion as to whether the accused may have sexual preference disorders, he is obliged to admit evidence from the opinion of at least two expert psychiatrists regarding the mental health of the accused and provide in its release, in the field of sexual preference disorders, participation of a certified sexologist. In addition, the court pointed out that the opinion regarding sexual preference disorders is part of the opinion about the mental state of the accused. It is not an opinion independent of the opinion of expert psychiatrists about the mental state of the accused, and opinions on the subject of sexual preferences of the accused should take place under the so-called comprehensive opinion [21]. Therefore, the appointment of a sexologist is obligatory in such cases.

The above ruling is an important direction of interpretation of legal provisions in the subject in question. However, one should think about who is obliged to state the occurrence of sexual preference disorders. Because in accordance with art. 202 § 3 of the Code of Criminal Procedure the prosecutor or court appoints a sexologist to give an opinion on the state of mental health in these cases. Therefore, before calling a sexologist, there must be at least reasonable suspicion of sexual preference disorders. In this matter, judicial discrepancies were already appearing under the CCP of 1969. The entry into force of the 1997 Code did not solve this dilemma, but actually deepened it. The axis of the dispute was the issue of whether the appointment of an expert sexologist previously requires the appointment of expert psychiatrists and only at their request a sexologist, or whether the appointment of an expert sexologist belongs to the evidence initiative of the court or the prosecutor [22].

In the decision of 8 February 2012 in the case reference number V KK 180/115 SN pointed out that it is the court's or prosecutor's responsibility to appoint a sexologist to participate in this opinion only if the request for his appointment pursuant to art. 202 § 2 of the Code of Criminal Procedure, will be lodged by previously appointed psychiatrists [23]. In the resolution of 7 judges of 25 September 2013, the Supreme Court expressed a completely different position, ruling that the appointment by the court and in the preparatory proceedings by the prosecutor pursuant to art. 202 § 3 of the Code of Criminal Procedure an expert sexologist to participate in issuing an opinion on the mental state of the accused in the field of sexual preference disorders, does not require the application of an expert psychiatrist, referred to in art. 202 § 2 of the Code of Criminal Procedure [24]. The above resolution of the Supreme Court closed the dispute that had arisen previously.

The Supreme Court unequivocally emphasized that the appointment of an expert sexologist is obligatory in every case where there is a suspicion that the perpetrator has committed a criminal act in connection with sexual preference disorders [25]. The application of the above thesis, certainly correct, raises practical problems. First of all, it should be pointed out that the number of expert sexologists in the whole country is very small compared to the number of experts in other branches of medicine [26]. For example, on the list of experts of the District Court in Rzeszów there are only two sexologists, while there are many more experts of other specialties [27]. The above problem causes a significant extension of proceedings in cases where there is a suspicion of committing acts in connection with the disorder of sexual preferences.

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The legislator indicated in art. 202 § 3 of the Code of Criminal Procedure, that opinions on sexual preference disorders fall within the competence of a sexologist. This term makes it impossible to make an opinion e.g. by a sexologist psychologist. One should consider expanding the circle of experts authorized to draw up these opinions to include a certified sexologist and psychologist. It is worth to signal that the legislator in art. 11 of the Act of 22 November 2013 on proceedings against people with mental disorders allowed the perpetrator to determine the existence of sexual preferences by the sexologist or certified sexologist. Also art. 354a § 1 item 3 of the Code of Criminal Procedure stipulates that before a ruling on a precautionary measure in cases of persons with sexual preference disorders, the court shall hear an expert psychologist, psychiatrist and expert sexologist or expert sexologist. In the present situation, the court may, therefore, alternatively hear an expert sexologist or expert sexologist. The proposed change would certainly improve both preparatory and judicial proceedings in the discussed cases.

It should be noted that the participation of an expert sexologist means not only participation in the preparation of this opinion, but in general participation in research aimed at determining the mental state of the accused, as it will result in the opinion referred to in art. 202 § 2 of the Code of Criminal Procedure [28]. The task of a certified sexologist is to assess whether sexual preference disorders had an impact on the subject's sanity and, if he was not, also on the need for a precautionary measure as referred to in Article 93 of the Penal Code (hereinafter referred to as the Penal Code). The rule is that a decisive role in assessing the mental health of the perpetrator is played by expert psychiatrists and possibly a psychologist, however, the expert sexologist is obliged to comment on the influence of sexual preferences on the sanity of such a person, and his conclusions cannot be omitted when preparing a comprehensive opinion [29].

The opinion-maker practice in cases of crimes committed in connection with sexual preference disorders makes it possible to distinguish several types of connections between the opinions of expert psychiatrists and sexological expertise. The most common practice is to draw up two separate opinions, based on separate studies, by both expert specialists, and then to include sexological expertise in the conclusions of the forensic-psychiatric opinion. Comprehensive and rigorously reasoned opinions are prepared very rarely, issued jointly after joint research. A special case is opinions in which one of the expert experts is both a psychiatrist and a sexologist. Then he plays two roles [30].

It is worth noting that the jurisprudence indicates that the preparation of two separate opinions of a psychiatrist and sexologist is not a fault provided that they jointly participate in the study, make a diagnosis and agree their conclusions. An opinion prepared in this way will admittedly be based on two different documents, but will be a joint opinion [31]. The expert sexologist's opinion may consist only in sexological consultation, performed only for the purposes of assessing the accountability of the perpetrator.

Judicial doubts are also caused by the lack of a normative definition of sexual preference disorders. The International Statistical Classification of Diseases and Health Problems functioning under the name ICD-10 published by the World Health Organization includes the disorder of sexual preferences in the group of adult personality disorders and behavior (F60-F69) and denotes it with the code F65. Within this ICD-10 classification, sexual preference disorders include fetishism, transvestism, fetishism, exhibitionism, voyeurism, pedophilia, sadomasochism, compound parish,

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and other indefinite parishes. [32] Homosexuality was not indicated as a disorder of sexual preferences in this classification. Therefore, the mere suspicion of a different sexual orientation cannot constitute the basis for the application of Art. 202 § 3 of the Code of Criminal Procedure obliging the appointment of a sexologist to participate in the preparation of opinions on the offender's sexual preferences. J.K. Gierowski and L.K. Paprzycki define sexual preference disorders as irregularities in the selection of a sexual object or incorrect preferences in the scope of a sexual act. Therefore, this concept also does not include the concept of homosexual disorder. The authors aptly noticed that the new editorial office of Art. 95a of the Penal Code compared to the previous one, it limited the category of perpetrators to those who meet the criteria of parish. Previous Editorial Art. 95a of the Penal Code pointed to a wider group of perpetrators against sexual freedom who could have undergone therapy [33]. One should agree with D. Krakowiak's apt view that placing the homosexual tendencies of the perpetrator as part of sexual preference disorders referred to in art. 202 § 3 of the Code of Criminal Procedure is contrary to current psychiatric knowledge. The author rightly critically referred to the Supreme Court judgment of 13 March 2013, in which the Supreme Court agreed with the prosecutor's opinion that the suspicion of a different sexual orientation of the accused may constitute the basis for reaching for the provision of Art. 202 § 3 of the Code of Criminal Procedure obliging the doctor to admit the sexologist to participate in opinions on the offender's sexual preferences [34].

Conclusion

This article analyzes the issue of opinions on sexual preference disorders. The authors' intention was to signal the most important problems both in the interpretation of legal provisions and in the application of the discussed regulations in practice. The analysis made it possible to draw the following conclusions.

In expressing opinions on sexual preferences, an appropriate role is played by appropriate cooperation between experts of various specialties. Practice shows that comprehensive opinions are prepared in many ways. Although the expert sexologist does not comment on the sanity of the perpetrator - it is only the competence of expert psychiatrists - however, the conclusions and conclusions derived by him allow to indicate the motivational aspect of the offender, illustrate the sphere of his sexuality, which in turn allows expert psychiatrists to terminate on the sanity of the perpetrator. The work of an expert sexologist is of great importance for the work of the justice system, hence it is worth that the recommendations of expert sexologists are also used in prevention in the treatment of persons convicted of sexual offenses. These perpetrators require a special impact due to the fact that their actions are highly socially harmful and the victims are usually children. Sexual preference disorders are difficult to treat, however, it is possible to teach the perpetrator to control his instincts.

Proper procedures for giving opinions to a team of experts are of great importance in determining material truth. Neither an expert psychiatrist nor a psychologist or sexologist have the opportunity to perform reliable tests. The risk of erroneous examination is offset by the competent work of the team of experts, because through mutual clash of one's own opinions (often contradictory), mutual control is reached, which allows drawing common conclusions.

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A practical problem is also the mistakes made by expert sexologists, i.e. making an opinion on a diagnosis not supported by justification, following one's own beliefs, views, categorical statement, not confirmed in the conducted research, citing from the case file testimonies selectively [35].

At this point, we would like to quote the words of George Burgess Magrath, directed towards experts, which in the context of this study deserve full approval: 'If the law has made you a witness, remain a man of science: You have no victim to avenge, no guilty or innocent person to ruin or save. You must bear testimony within the limits of science [36].

To sum up, it should be admitted that the legal solutions presented in this article, although they often raise practical doubts, are going in the right direction. They provide the basis for comprehensive regulations in the sphere of issuing opinions on sexual preferences.

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